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 GS-1101 Order 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 19th day of August, 2015.

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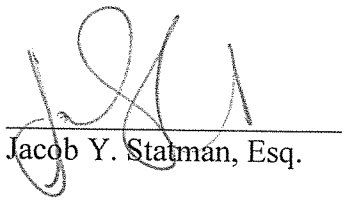

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UNION'S RESPONSE IN OPPOSITION TO AGENCY'S EXCEPTIONS TO ARBITRATOR AWARD

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 Arbitrator McKissick's June 17, 2015 Order[1] concerning the promotion of GS-1101 employees ("GS-1101 Order"), and must be dismissed or denied. In support, thereof, the Union states as follows:

Background

The instant Exceptions pertain solely to the GS-1101 Order. While the Exceptions go through the entire case history, it is clear from the record that such an extensive discussion is not required for the instant Exceptions. Most relevant to the instant filing, are: the Remedial Award

[1] The Agency's allegation that the Order is from June 15, 2015 is without merit. The Order was sent on June 17, 2015. *Infra.*

issued on January 10, 2012, (**Agency Exhibit 3**[2]); the Arbitrator's Summary of Implementation Orders dated March 14, 2014, ("Summary 1"); May 17, 2014, ("Summary 2"); August 2, 2014, ("Summary 3"); January 10, 2015, ("Summary 4"); February 27, 2015, ("Summary 5"); and May 16, 2015, ("Summary 6") (**Agency Exhibit 7**), and the GS-1101 Order. **Agency Exhibit 17**.

The instant Exceptions pertain solely to the GS-1101 Order. As discussed *infra,* the GS-1101 Order simply reiterates the findings contained in the Remedial Award and subsequent Summaries, including Summary 3, and does not form the basis for any valid appeal.

I. 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.

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

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.

II. 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...**[3]
>
> ...**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

[3] 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 A.** 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.

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

III. 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.

IV. 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 the GS-1101 Order and

the identification of affected BUEs are without merit because the Order simply reiterates what was said in Summary 3, which is final. *Infra.*

V. 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.***

VI. 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.

VII. Summary 6.

On May 16, 2015, the Arbitrator issued Summary 6. **Agency Exhibit 7.** Exceptions as to Summary 6 are currently pending before the Authority. 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.**

VIII. The GS-1101 Order and PHRS/CIRS Order

Upon receipt of the Authority's decision in ***AFGE 222 v. U.S. Department of HUD*, 68 FLRA 631 (2015)** and pursuant to the Orders contained in Summary 3, on May 29, 2015, the Union sent the Agency a draft stipulation to promote the PHRS/CIRS employees at issue. **Exhibit B**. The Agency did not respond to that communication.

On June 2, 2015, the Parties met for the seventh IM. At that meeting the Agency stated its intention to request reconsideration of the Authority's May 22, 2015 decision and that it would not be discuss anything related to Summary 3, including the stipulations required by the Arbitrator in Summary 3, which were sent to the Agency on May 29, 2015. **Exhibit C.**

At the IM, the Agency took the position that, since it intended to file a request for reconsideration of the Authority's May 22, 2015 Order, jurisdiction was removed from the Arbitrator. ***Id.*** The Agency's position was improper; Authority regulations are clear in this regard: "[T]he filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority." **5 C.F.R. § 2429.17.** Because the Authority did not order such a stay, the Agency was required to comply with the order dismissing the Exceptions and promote the GS-1101 employees at issue. **Exceptions, Exhibit 7, Summary 3.**

On June 4, 2015, two days after the seventh IM, the Union submitted a draft Order to Arbitrator McKissick concerning the promotion of the PHRS and CIRS Employees (the "PHRS/CIRS Order") at issue. **Exhibit C**. The email attaching the draft Order restated the regulation concerning reconsideration discussed *supra.* Due to the Agency's bad-faith refusal to

discuss promotions for eligible PHRS/CIRS and GS-1101 employees at the seventh IM, the Union was left with no choice but to submit the proposed Orders to the Arbitrator. It must be noted that this all occurred before the Agency had filed its Motion for Reconsideration and Motion for Stay, both of which are currently pending.

The Arbitrator was unable to access the attachment, and it was re-submitted on June 8, 2015, at or around 9:37 am. ***Id.*** On June 8, 2015, at or around 1:19 pm the Union submitted its draft Summary 7 and also submitted a draft GS-1101 Order concerning the promotion of certain GS-1101 employees at issue. ***Id.*** The Exceptions erroneously assert that the submission of the draft GS-1101 Order took place on June 4, 2015. **Exceptions, p. 21**.

Both the draft GS-1101 and PHRS/CIRS Orders were sent in response to the Authority's dismissal of the Agency's Exceptions to Summary 3 on May 22, 2015, ***AFGE 222,* 68 FLRA 631,** and the Agency's subsequent refusal to comply with the Order. *Supra.*

On June 8, 2015, at or around 2:39 pm, the Arbitrator instructed to Agency to provide its comments "this Order" by June 15, 2015. **Agency Exhibit 15**. The Agency provided its comments at or around 2:31 pm on June 15, 2015. Based upon both of the Agency's Exceptions (i.e, the PHRS/CIRS Order Exception and the instant GS-1101 Order Exception) the comments were intended to cover both proposed Orders. **Agency Exhibit 16.**

In its comments in response to the Arbitrator, the Agency noted that it was "unable to verify the attached lists are true representations of the HR data available." ***Id.*** The Agency further alleged issues with the time it would take to comply with the Order and the lack of availability of funds; as well as vague objections and the need for additional time. ***Id.*** The Agency did not request additional time or indicate any intention to promote even employees that

were not at issue, i.e., the employees it believed were eligible for promotion pursuant to the Agency's own (albeit, improper) methodology discussed *supra.* ***Id.***

On June 15, 2015 at or around 2:54 pm, the Union responded to the Agency's comments. **Exhibit D.** The Union argued that the Agency was untimely raising issues that had already been litigated and that any lack of funding was the Agency's own fault. ***Id.*** The Union further asserted that the Agency was disingenuous in asserting that it could not move forward with promotions, and has not shown the slightest amount of good-faith effort to resolve **any** of these issues. ***Id.***

Contrary to the Agency's argument that the GS-1101 Order was sent on June 15, 2015, the Order was actually sent on June 17, 2015. **Exhibit E.** On that date, Arbitrator McKissick sent the signed and final GS-1101 Order at issue via facsimile. ***Id.*** While the GS-1101 Order is dated June 18, 2015, it appears that date was an error from the Arbitrator as the Union's fax log clearly indicates that the fax was received on June 17. ***Id.*** The June 15, 2015 date stamp at the top of the GS-1101 Order is likely the result of an incorrect setting on the fax machine from which the Order was sent. This is likely the case because the PHRS/CIRS Order was dated and received by the Union on June 19, 2015, but contained a June 17, 2015 date stamp. ***Id.*** Since the date stamp on both Orders was two days earlier than the date that they were received, this is the most likely scenario.

Argument & Analysis

I. The Exceptions must be denied because the Agency fails to establish that the GS-1101 Order was based on non-fact.

The Agency argues that the GS-1101 Order 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 that any of the employees claimed by the Union should be eligible class members, based upon the methodology adopted by the

Arbitrator." **Exceptions, p. 24.** The Agency further argues that "[A] review of the plain language of the GS 1101 Order shows that the Agency's alleged failure to dispute the GS 1101 class list was a central fact. This central fact resulted in the Order directing the Agency to promote employees listed in the GS 1101 Union list." ***Id.*** But a review of the Order **does not even hint** that the Agency's failure to dispute the list was a central fact, or the central fact in the Arbitrator's reasoning and other than a conclusory statement to the contrary, the Agency provides no reason why it should be considered as such. The finding was **not** 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 Arbitrator's statement was as follows:

> The Union provided the Agency with a list of 3,777 class members in September 2014. The Union previously explained how it arrived at this list, in compliance with the methodology described by this Arbitrator in Summaries 1, 2, 3 and 5. The Union showed that, if the Agency followed the methodology described and adopted by this Arbitrator, it would demonstrate that the resulting class list provided by the Union would be accurate. The Agency has not disputed that any of the employees claimed by the Union should be eligible class **members based on the methodology adopted by the Arbitrator therein**.

Agency Exhibit 17 (emphasis added).

The Arbitrator did not state that the Agency did not dispute the Union's list. Rather, the Arbitrator correctly noted that based upon the methodology previously adopted by the Arbitrator, the class list was not disputed. 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 adopted

methodology to the Agency's data, the resulting class list would be the same as the Union's class list. The Arbitrator's language is clear in this regard.

In other words, the Agency has not contested eligibility of the employees *identified by the Union*, pursuant to the methodology previously adopted by the Arbitrator. As such, this was not a non-fact.

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 based upon the adoption of the of the Union's methodology, the Agency has not disputed the Union's class list, is not even **a** central fact underlying the Award. ***Id.*** And it is certainly not **the** central fact.

The Agency does not actually present any argument in support of this contention. Rather, all that is presented is the conclusory sentence that "[A] review of the plain language of the GS 1101 Order shows the Agency's alleged failure to dispute the Union's GS 1101 class list was a central fact." **Exceptions, p. 24.** But there are no facts argued to support such a conclusion and 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, the alleged factual finding **is not a central** fact, and there is a plethora of evidence within the GS-1101 Order which proves that even without the alleged factual finding at issue, the Arbitrator would have reached **the exact same result**.

The GS-1101 Order 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: (1) the FLRA had upheld Summary 3 which required the Agency to promote GS-1101 employees at issue; (2) Summaries 2 and 3 contained language that supported the conclusion of the GS-1101 Order; (3) the Agency refused to discuss the issue of promoting GS-1101 employees at the June 2, 2015 Implementation Meeting due to its intention to file a Motion for Reconsideration; (4) the Union presented its method and approach for how it created its class list; and (5) the Agency did not allege that any specific employee did not have the requisite time in grade or sufficient performance to justify a promotion. **Agency Exhibit 17.** Indeed, even if the alleged fact at issue, that the Agency did not dispute the list, was removed from the GS-1101 Order entirely, the conclusion **would remain exactly the same.**

These factual findings above 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 The GS-1101 Order was incomplete.

The Agency argues that the GS-1101 Order is deficient and must be set aside because it is so incomplete as to make implementation impossible in regards to the retroactive promotions. **Exceptions, p. 25.** "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 the GS-1101 Order 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.

A. The GS-1101 Order 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 the GS-1101 Order 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. 26.** 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 the GS-1101 Order 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 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 the GS-1101 Order 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 the GS-1101 Order 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 Exhibits 3 and 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 the GS-1101 Order 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. The GS-1101 Order is not incomplete because it provides certain deadlines to implement the Award.

The Agency further argues that the GS-1101 Order is incomplete because it is impossible to promote the employees at issue within thirty days due to internal personnel and payroll procedures. **Exceptions, p. 27**. 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 30-day time period, and the Arbitrator's factual finding that it may be difficult but not impossible to do so is a finding to which the Authority must defer. ***U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 68 FLRA 269, 270 (2015)**.

Moreover, 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 the GS-1101 Order. As such, the Exception must be denied.

C. The GS-1101 Order 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 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. 27.** 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]. **Agency Exhibit 7, 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 the GS-1101 Order was contrary to law.

The Agency argues that the GS-1101 Order is deficient and must be set aside because it is contrary to law. **Exceptions, p. 28**. Specifically, the Agency argues that the Order is contrary to law because: (1) it constitutes a classification issue; (2) it impacts a reserved management right; and (3) it directs the Agency to work with OPM to expedite the processing of annuity calculations; and (4) the Agency's June 22, 2015 Exceptions "effectively hold in abeyance the Arbitrator's adoption of the Union's methodology." ***Id.*** As demonstrated below, however, none

[5] On page 9 of the Agency's Exceptions, it makes reference to the Union's estimation of the cost for implementation of this case. **Exceptions, p. 9**. 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 F**. 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.

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

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

The Agency alleges that the GS-1101 Order is contrary to law because it constitutes a classification. **Exception, p. 29.** However, there is nothing new in the GS-1101 Order 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 the GS-1101 Order that would provide an opening for the Agency to now timely assert this argument. From the Remedial Award up until and including the GS-1101 Order, 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, including Summary 3; it did not. Because the Agency failed to do so, or because those Exceptions have already been denied, an Exception based upon classification is untimely or otherwise improper. As such, the Exception must be denied.

B. The GS-1101 Order does not deal with classification.

The Agency argues that the GS-1101 Order 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. 29**. 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. 29.** 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 the GS-1101 Order 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 selections 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, the GS-1101 Order does not include any classification issue and is, therefore, not contrary to law.

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

The Agency further argues that the GS-1101 Order 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. 30.** 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 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 the GS-1101 Order 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 G.** 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 G.** 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.

D. The portion of the GS-1101 Order directing the Agency to work with OPM to expedite any delayed annuity calculations is not contrary to law.

The Agency alleges that the Arbitrator's order requiring the Agency to "work with OPM to expedite any delayed annuity recalculations" is contrary to law because "it cannot take actions within the purview of a third party." **Exceptions, p. 31.** But the GS-1101 Order does not require the Agency to expedite annuity recalculations; nor is there any indication that if annuity calculations are delayed through no fault of its own, that the Agency would be in violation of the Order. Rather, all that is required is that the Agency "work with OPM" to do whatever it is able, pursuant to the numerous inter-agency agreements between the agencies. Indeed, the Agency even references the fact that it has some ability to reach out to OPM to resolve annuity issues. The Exceptions state that: "[A]cting CHCO Towanda Brookes advised the Parties that as early as the morning of June 2, 2015, IM that the Agency had again contacted OPM on the status of annuity recalculations." **Exceptions, p. 20**. "Ms. Brooks further advised that HUD's payroll personnel were reaching out to OPM on a weekly basis for status updates on this issue." ***Id.***

The GS-1101 Order does not require OPM to do anything on its own and does not require HUD to take any actions within the purview of another agency. In fact, all it requires is for the Agency to continue doing exactly what it has admittedly already been doing. As such, this Exception must be denied.

E. The GS-1101 Order is not incorporated within the larger class currently pending on appeal.

The Agency argues that the GS-1101 Order is effectively incorporated within the larger class of 3,777 grievants currently on appeal before the Authority and as such was contrary to law. **Exceptions, p. 32.** It should be noted that when the Arbitrator issued the GS-1101 Order the Agency's Exceptions to Summary 6 were not yet pending before the Authority, as those were filed approximately one week later, on June 22, 2015. **Agency Exhibit 18.**

The GS-1101 Order is not subsumed within, nor is it at all related or part of Summary 6. Rather, the GS-1101 Order pertains solely to Summary 3, and as noted *supra*, was only issued due to the Agency's lack of good faith in its refusal to implement the orders contained in Summary 3 after the Authority upholding of the same. *Supra.* The plain language of the GS-1101 Order confirms the same:

> On January 10, 2012, this Arbitrator issued an Opinion and Award (the "Award") in the above referenced matter. On August 8, 2012, the FLRA upheld the Award. This Arbitrator ordered the Parties to work together to implement the Award as written. The process of implementation has been overseen by this Arbitrator since then, on an ongoing and continuous basis.
>
> In the Summary of Implementation Meeting dated August 2, 2014, upheld by the FLRA on May 22, 2015, this Arbitrator noted that the Award covers all GS-1101 bargaining unit employees employed during the relevant damages period.

Agency Exhibit 17.

The Arbitrator then provides additional background on the basis for the Order based upon the Remedial Award, Summary 2 and Summary 3. ***Id.*** The GS-1101 Order does not add to or

modify any portion of Summary 3 and does not have **anything** to do with Summary 6. Rather, it is simply a recitation of which employees should be eligible for relief based upon the Authority's upholding of Summary 3. Indeed, the Arbitrator cited to the holding of Summary 3 explicitly:

> As stated in prior Summaries, this Arbitrator has instructed the Parties to make substantial progress on identifying class members. The Parties were instructed that based upon this Arbitrator's Award, as an example, all GS-1101 employees at the GS-12 level from 2002 to present were to be promoted, per the Back Pay Act and CBA, with back pay and interest, as of their earliest date of eligibility.

Id.

The GS-1101 Order has no bearing on Summary 6, does not rely upon Summary 6, and is not subsumed within Summary 6. As such, the Order was not contrary to law and 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. 33**. This Exception must be denied because 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. **Exhibits H-J**.

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 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.

The Agency's Exception based upon bias must 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. 33.** 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.[6] 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, putting the cart before the horse, cites to the instant GS-1101 Order as an example of the Arbitrator's alleged bias, despite the fact that the Authority has not ruled that there was anything improper about the GS-1101 Order. As explained throughout this opposition the GS-1101 Order was not improper and the Exceptions should be denied.

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. 35**. Yet, the Agency only provides two weak examples 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

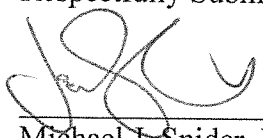
[6] This is possibly an attempt to gain sympathy based on dicta in the dissenting opinion found in 68 FLRA 631.

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.

Conclusion

The Agency's Exceptions must be dismissed and/or denied. Each of the Agency's Exceptions fails to establish that the GS-1101 Order was deficient in any way. Rather, the Agency simply disagrees with the Arbitrator's findings and attempts to collaterally attack the Remedial Award and prior Summaries. Moreover, the Agency has failed to establish that the Arbitrator was biased against the Agency. The Agency's Exceptions, therefore, must be dismissed and/or denied.

Respectfully Submitted,



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EXHIBITS:

Exhibit A – June 5, 2013 letter from Union

Exhibit B – May 29, 2015, email to Agency with PHRS/CIRS Stipulation

Exhibit C – June 4, 2015 – June 8, 2015 email traffic with Agency and Arbitrator.

Exhibit D – June 15, 2015, email to Arbitrator responding to Agency's comments

Exhibit E – Affidavit of Rivka Hersher

Exhibit F – Affidavit of Holly Salamido

Exhibit G – Article 13 of the Parties' CBA

Exhibit H – Filed ULP

Exhibit I - February 28, 2013 letter to FLRA

Exhibit J – Affidavit of Michel J. Snider

EXHIBIT

A

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Keith Kauffman, Esq. ⊥ ⁎
James L. Fuchs, Esq. ⊥ ⊗ ⊛

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⊗ admitted in Illinois
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June 5, 2013

SENT VIA E-MAIL
Dr. Andree McKissick
Labor Arbitrator
2808 Navarre Drive
Chevy Chase, Maryland 20815
Email: mckiss3343@aol.com

Re: *AFGE Council 222 v. U.S. Department of Housing & Urban Development*
Fair & Equitable Grievance

Dear Arbitrator McKissick:

The purpose of this letter is to memorialize the conference call that took place on Thursday, May 30, 2013 regarding the above referenced matter and update you on the Parties' progress since then.

On May 30, 2013, a conference call was held to discuss implementation of Remedy No. 1 of your Decision and Award dated January 10, 2012. In addition to the Arbitrator, present for the conference were: Mr. Jacob Y. Statman and Mr. Michael J. Snider for the Union and Ms. Tresa A. Rice and Mr. James E. Fruge for the Agency.

Prior to and during the call, the Union took issue with the manner in which the Agency is implementing Remedy No. 1. First, the Union noted that the Arbitrator's order required the Agency to implement the ordered remedy within 30 days. The Union further took issue with the fact that, after representing to the Arbitrator and after testifying on the record that it could not locate many of the vacancy announcements at issue, the Agency now claims that it is planning on hand-searching through an old database to attempt to locate old, possibly relevant vacancy announcements. The Union brought up the Arbitrator's Order drawing an Adverse Inference and establishing a broad class of employees entitled to Relief under Remedy No. 1, and argued that any search for vacancy announcements and employees who applied for, or were eligible to apply for those vacancies, should be added to the class identifiable through the Adverse Inference.

During the call, the Arbitrator affirmed her Order finding an Adverse Inference against the Agency and that the class, as can be established through that Order and Adverse Inference would not be affected by the Agency's alleged ability to now locate vacancy announcements. The Arbitrator further stated that, while the Agency could use the records to find additional class members or to identify class members, it could not use the search results to limit the class.

The Arbitrator also inquired of the Agency why it had not yet processed promotions and backpay awards for employees not in dispute, and ordered that those employees be promoted and

paid immediately. The Arbitrator further instructed the Parties to meet and discuss the implementation process and, if a joint process and timeframe cannot be reached, to submit competing proposals for the Arbitrator to review.

Subsequent to the conference call the Agency submitted its findings from Phase I. The Agency found that there are no eligible class members from its Phase I review. In other words, a year has passed since the Award and over four months since the Agency began its "review," and not one employee has been promoted and/or paid backpay.

The Parties have since agreed to discuss the results via telephone on June 13, 2013, and meet in-person on June 19, 2013. The Union will continue to keep the Arbitrator apprised of the Parties' progress.

Thank you.

Respectfully Submitted,

SNIDER & ASSOCIATES, LLC

Jacob Y. Statman, Esq

Cc: Ms. Tresa Rice
Ms. Carolyn Federoff
Mr. William Biggs

EXHIBIT

B

Jacob Statman

From: Jacob Statman
Sent: Friday, May 29, 2015 12:00 PM
To: 'Rice, Tresa A'
Cc: Constantine, Peter J; MOMENI, MERCEDEH; Myung, Javes; M Snider; Salamido, Holly (Holly.Salamido@hud.gov)
Subject: AFGE 222 - F/E - Stipulation
Attachments: Stipulation for PHRS_CIRS with Exhibits.pdf

Good morning,

Per the Arbitrator's prior orders please see the attached stipulation for the PHRS and CIRS positions. Thank you.

Jacob Y. Statman, Esq.
Snider & Associates, LLC
600 Reisterstown Road; 7th Floor
Baltimore, Maryland 21208
Phone: (410) 653-9060
Direct Dial: (443) 544-2450
Fax: (410) 653-9061
Email: jstatman@sniderlaw.com

From: Rice, Tresa A [mailto:Tresa.A.Rice@hud.gov]
Sent: Thursday, May 28, 2015 9:20 AM
To: Jacob Statman
Cc: Constantine, Peter J; MOMENI, MERCEDEH; Myung, Javes; M Snider
Subject: RE: Fair and Equitable: March 26, 2015, Implementation Meeting Summary

Dear Mr. Statman,

We will call your office.

Thank you,
Tresa A. Rice
Senior Attorney Advisor, Personnel Law Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, Room 3170
Washington, DC 20410
Office: (202) 402-2222
Fax: (202) 401-7400

From: Jacob Statman [mailto:jstatman@sniderlaw.com]
Sent: Wednesday, May 27, 2015 6:10 PM
To: Rice, Tresa A

Cc: Constantine, Peter J; MOMENI, MERCEDEH; Myung, Javes; M Snider
Subject: Re: Fair and Equitable: March 26, 2015, Implementation Meeting Summary

Thank you. Should we set up a dial in or can you call our office at 1:30?

Jacob Y. Statman, Esq.
Snider & Associates, LLC
600 Reisterstown Road; 7th Floor
Baltimore, Maryland 21208
Phone: (410) 653-9060
Fax: (410) 653-9061
Email: jstatman@sniderlaw.com

On May 27, 2015, at 6:04 PM, Rice, Tresa A <Tresa.A.Rice@hud.gov> wrote:

> Dear Mr. Statman,
>
> My apologies for the delay in responding. I am sending this message on behalf of counsel. We are available to speak in response to your message below and Mr. Snider's separate request to speak with HUD, as well. However, we are available from 1:30-2:30pm. If 3 pm becomes available I will advise you as soon as possible, but in the meantime I wanted to forward the time slot that I can confirm we are presently available to participate in a phone call with Union counsel.
>
> Thank you,
> Tresa A. Rice
> Senior Attorney Advisor, Personnel Law Division
> Office of General Counsel
> Department of Housing and Urban Development
> 451 7th Street, Room 3170
> Washington, DC 20410
> Office: (202) 402-2222
> Fax: (202) 401-7400

From: Jacob Statman [mailto:jstatman@sniderlaw.com]
Sent: Tuesday, May 26, 2015 2:25 PM
To: Rice, Tresa A
Cc: Constantine, Peter J; MOMENI, MERCEDEH; Myung, Javes; Clemmensen, Craig T; Pavlik, Mary E; Salamido, Holly; M Snider
Subject: RE: Fair and Equitable: March 26, 2015, Implementation Meeting Summary

Understood. We would like to have a call on Thursday afternoon in advance of next week's meeting with the Arbitrator. Is the Agency available at 3:00pm on Thursday for a call?

Jacob Y. Statman, Esq.
Snider & Associates, LLC
600 Reisterstown Road; 7th Floor
Baltimore, Maryland 21208
Phone: (410) 653-9060
Direct Dial: (443) 544-2450

EXHIBIT

C

Jacob Statman

From: M Snider
Sent: Monday, June 08, 2015 1:19 PM
To: Dr. A. Y. Mckissick
Cc: Holly.Salamido@hud.gov; Jacob Statman; Peter.J.Constantine@hud.gov; Craig.T.Clemmensen@hud.gov; MERCEDEH.MOMENI@hud.gov; javes.myung@hud.gov; Tresa.A.Rice@hud.gov
Subject: RE: AFGE 222 and HUD, Fair and Equitable Arbitration - proposed Order
Attachments: AFGE 222 v HUD - Fair and Equitable Arbitration - Union Proposed Summary of IM 6-2-15.pdf; AFGE 222 v HUD - Fair and Equitable Arbitration - Order on GS-1101 Employees FINAL.pdf; Exhibits for GS-1101 Order.pdf

Dr. McKissick:

Thank you for meeting with the Parties last week.

Attached is the Union's proposed Summary of IM for the June 2, 2015 meeting.

Also attached is a proposed Order concerning GS-1101 promotions and Exhibits thereto.

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

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

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

From: Dr. A. Y. Mckissick [mailto:mckiss3343@aol.com]
Sent: Monday, June 08, 2015 11:50 AM
To: Jacob Statman; M Snider
Cc: Holly.Salamido@hud.gov; Peter.J.Constantine@hud.gov; Craig.T.Clemmensen@hud.gov; MERCEDEH.MOMENI@hud.gov; javes.myung@hud.gov; Tresa.A.Rice@hud.gov
Subject: Re: AFGE 222 and HUD, Fair and Equitable Arbitration - proposed Order

Thank you, Mr Statman. I had no problem retrieving it.

Ms. Rice , would you like to formally respond to this order? If so, please respond promptly.

Dr. McKissick

-----Original Message-----
From: Jacob Statman <jstatman@sniderlaw.com>
To: Dr. A. Y. Mckissick <mckiss3343@aol.com>; M Snider <m@sniderlaw.com>
Cc: Holly.Salamido <Holly.Salamido@hud.gov>; Peter.J.Constantine <Peter.J.Constantine@hud.gov>; Craig.T.Clemmensen <Craig.T.Clemmensen@hud.gov>; MERCEDEH.MOMENI <MERCEDEH.MOMENI@hud.gov>;

javes.myung <javes.myung@hud.gov>; Tresa.A.Rice <Tresa.A.Rice@hud.gov>
Sent: Mon, Jun 8, 2015 9:37 am
Subject: RE: AFGE 222 and HUD, Fair and Equitable Arbitration - proposed Order

Dr. McKissick,

I am reattaching the Proposed Order. Please let me know if you are able to access it.

Thank you.

Jacob Y. Statman, Esq.
Snider & Associates, LLC
600 Reisterstown Road; 7th Floor
Baltimore, Maryland 21208
Phone: (410) 653-9060
Direct Dial: (443) 544-2450
Fax: (410) 653-9061
Email: jstatman@sniderlaw.com

From: Dr. A. Y. Mckissick [mailto:mckiss3343@aol.com]
Sent: Sunday, June 07, 2015 7:41 PM
To: M Snider
Cc: Holly.Salamido@hud.gov; Jacob Statman; Peter.J.Constantine@hud.gov; Craig.T.Clemmensen@hud.gov; MERCEDEH.MOMENI@hud.gov; javes.myung@hud.gov; Tresa.A.Rice@hud.gov
Subject: Re: AFGE 222 and HUD, Fair and Equitable Arbitration - proposed Order

Hello Mr. Snider:
I was unable to retrieve your attached Order. Did you forget to attach it? Please re-attach it. Thanks.

Dr. McKissick

-----Original Message-----
From: M Snider <m@sniderlaw.com>
To: McKiss3343 <McKiss3343@aol.com>
Cc: Salamido, Holly (Holly.Salamido@hud.gov) (Holly.Salamido@hud.gov) <Holly.Salamido@hud.gov>; Jacob Statman <jstatman@sniderlaw.com>; Constantine, Peter J (Peter.J.Constantine@hud.gov) (Peter.J.Constantine@hud.gov) <Peter.J.Constantine@hud.gov>; Clemmensen, Craig T (Craig.T.Clemmensen@hud.gov) (Craig.T.Clemmensen@hud.gov) <Craig.T.Clemmensen@hud.gov>; MOMENI, MERCEDEH (MERCEDEH.MOMENI@hud.gov) (MERCEDEH.MOMENI@hud.gov) <MERCEDEH.MOMENI@hud.gov>; Myung, Javes <javes.myung@hud.gov>; Rice, Tresa A <Tresa.A.Rice@hud.gov>
Sent: Thu, Jun 4, 2015 3:41 pm
Subject: AFGE 222 and HUD, Fair and Equitable Arbitration - proposed Order

Arbitrator McKissick:

As we discussed during this past week's IM, attached is a Proposed Order for the promotions of the PHRS and CIRS class members. Thank you for your attention to this matter.

Further, as we discussed during the IM, neither the Agency's proposal to file, nor the actual filing of a Motion for Reconsideration, would stay the effectiveness of the FLRA's Decision upholding your IM #3. The FLRA's regulation is as follows:

§ 2429.17

Reconsideration.
After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within ten (10) days after service of the Authority's decision or order. A motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by appropriate citations. The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority. A motion for reconsideration need not be filed in order to exhaust administrative remedies.

Thank you for your consideration.

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

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

m@sniderlaw.com<mailto:m@sniderlaw.com>
email
www.sniderlaw.com<http://www.sniderlaw.com> website

EXHIBIT

D

Jacob Statman

From: M Snider
Sent: Monday, June 15, 2015 2:54 PM
To: Dr. A. Y. Mckissick
Cc: Salamido, Holly; Jacob Statman; Constantine, Peter J; Clemmensen, Craig T; MOMENI, MERCEDEH; Myung, Javes; Pavlik, Mary E; Rice, Tresa A
Subject: RE: AFGE 222 and HUD, Fair and Equitable Arbitration - proposed Order

Dr. McKissick:

As noted in your Summaries, the Agency has had plentiful opportunities to raise all of these issues, but it hasn't. The Agency cannot relitigate issues now. As for funding, that is the Agency's problem – it has not properly budgeted for this case, as you have heard. Moreover, the Agency has not shown that it has taken all efforts to fund the case, through reprogramming of funds or other measures. Perhaps by withholding bonus awards from supervisors, it can fund your Order.

In any case, the Agency has not reached out to the Union to meet. Instead, it merely states that the Union proposes to move forward with promotions that it "has been advised cannot be accomplished. That is disingenuous. The Agency has not proven that it cannot effectuate the promotions; it has merely alleged that it cannot, or that it would be time consuming, or that it would be expensive. The Agency has not even tried to work with the Union or tried to meet with the Union in order to attempt to find a way to implement the Arbitrator's Award and Summaries. It simply argues to the Arbitrator that it, after 13 years of continuous violations, is now in a bad position. That is not enough to avoid implementation. The Union provided a list of employees who have passed away waiting for their remedy, and more are passing away every week and month.

As far as signing the Order, the Agency has no legal basis to dispute the Order. Instead it is raising technical objections. Of course, it does so without even requesting a meeting or even a phone call with the Union to discuss it.

The list, as sent to the Agency over a year ago, is drawn directly from Agency data. The Agency has known how the list was generated, as the Union provided the Agency with step by step instructions and a live Excel spreadsheet so the Agency could replicate the steps. Again, in the over a year since the list was provided, the Agency did not dispute the list. In particular, you were clear in your Summary that the Agency had 30 days from June 2014 to discuss and dispute the list - which it never did. It still does not lodge any specific objections, other than raising the possibility of some issues, which can most likely be worked out with the Union – if the Agency were to engage the Union.

As far as effectuating the promotions prior to identifying the source of funds for backpay, the Union is certain that the Agency can actually, and has in the past, effectuated promotions without backpay at the time of the promotion. The Agency can certainly effectuate prospective promotions without retroactive pay, and work out the source of funds for the retroactivity later.

The Agency's specific issues are, as stated, individualized as to each person. Obviously if an employee is not currently in the AFGE 222 Bargaining Unit, they won't be affected. But if that employee was in the AFGE 222 Bargaining unit at any time during the damages period, the Agency would have to process their promotion retroactively for that period of time.

We are amenable to a meeting with the Agency, a phone conference with the Agency, and/or a meeting or phone conference in the next few days with the Arbitrator – subject to her availability.

The Union requsts that the Arbitrator sign the Order and that the Parties, with the help of the Arbitrator, work out the small details together, as envisioned in the IM process.

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

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

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

From: Rice, Tresa A [mailto:Tresa.A.Rice@hud.gov]
Sent: Monday, June 15, 2015 2:32 PM
To: Dr. A. Y. Mckissick; Jacob Statman; M Snider
Cc: Salamido, Holly; Constantine, Peter J; Clemmensen, Craig T; MOMENI, MERCEDEH; Myung, Javes; Pavlik, Mary E
Subject: RE: AFGE 222 and HUD, Fair and Equitable Arbitration - proposed Order

Dear Arbitrator McKissick,

As a follow up to the parties' June 2, 2015, Implementation Meeting, the Agency filed a Motion for Reconsideration and a Motion to Stay the Authority's May 22, 2015, Order on Monday, June 8, 2015.

During the parties' June 2, 2015, Implementation Meeting, Mr. Snider advised on behalf of the Union that he and his clients were happy to meet and discuss with the Agency next steps regarding the identification of claimants. However, as evidenced by the Union's proposed Order, submitted on June 4, 2015, the Union continues to propose that the Agency process retroactive promotions actions and related payments that he has been fully advised by the Agency's financial and personnel representatives cannot be accomplished. The proposed Order further seeks to have the Agency effectuate retroactive promotions prior to independent verification by the responsible management offices that the list of employees can be supported by the data on potential claimants for the remedy. HUD opposes the Union's request for you to sign the order for the reasons that follow.

The Union cannot simultaneously propose discussions with the Agency so that the parties can jointly identify the names, effective dates, positions, etc. of claimants, and conversely submit a proposed Order to the Arbitrator that has the effect of binding the hands of the Agency without providing the Agency with an opportunity to perform its due diligence to ensure the names, effective dates, positions, etc. are proper.

At present, the Agency is unable to verify that the attached lists are true representations of the HR data available. As stated during the June 2, 2015 Implementation Meeting, the Agency cannot process promotions for claimants without first knowing the effective dates for the retroactive promotions. The Agency has presented to the Union and the Arbitrator numerous times the regulatory defined processes for retroactive promotions, and cannot short-circuit the requirements here. In addition to the need for identifying effective dates for retroactive promotions, additional information is also necessary to identify the position titles and position descriptions, as numerous jobs are listed under the 1101 job series. The Agency has also advised the Arbitrator and Union that an estimation of costs and identification of funds sources and availability must occur prior to effectuating the retroactive promotion actions. The Agency further stressed during the June 2

Implementation Meeting that the processing of retroactive promotions for the 17 grievants is indicative of the thorough process required in order to process the promotions.

Based upon our preliminary review of the employee list attached to the Union's proposed Order, please be advised that HUD has identified issues that render the Union's proposed Order untenable. Some of these issues are outlined below:

- The Agency's initial review of the attached employee list indicates that the only GS-12 PHRS identified on the attached employee list is a member of the NFFE 1450 bargaining unit.
- The attached employee list at first glance covers current employees in more than 16 different job titles at the Agency. Additional analysis would be required to determine if the Agency's initial review is accurate.
- The attached employee list at first glance includes 144 separated employees and 129 current employees. Additional analysis would be required to determine if the Agency's initial review is accurate.
- The attached employee list at first glance includes a handful of employees currently at grades lower than 12, who may have taken voluntary downgrades to enter new careers, encountered performance issues, or any number of special circumstances. Additional analysis would also be required to determine if the Agency's initial review is accurate.

Lastly, please include Agency Representative Mary Beth Pavlik on all communications to the Agency on this case.

Thank you,
Tresa A. Rice
Senior Attorney Advisor, Personnel Law Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, Room 3170
Washington, DC 20410
Office: (202) 402-2222
Fax: (202) 401-7400

From: Dr. A. Y. Mckissick [mailto:mckiss3343@aol.com]
Sent: Monday, June 08, 2015 11:50 AM
To: jstatman@sniderlaw.com; m@sniderlaw.com
Cc: Salamido, Holly; Constantine, Peter J; Clemmensen, Craig T; MOMENI, MERCEDEH; Myung, Javes; Rice, Tresa A
Subject: Re: AFGE 222 and HUD, Fair and Equitable Arbitration - proposed Order

Thank you, Mr Statman. I had no problem retrieving it.

Ms. Rice , would you like to formally respond to this order? If so, please respond promptly.

Dr. McKissick

-----Original Message-----
From: Jacob Statman <jstatman@sniderlaw.com>
To: Dr. A. Y. Mckissick <mckiss3343@aol.com>; M Snider <m@sniderlaw.com>
Cc: Holly.Salamido <Holly.Salamido@hud.gov>; Peter.J.Constantine <Peter.J.Constantine@hud.gov>;

Craig.T.Clemmensen <Craig.T.Clemmensen@hud.gov>; MERCEDEH.MOMENI <MERCEDEH.MOMENI@hud.gov>; javes.myung <javes.myung@hud.gov>; Tresa.A.Rice <Tresa.A.Rice@hud.gov>
Sent: Mon, Jun 8, 2015 9:37 am
Subject: RE: AFGE 222 and HUD, Fair and Equitable Arbitration - proposed Order

Dr. McKissick,

I am reattaching the Proposed Order. Please let me know if you are able to access it.

Thank you.

Jacob Y. Statman, Esq.
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Phone: (410) 653-9060
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Email: jstatman@sniderlaw.com

From: Dr. A. Y. Mckissick [mailto:mckiss3343@aol.com]
Sent: Sunday, June 07, 2015 7:41 PM
To: M Snider
Cc: Holly.Salamido@hud.gov; Jacob Statman; Peter.J.Constantine@hud.gov; Craig.T.Clemmensen@hud.gov; MERCEDEH.MOMENI@hud.gov; javes.myung@hud.gov; Tresa.A.Rice@hud.gov
Subject: Re: AFGE 222 and HUD, Fair and Equitable Arbitration - proposed Order

Hello Mr. Snider:
I was unable to retrieve your attached Order. Did you forget to attach it? Please re-attach it. Thanks.

Dr. McKissick

-----Original Message-----
From: M Snider <m@sniderlaw.com>
To: McKiss3343 <McKiss3343@aol.com>
Cc: Salamido, Holly (Holly.Salamido@hud.gov) (Holly.Salamido@hud.gov) <Holly.Salamido@hud.gov>; Jacob Statman <jstatman@sniderlaw.com>; Constantine, Peter J (Peter.J.Constantine@hud.gov) (Peter.J.Constantine@hud.gov) <Peter.J.Constantine@hud.gov>; Clemmensen, Craig T (Craig.T.Clemmensen@hud.gov) (Craig.T.Clemmensen@hud.gov) <Craig.T.Clemmensen@hud.gov>; MOMENI, MERCEDEH (MERCEDEH.MOMENI@hud.gov) (MERCEDEH.MOMENI@hud.gov) <MERCEDEH.MOMENI@hud.gov>; Myung, Javes <javes.myung@hud.gov>; Rice, Tresa A <Tresa.A.Rice@hud.gov>
Sent: Thu, Jun 4, 2015 3:41 pm
Subject: AFGE 222 and HUD, Fair and Equitable Arbitration - proposed Order

Arbitrator McKissick:

As we discussed during this past week's IM, attached is a Proposed Order for the promotions of the PHRS and CIRS class members. Thank you for your attention to this matter.

Further, as we discussed during the IM, neither the Agency's proposal to file, nor the actual filing of a Motion for Reconsideration, would stay the effectiveness of the FLRA's Decision upholding your IM #3. The FLRA's regulation is as follows:

§ 2429.17
Reconsideration.
After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within ten (10) days after service of the Authority's decision or order. A motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by appropriate citations. The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority. A motion for reconsideration need not be filed in order to exhaust administrative remedies.

Thank you for your consideration.

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

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

m@sniderlaw.com<mailto:m@sniderlaw.com>
email
www.sniderlaw.com<http://www.sniderlaw.com> website

EXHIBIT

E

AFFIDAVIT OF RIVKA HERSHER

I, Rivka Hersher, being over the age of eighteen and competent to provide testimony hereby affirm as follows:

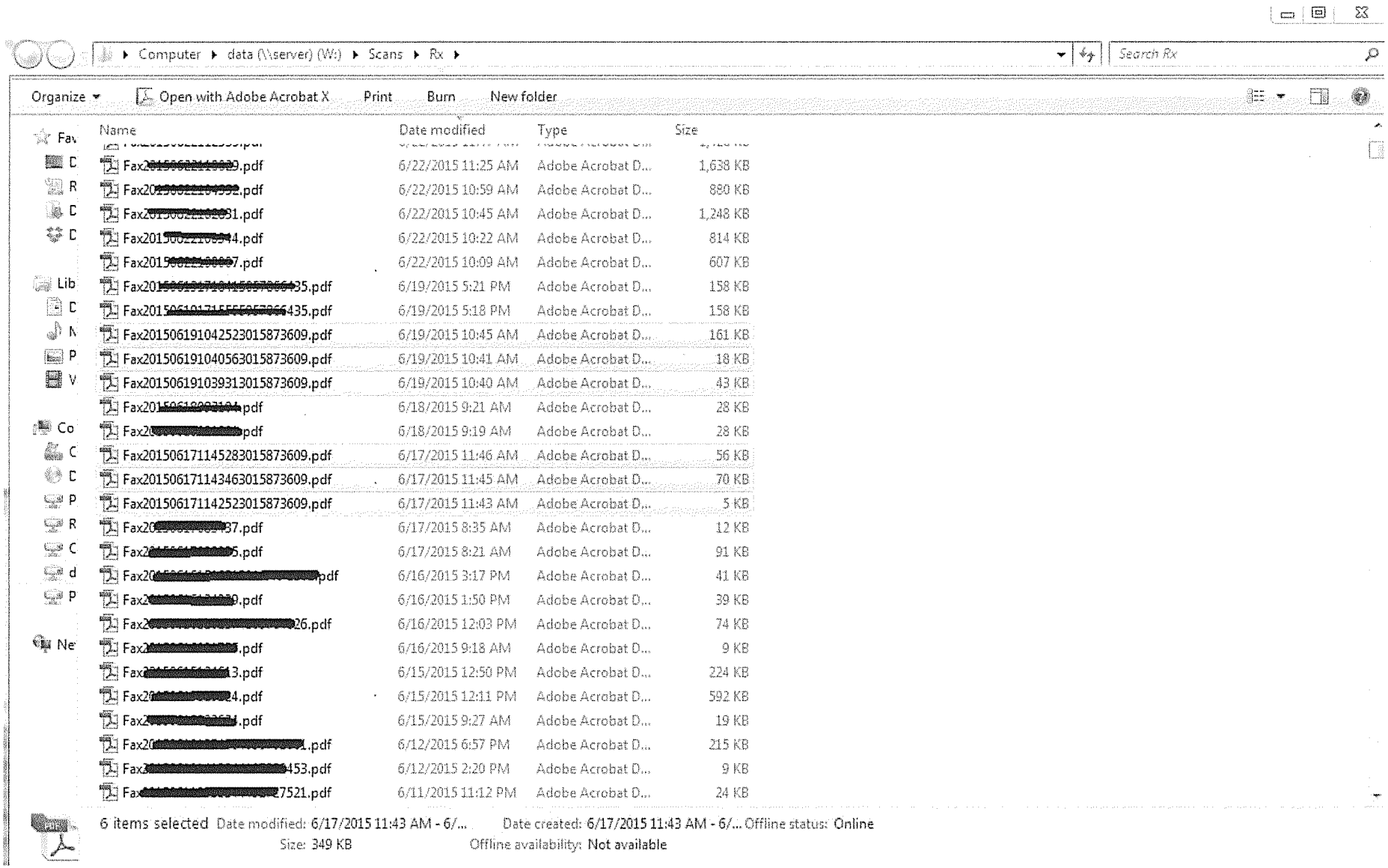
1. I am the receptionist and administrative assistant at Snider & Associates, LLC.
2. One of my duties is to process all incoming packages, mail, and faxes.
3. I maintain a detailed log of all incoming faxes.
4. On June 17, 2015, we received three faxes from (301) 587-3609.
5. The first fax was received at 11:43am and consisted of a single page cover sheet from Arbitrator McKissick.
6. The second fax was received at 11:45am and consisted of pages 1-3 of an Order from Arbitrator McKissick,
7. The third fax was received at 11:46am and consisted of pages 4-6 of an Order from Arbitrator McKissick.
8. Page 6 of the Order was dated June 18, 2015.
9. All three faxes received on June 17, 2015, contain a heading of June 15, 2015 despite being received on June 17, 2015.
10. A brief review of the Order demonstrates that it pertains to GS-1101 employees at the U.S. Department of Housing and Urban Development.
11. On June 19, 2015, we received three faxes from (301) 587-3609.
12. The first fax was received at 10:40am and consisted of three pages. A cover page and the first two pages of an Order from Arbitrator McKissick.
13. The second fax was received at 10:41am and consisted of two pages. Page 3 of an Order and a page titled "Exhibit A PHRS Class Members."

14. The third fax was received at 10:41am and consisted of eight pages containing a list of names.
15. All three faxes received on June 19, 2015, contain a heading of June 17, 2015 despite being received on June 19, 2015.
16. A brief review of the Order demonstrates that it pertains to PHRS and CIRS employees at the U.S. Department of Housing and Urban Development.
17. Faxes received by our office are automatically saved on the firm's server as a .pdf file. The date and time and receipt are noted within the file properties.
18. A true and correct redacted screen shot from the firm's server, showing the properties of the referenced faxes, is attached hereto.

I have reviewed the foregoing two pages and they are true and correct to the best of my knowledge and belief.

Rivka Hersher

8/19/15
Date


Computer ▸ data (\\server) (W:) ▸ Scans ▸ Rx ▸
Search Rx
Organize
Open with Adobe Acrobat X
Print
Burn
New folder
Name
Date modified
Type
Size
Fax[redacted].pdf 6/22/2015 11:25 AM Adobe Acrobat D... 1,638 KB
Fax[redacted].pdf 6/22/2015 10:59 AM Adobe Acrobat D... 880 KB
Fax[redacted].pdf 6/22/2015 10:45 AM Adobe Acrobat D... 1,248 KB
Fax[redacted].pdf 6/22/2015 10:22 AM Adobe Acrobat D... 814 KB
Fax[redacted].pdf 6/22/2015 10:09 AM Adobe Acrobat D... 607 KB
Fax[redacted].pdf 6/19/2015 5:21 PM Adobe Acrobat D... 158 KB
Fax[redacted].pdf 6/19/2015 5:18 PM Adobe Acrobat D... 158 KB
Fax20150619104252301587360 9.pdf 6/19/2015 10:45 AM Adobe Acrobat D... 161 KB
Fax20150619104056301587360 9.pdf 6/19/2015 10:41 AM Adobe Acrobat D... 18 KB
Fax20150619103931301587360 9.pdf 6/19/2015 10:40 AM Adobe Acrobat D... 43 KB
Fax[redacted].pdf 6/18/2015 9:21 AM Adobe Acrobat D... 28 KB
Fax[redacted].pdf 6/18/2015 9:19 AM Adobe Acrobat D... 28 KB
Fax20150617114528301587360 9.pdf 6/17/2015 11:46 AM Adobe Acrobat D... 56 KB
Fax20150617114346301587360 9.pdf 6/17/2015 11:45 AM Adobe Acrobat D... 70 KB
Fax20150617114252301587360 9.pdf 6/17/2015 11:43 AM Adobe Acrobat D... 5 KB
Fax[redacted].pdf 6/17/2015 8:35 AM Adobe Acrobat D... 12 KB
Fax[redacted].pdf 6/17/2015 8:21 AM Adobe Acrobat D... 91 KB
Fax[redacted].pdf 6/16/2015 3:17 PM Adobe Acrobat D... 41 KB
Fax[redacted].pdf 6/16/2015 1:50 PM Adobe Acrobat D... 39 KB
Fax[redacted].pdf 6/16/2015 12:03 PM Adobe Acrobat D... 74 KB
Fax[redacted].pdf 6/16/2015 9:18 AM Adobe Acrobat D... 9 KB
Fax[redacted].pdf 6/15/2015 12:50 PM Adobe Acrobat D... 224 KB
Fax[redacted].pdf 6/15/2015 12:11 PM Adobe Acrobat D... 592 KB
Fax[redacted].pdf 6/15/2015 9:27 AM Adobe Acrobat D... 19 KB
Fax[redacted].pdf 6/12/2015 6:57 PM Adobe Acrobat D... 215 KB
Fax[redacted].pdf 6/12/2015 2:20 PM Adobe Acrobat D... 9 KB
Fax[redacted].pdf 6/11/2015 11:12 PM Adobe Acrobat D... 24 KB
6 items selected Date modified: 6/17/2015 11:43 AM - 6/... Date created: 6/17/2015 11:43 AM - 6/... Offline status: Online
Size: 349 KB Offline availability: Not available

EXHIBIT

F

AFFIDAVIT OF HOLLY SALAMIDO

I, Holly Salamido, being over the age of eighteen and competent to provide testimony hereby affirm as follows:

1. I am the President of AFGE Council of Locals, Council 222.
2. I am familiar with the Fair and Equitable Grievance against the U.S. Department of Housing and Urban Development.
3. I have reviewed the Agency's Exceptions currently pending before the FLRA.
4. On page 8 of the Exceptions, the Agency references the "Union's estimation of the cost for implementation of this case as of December 2014."
5. That document was presented by me to HUD Deputy Secretary, Nani A. Coloretti.
6. I gave the document to Ms. Coloretti during a discussion between the two of us about settling the Fair and Equitable Grievance. It was clear at the time I gave the document to Ms. Coloretti that the document was being provided to her as part of a settlement discussion.
7. The Agency's failure to keep the Union's damages estimate confidential was a violation of applicable settlement rules and procedures.

I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief.

Holly Salamido 8/3/15

Holly Salamido Date

EXHIBIT

G

Agreement

between
U.S. Department of Housing
and Urban Development

and

American Federation of
Government Employees
AFL-CIO

1998

PREAMBLE

This Agreement is made and entered into by and between the United States Department of Housing and Urban Development, hereinafter referred to as "Management" and the American Federation of Government Employees, AFL-CIO, hereinafter referred to as the "Union," together referred to as the "Parties."

Management and the Union agree that labor-management relations within the Department are strengthened by the participation of employees in the formulation and implementation of personnel policies and practices relating to their conditions of employment and through constructive and cooperative relationships with labor organizations.

The parties affirm that the public purposes to which the Department is dedicated can be advanced through understanding and cooperation achieved through collective bargaining as defined in Public Law 95-454. The provisions of the Contract shall be administered and interpreted in a manner consistent with the requirement for an effective and efficient Government.

The terms and conditions of this Agreement apply only to employees within the bargaining unit.

ARTICLE 13
MERIT PROMOTION AND INTERNAL PLACEMENT

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

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

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

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

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

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

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

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

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

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

(4) **Reassignment.** The change of an employee from one position to another without promotion or demotion.

(5) **Area of Consideration.** The area in which an intensive search is made for agency candidates who are eligible for consideration in a specific competitive placement action.

(6) **Career Ladder.** A series of positions of increasing complexity and at successively higher grades in the same line of work, through which employees may progress from entrance levels to the full-performance, or journey level. A career ladder may exist within one (1) organizational unit or it may cross organizational lines.

(7) **Full-Performance Level.** The target or journey level in a specific occupational career ladder.

(8) **Known Promotion Potential.** The projected full-performance level of a position to which an employee may be non-competitively promoted based on a prior selection through competitive procedures.

(9) **Non-competitive Promotion.** A promotion without current competition when:

(a) The employee was previously appointed or competitively selected for an assignment intended to prepare him/her for the position currently being filled.

(b) The employee's position is reclassified to a higher grade because of additional duties and responsibilities.

(c) The employee's position is upgraded without significant change in its duties and responsibilities due to issuance of a new classification standard or the correction of a prior classification error.

(10) **Job Analysis.** The systematic process of analyzing the duties of a position to identify the knowledges, skills, abilities and other characteristics (KSAOs) required for successful job performance.

(11) **Crediting Plan.** An evaluation method, based on job-related criteria developed through job analysis, to:

(a) Rate candidates' qualifications; and

(b) Rank candidates for referral in a competitive placement action.

(12) **Qualified Candidates.** Those candidates who meet the minimum Office of Personnel Management (OPM) qualification standards for a position and, also, any appropriate selective placement factors.

(13) **Best Qualified Candidates.** Those candidates whose qualifications are clearly superior when compared with other qualified candidates for the position to be filled, and who are referred to the selecting official on a competitive placement certificate.

(14) **Selective Placement Factor.** A selective placement factor is a knowledge, skill, ability or other characteristic in addition to the basic qualification standard that is essential for satisfactory performance on the job. The following are examples of appropriate selective factors for determining eligibility when the factors are essential for successful job performance:

(a) Ability to speak, read, and/or write a language other than English;

(b) Knowledges and abilities pertaining to a certain program or mission, when these cannot readily be acquired after selection; and

(c) Ability in a functional area (for example, ability to evaluate alternative ADP systems).

(15) **Competitive Placement Certificate.** A list of the best qualified candidates, identified through competitive placement procedures, for use by a selecting official in filling a vacancy.

Section 13.04 - Notification to Union of Staff Vacancies. As a bargaining unit position becomes available, Management agrees to notify promptly the Union of its intent to staff or cancel the vacant position.

Section 13.05 - Simultaneous Consideration in Filling Unit Vacancies. Management agrees to provide simultaneous selection consideration of:

(1) Properly ranked and certified candidates for either immediate or potential promotion, identified through the competitive procedures of this Article; and

(2) Qualified candidates eligible for appointment from an OPM or Delegated Examining Unit (DEU) register, by reinstatement or by transfer.

Simultaneous consideration shall not apply to the filling of positions with no greater promotion potential than GS-5 in Headquarters; GS-4 in the Field, as well as critical shortage or hard to fill positions identified by the Office of Personnel Management.

Consideration of candidates from appropriate sources outside the Department shall not be required except at Management's option.

Section 13.06 - Actions Covered by Competitive Procedures. Competitive placement procedures shall apply to the following types of personnel actions concerning bargaining unit positions, unless excluded by Section 13.07:

(1) Promotions;

(2) Temporary promotions exceeding one hundred and twenty (120) days;

(3) Details to higher graded positions or to positions with known promotion potential for more than one hundred and twenty (120) days;

(4) Selection for training which is given primarily to prepare an employee for advancement and is required for promotion;

(5) Reassignment or demotion to a position with more promotion potential than the employee's current position;

(6) Transfer from another Federal agency to a higher graded position; and

(7) Reinstatement or promotion to a permanent or temporary position at a higher grade than the highest nontemporary position held in the competitive service from which the employee was not demoted for cause or performance.

Section 13.07 - Actions Not Covered by Competitive Procedures. Nothing in this Agreement shall preclude the selection or placement of a person entitled to a higher order of consideration by law or Governmentwide rule or regulation. In addition, the following actions are specifically excluded from coverage of the competitive placement procedures of this Agreement:

(1) **Appointments.**

(a) Appointment from an Office of Personnel Management register or a register under the Department's delegated examining and/or Schedule B appointment authority;

(b) Reinstatement to a grade or position previously held by an employee under a non-temporary appointment from which the employee was not demoted for cause or performance, and meets the qualification standards;

(c) Reinstatement from the Department's Reemployment Priority List (RPL) for a position at a higher grade than the one last held in the competitive service;

(d) Transfer from another Federal agency to a grade or position previously held by an employee under a non-temporary appointment from which the employee was not demoted for cause or performance, and meets the qualification standards;

(e) Conversion to competitive appointment of an employee who has successfully satisfied the specific requirements of a special employment program. Examples of such programs include:

Cooperative Education;
Veterans' Readjustment;
Selective Placement; and
Presidential Management Intern.

(f) Action to fill a position which has no greater promotion potential than GS-5 in Headquarters; GS-4 in the Field.

(2) **Position Changes - Permanent.**

(a) Reassignment or demotion to a position with no greater promotion potential than the employee's current position; including to a position that might require a training plan and/or qualifications waiver;

(b) Promotion resulting from the upgrading of a position without significant changes in the duties and responsibilities due to issuance of a new classification standard or the correction of an initial classification error;

(c) Promotion resulting from an employee's position being reclassified at a higher grade because of additional duties and responsibilities;

(d) Career promotion without current competition when an employee was previously appointed or competitively selected for an assignment intended to prepare the employee for the position to be filled;

(e) Repromotion to a grade or position previously held by an employee under a non-temporary appointment, and from which the employee was not demoted for cause or performance, and meets the qualification standards;

(f) Promotion resulting from priority consideration granted because of failure in the past to receive proper placement consideration;

(g) Promotion through career ladders after employees are converted from a special employment program to career or career-conditional;

(h) A position change permitted by reduction-in-force regulations;

(i) Placement of an employee who failed to satisfactorily complete a supervisory/managerial probationary period; and

(j) Permanent promotion of an employee competitively selected for temporary assignment, provided the initial announcement stated that a permanent promotion could result.

(3) **Position Changes - Temporary.**

(a) Temporary promotions of one hundred twenty (120) days or less; and

(b) Details of one hundred twenty (120) days or less to higher-graded positions or to positions with known promotion potential.

Section 13.08 - Locating Candidates and Publicizing Vacancies. Vacancies in the bargaining unit which are to be filled by competitive placement procedures shall be announced and posted in the area of consideration. The procedures described below shall be followed.

(1) **Area of Consideration.** The minimum area of consideration shall be:

(a) Department-wide: GS-14 and above;

(b) Geographic Area or Headquarters: GS-13; and

(c) Local Commuting Area: GS-12 and below.

When the minimum area of consideration does not generate an adequate number of candidates, it may be expanded. However, at the discretion of Management, the initial area of consideration may be extended to fill vacancies that are hard to fill.

(2) **Vacancy Announcements.** Vacancy announcements shall include the following information:

(a) Announcement number and opening and closing dates;

(b) Title, series and grade of the position;

(c) Number of vacancies to be filled;

(d) Geographic and organizational location;

(e) Summary statement of the principal duties and responsibilities;

(f) Minimum Office of Personnel Management (OPM) qualifications and eligibility requirements;

(g) All selective placement factors;

(h) Summary statement of the evaluation method and criteria, including relative weights, to be used to rate and rank candidates. The criteria shall be expressed in terms of knowledges, skills, abilities and other characteristics (KSAOs);

(i) Description of known promotion potential, if any;

(j) Permanent or temporary nature and, if temporary, the duration and whether the assignment can be made permanent;

(k) The area of consideration;

(l) Coverage of position under the Fair Labor Standards Act (FLSA);

(m) Whether or not position is in the bargaining unit;

(n) Where additional information may be secured;

(o) What constitutes an appropriate application;

(p) Written examinations to be used, if any;

(q) A statement on Equal Employment Opportunity;

(r) A statement on smoking restriction; and

(s) Where applications can be accepted or submitted.

(3) **Posting Periods.**

(a) The number of calendar days that a vacancy announcement is open shall be determined by the level of difficulty in recruiting qualified candidates. The opening and closing dates shall be specified on the vacancy announcement. All vacancy announcements shall be open a minimum of fourteen (14) calendar days.

(b) When solicitation for the normal posting period and area would be clearly impractical because of extenuating and unique circumstances (e.g., budgetary limitations, FTE limitations), the posting period may be shortened to a minimum of seven (7) days. The merit staffing record must contain complete documentation explaining the circumstances.

(c) Open continuous announcements, without specific closing dates, may be used to advertise recurring vacancies.

(4) **Reposting, Extension or Cancellation.**

(a) If a vacancy announcement has been posted and any significant information is later found to have been omitted or in error, an amended announcement shall be reposted citing the change(s) and whether or not the original applicants must refile in order to be considered. Posting periods shall be adjusted, if necessary.

(b) Extension of the closing date of an announcement shall be done by an amendment to the original announcement.

(c) Cancellation of an announcement shall be done by an amendment to the original announcement. The reasons for cancellation shall be noted on the amended announcement.

(5) **Posting Vacancy Announcements.** When positions are advertised, Management agrees to post vacancy announcements for both unit and nonunit positions on bulletin boards or other appropriate places within the area of consideration.

It is further agreed that a copy of each vacancy announcement (including DEU/PAC) shall be provided to the designated Union official. These provisions also apply to vacancy announcements which are reposted, extended or canceled.

Section 13.09 - Employee Applications.

(1) **Filing an Application.** To be considered for a vacancy, an employee must file an appropriate application (as specified in the announcement) with the servicing Human Resources office responsible for staffing the vacancy or with the local office where the vacancy is located. Employees away from their duty station may contact the servicing Human Resources office to obtain information and copies of vacancy announcements.

(2) **Full and Complete Information.** An employee is responsible for providing full and complete information, in writing, on his/her application for a posted vacancy, as follows:

(a) The employee should identify the announcement number and position title.

(b) The employee should describe experiences, awards and performance ratings as they relate to (each of the) knowledges, skills, abilities and other characteristics (KSAOs) for the vacancy, in a supplemental qualification statement.

(c) The employee shall describe any training or outside activities related to the vacancy.

(d) All pages of the most recent performance appraisal shall be submitted.

(e) The employee shall give organization location, and/or home address, home and/or work telephone number, and shall sign and date the application.

(f) Other information required by the announcement.

(4) **Failure to Provide Information.** Failure to provide any necessary and relevant information such as an appropriate application, Supplemental Qualifications Statements, and latest performance appraisals, etc., required by the vacancy announcement, shall be disqualifying.

(5) **Time Limits.** Applications forwarded in response to individual announcements shall be accepted if they are received in the servicing personnel office staffing the vacancy by close of business (COB) of the last open day of the announcement or the COB in the local office where the vacancy is located.

Section 13.10 - Evaluation of Candidates.

(1) **Determining Basic Eligibility.** The minimum qualification standards prescribed by the Office of Personnel Management and, in addition, selective placement factors, if any, identified as essential to satisfactory job performance, shall be used to determine basic eligibility of candidates for competitive placement consideration.

(a) The minimum qualification standards and selective placement factors, for a position to be filled by competitive placement procedures, shall be stated on the vacancy announcement.

(b) Candidates who shall meet all requirements within thirty (30) calendar days after the closing date of the vacancy shall be considered qualified and eligible for further consideration.

(c) Ineligible applicants shall be promptly notified in writing of the reasons for their ineligibility.

(2) **Criteria for Evaluation of Candidate Qualifications.** The evaluation process shall be based on a comparison of the qualified candidates' qualifications against a set of job-related criteria that have been developed for the position to be filled.

(a) Job-related criteria shall go beyond the minimum standards for basic eligibility and shall be expressed in terms of the specific knowledges, skills, abilities, and other characteristics (KSAOs) that shall be used to distinguish BEST QUALIFIED candidates from a group of QUALIFIED applicants.

(b) Evaluation criteria shall be identified through analysis of the duties and responsibilities of the position to be filled or of a group of related positions having common characteristics and no critical differences in duties and responsibilities.

(c) A crediting plan shall be developed by Management for the position to be filled. It shall specify how each knowledge, skill, ability and other characteristic

(KSAO) is to be measured and the credit levels for each. The plan must equate the quality of candidates' possession of essential KSAOs to specific credit levels.

(d) A candidate's rating shall be determined on the basis of relevant job-related information derived from a specified combination of the following sources:

Appropriate application;

Supplemental Qualifications Statements;

Supervisory Appraisals;

Structured interviews; and

Written aptitude/ability tests (if required by the Office of Personnel Management).

(3) **Rating and Ranking of Candidates and Certificates.**

(a) Rating is the process of evaluating the qualifications of QUALIFIED candidates by use of a crediting plan to identify those who are QUALIFIED in terms of the KSAOs of the position to be filled.

(b) Ranking is another step in the candidate evaluation process involving the comparison of QUALIFIED candidates based on rating with each other to determine if there is a natural break. Those who clearly stand out are the BEST QUALIFIED.

(c) All qualified candidates shall be rated and ranked against the criteria in a crediting plan by a Human Resources Specialist or merit staffing panel. When there are ten (10) or fewer qualified candidates at any one grade level, the selecting official has the option of requesting a Human Resources Specialist or panel to apply the crediting plan and to determine the best qualified candidates to be referred.

(d) Merit Staffing Panel

1. If a merit staffing panel is used, the selecting official shall not be a member of the panel.

2. Members of the panel must evaluate candidates in accordance with the applicable crediting plan. They must take into consideration all job-related information derived from the application forms, supplemental qualifications statements,

supervisory appraisals; and, if used, structured interviews and/or written tests. If necessary, the panel may ask the personnel specialist for clarification/verification of the information on any candidate.

3. Ratings of applicants may be done jointly, or individually, and then averaged. Ratings shall be sufficiently documented in order to reconstruct the action.

4. Determination of the number of BEST QUALIFIED candidates referred shall be based on a natural break between the relative ranking of QUALIFIED candidates. Normally three to five names shall be submitted to the selecting official. The lowest ranking candidate above the break should be able to perform the job with substantially equal success as all candidates with higher scores.

   a. In case of ties, candidates with the same numerical ranking shall be considered as one referral and all such candidates shall be referred. When a selecting official has more than one vacancy to fill, two (2) additional names may be added for each vacancy.

(4) **Extending the Search.** Ordinarily, the search may be extended if there are less than three (3) BEST QUALIFIED candidates and the search is likely to increase this number in a reasonable period of time.

(5) **Additions to the Certificate.** In the event of declinations after referral, additional candidates may be added to the Competitive Placement Certificate in accordance with the general rule as to the number to be referred in 4(a) above.

(6) **Validity of Certificate.** Certificates are valid for up to sixty (60) days. However, if a selectee declines before assuming the duties of the vacancy, the certificate may be used again to make a selection.

(7) **Reuse of Certificate.** The same certificate may be used again within sixty (60) days from the date of selection or cancellation for additional identical positions.

Section 13.11 Selection Consideration. Management shall ensure that the evaluation of candidates complies with this Agreement and shall forward the Competitive Placement Certificate to the selecting official.

(1) **Action by Selecting Official.** The selecting official is entitled to select, or not select, any of the candidates on the Competitive Placement Certificate. The selecting official is expected to make a selection normally within thirty (30) days following receipt of the certificate.

(2) **Interviewing Candidates.**

(a) The selecting official or a designee shall interview all or none of the BEST QUALIFIED candidates referred.

(b) Telephone interviews are acceptable for candidates located outside of the local commuting area.

(c) Supervisors shall release employees for such interviews for the necessary length of time.

(3) **Notification to Candidates.** When a selection is made, the employee shall be notified and a release date arranged by Management. Candidates who were certified but not selected shall be promptly advised of their nonselection by Management and also the name of the selectee.

(4) **Effective Dates of Actions.**

(a) An employee selected for a position shall be released from the former position at the earliest practicable date after approval of the action, but not later than thirty (30) days from the date of selection.

(b) When an employee is competitively promoted, the effective date of the promotion shall normally be no later than the beginning of the second complete pay period following the date of selection.

Section 13.12 - Priority Consideration.

(1) **Definition.** Priority consideration is special placement consideration for an appropriate vacancy given to an employee who did not receive proper consideration in a prior competitive placement case due to a documented procedural, regulatory, or program violation.

(2) **Appropriate Vacancy.** An appropriate vacancy is the next available position for which the employee is interested and fully qualified and which has the same or less promotion potential as the one for which proper consideration was not given.

(3) **Entitlement.** An employee is entitled to only one (1) priority consideration for noncompetitive placement for each instance in which he/she was previously denied proper consideration. An employee shall exercise his/ her entitlement to priority consideration for a specific, advertised vacancy by written request to the servicing personnel office staffing the vacancy. If not exercised within two (2) years from official notification, an employee's entitlement to priority consideration shall expire.

(4) **Processing.** The procedures for processing priority consideration(s) shall be:

(a) Before referring a Competitive Placement Certificate to the selecting official, Management shall provide the selecting official with a list of employees interested and eligible for priority consideration.

(b) The selecting official shall interview and give bona fide consideration to those employees on the priority consideration list.

(c) Management shall notify the employee of nonselection under priority consideration. Nonselection under this Section shall not preclude an employee from subsequent selection from a Competitive Placement Certificate for the same position provided that the employee has submitted all the required application documents, supplemental statements and performance appraisals.

(d) Upon request, the employee shall be provided the reasons for nonselection.

Section 13.13 - Career Ladder Promotion. Management shall make prompt determinations regarding career ladder promotions of their employees. Management shall notify the employee by his/her anniversary date whether or not a promotion shall be recommended and provide a written explanation if the employee shall not be promoted. A career ladder promotion is dependent on:

(1) The employee's demonstration of the ability to perform the duties of the next higher grade to the satisfaction of his/her supervisor. A copy of the promotion criteria (position description or performance standards for the next grade) shall be given to an employee as he/she enters each level of a career ladder.

(2) The availability of enough work at the next higher grade.

(3) Meeting the minimum qualification and other regulatory requirements.

Section 13.14 - Employee Information.

(1) **Information on Certificates.** Upon request, the Union shall have access to information on the certificate not prohibited by law, or Governmentwide regulation. For purposes of the Privacy Act, the Union shall be considered a party with a need to know when it requests information under this Article.

(2) **Information on Selection.** Quarterly announcements of persons selected for positions within the preceding period shall be posted at the locations at which vacancies are advertised. Copies shall be given to the Union.

Section 13.15 - Union-Management Review of Competitive Placement Actions. Upon request, appropriate Union and Management representatives shall review and audit any competitive placement records pertaining to unit employee positions. The disclosure of such information shall not be contrary to Governmentwide rule, regulation, the law, or the Privacy Act. Such reviews shall take place within five (5) days, unless the position was staffed in an office other than the office where the vacancy is located, after Management has received a formal request from the Union following the competitive placement action. The review may be done in the office where the vacancy is located.

Section 13.16 - Corrective Action. If a violation of the competitive placement procedures of this Agreement is officially determined to have occurred, Management shall take prompt action to rectify the situation. The nature and extent of the corrective action(s) to be taken shall be determined on the basis of all the facts in a case, to the equitable and legal rights of the parties concerned, and to the interest of the Government.

EXHIBIT

H

Michael J. Snider, Esq.
Keith Kauffman, Esq. ▲ ✱
James L. Fuchs, Esq. ▲ ✱ ◉ ◆

LAW OFFICES OF SNIDER & ASSOCIATES, LLC
JUSTICE IN THE WORKPLACE

Jason J. Weinbrot, Esq. ▲
Allan E. Feldman, Esq. ✱ ▲
Jacob Y. Statman, Esq. ▲

▲ admitted in the District of Columbia
✱ admitted in Florida
✕ admitted in New York
◉ admitted in Massachusetts
◆ admitted in Illinois
● admitted in West Virginia

October 24, 2012

SENT VIA FACSIMILE & CERTIFIED MAIL
Barbara Kraft
Regional Director
Federal Labor Relations Authority
1400 K Street, NW; 2nd Floor
Washington, D.C. 20424-0001
Fax: (202) 482-6724

Re: ULP in the matter of *AFGE Council 222 v. U.S. Department of Housing & Urban Development*

Dear Regional Director Kraft:

Attached you will find a completed FLRA Form 22 (Charge Against an Agency) with exhibits, in the above referenced matter. If you require any additional information please do not hesitate to contact us at the information shown below. Thank you for your attention to this matter.

Sincerely,

SNIDER & ASSOCIATES, LLC

Michael J. Snider, Esq.

Cc: Norman Mesewicz (with enclosures, via Email)
Carolyn Federoff (with enclosures, via Email)

Form Exempt Under 44 U.S.C. 3512

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

CHARGE AGAINST AN AGENCY

FOR FLRA USE ONLY

Case No

Date Filed

Complete instructions are on the back of this form.

1. Charged Activity or Agency

Name: U.S. Department of Housing & Urban Development

Address: 451 7th Street, SW
Washington, D.C. 20410

Tel.#: (202) 708-1492 Ext. 2859

Fax#:

2. Charging Party (Labor Organization or Individual)

Name: AFGE Council 222

Address: 451 7th Street, SW
Washington, D.C. 20410

Tel.#: (410) 653-9060 Ext.

Fax#: (410) 653-9061

3. Charged Activity or Agency Contact Information

Name: Norman Mesewicz

Title: Chief, Labor Relations

Address: 451 7th Street, SW
Washington, D.C. 20410

Tel.#: (202) 708-1492 Ext. 2859

Fax#:

4. Charging Party Contact Information

Name: Michael J. Snider, Esq.

Title: Counsel for AFGE Council 222

Address: Snider & Associates, LLC
600 Reisterstown Road, 7th Fl. Baltimore, MD 21208

Tel.#: (410) 653-9060 Ext.

Fax#: (410) 653-9061

5. Which subsection(s) of 5 U.S.C. 7116(a) do you believe have been violated? (See reverse) (1) and 2 + 5 + 8

6. Tell exactly WHAT the activity (or agency) did. Start with the DATE and LOCATION, state WHO was involved, including titles.

Please see the attached write-up with Exhibits.

Exhibit List:

Exhibit A - Arbitrator Remedy Award
Exhibit B - Agency's Exceptions
Exhibit C - Union's Opposition to Agency's Exceptions
Exhibit D - Email communication between Agency and Union

7. Have you or anyone else raised this matter in any other procedure? ✓ No ___ Yes If yes, where? [see reverse] ___

8. I DECLARE THAT I HAVE READ THIS CHARGE AND THAT THE STATEMENTS IN IT ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. I UNDERSTAND THAT MAKING WILLFULLY FALSE STATEMENTS CAN BE PUNISHED BY FINE AND IMPRISONMENT. 18 U.S.C. 1001. THIS CHARGE WAS SERVED ON THE PERSON IDENTIFIED IN BOX #3 BY [check 'x' box] ☑ Fax ☐ 1st Class Mail ☐ In Person ☐ Commercial Delivery ☑ Certified Mail

Michael J. Snider, Esq. — By JJS — 10/16/2012

Type or Print Your Name | Your Signature | Date

FLRA Form 22 (Rev. 1/99)

ATTACHMENT FOR ULP IN THE MATTER OF:

AFGE COUNCIL 222
v.
U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT

At all times since August 8, 2012, the Agency, by and through its representative Norman Mesewicz, Supervisory Personnel Management Specialist, has refused to implement the final and binding Remedy Award of Arbitrator Andree McKissick, ("the Award" attached as **Exhibit A**). The facts are as follows:

On January 10, 2012, Arbitrator Andree McKissick issued a Remedy Award ("the Award") in response to the Authority's decision in 59 FLRA 630. In that decision the Authority left the underlying violation found by the Arbitrator intact, but remanded the case to determine an appropriate remedy. Specifically, the Authority upheld the Arbitrator's determination that the Agency violated the CBA, and law, rule or regulation in not treating employees fairly and equitablyin its hiring process for positions with higher promotion potential than current employees, among other violations of contract and law.

The Award included one remedy, entitled "Remedy No. 1." The Award also included three ***alternative*** remedies which were clearly explicitly "alternative" and defined as being applicable if – and only if – the Authority vacated the initial remedy. However, the Award is clear that the first remedy is the only applicable remedy, absent vacation of the first remedy by the FLRA, and that the second, and all subsequent remedies are to be implemented: "only in the event the FLRA vacates Order No. 1." Award, p. 3.

Remedy No. 1 ordered:

> That the Agency process retroactive permanent selections of all affected BUE's into currently existing career ladder positions with promotion potential to GS-13 level.

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

Id.

In response to the Award, the Agency filed Exceptions (**Exhibit B**) and the Union filed an Opposition thereto (**Exhibit C**). On August 8, 2012, the Authority dismissed the Agency's Exceptions. See 66 FLRA 867. Pursuant to both the Parties CBA and FLRA regulations, the dismissal of the Agency's Exceptions renders the Arbitrator's Award a final and binding order. As such, it is clear that the Agency's only option is to implement the Award at Remedy No. 1, *Infra.*

The Agency, however, has refused to implement the Award at Remedy No. 1.

On October 9, 2012 - more than thirty days after the Authority issued its decision - Agency Representative Norman Mesewicz sent an email to counsel for the Union indicating that the Agency had no intention to comply with the Award and subsequent FLRA Decision and implement Remedy No. 1. (**Exhibit D**).

Specifically, Mr. Messewicz stated:

> Below is the Department's position regarding compliance with arbitrator McKissick's order in case FMCS No: 03-07743 (Attached).
>
> In her order, the arbitrator enumerates four potential remedies. A fair reading of the order reveals that the implementation of three of those remedies, #1, #2 and #4 would cause management to violate the Code of Federal Regulations and/or the Federal Labor-Management Relations Statute.
>
> Specifically, remedies #1, #2 and #4 direct that management non-competitively promote affected employees which may not be done. In this regard, please see 5 C.F.R. Section 335.1033(c)(v). Additionally, remedy #2 cannot be legally implemented since it directs management to classify certain positions at the GS-13 level in violation of Section 7121(c)(5) of the Federal Service Labor-Management Relations Statute.

With respect to remedy #3, I can state the following. Management is working to identify, to the extent possible, the incumbents at the time of the positions identified in the November 13, 2002 Grievance ofthe Parties. Next, of that group, those who currently remain HUD staff will be identified. This then will constitute the group of employees eligible for relief pursuant to remedy #3 of the order.

Lastly, HUD retains its right to advertise positions consistent with law, rule, regulation and the HUD/AFGE Agreement. *Id.*

The Agency's refusal to implement the final and binding Award with regard to Remedy No. 1 is an unfair labor practice pursuant to 5 U.S.C. §7116(a)(1), (2), (5) and/or (8).

EXHIBIT

I

Michael J. Snider, Esq.
Keith Kauffman, Esq. ⊥ *
James L. Fuchs, Esq. ⊥ ×⊙⊛

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February 28, 2013

SENT VIA E-MAIL
Merritt Weinstein, Esq.
Washington Regional Office
Federal Labor Relations Authority
1400 K Street, NW. 2nd Floor
Washington, DC 20424-0001
Email: mweinstein@flra.gov

Re: ***U.S. Department of Housing & Urban Development v. AFGE Council 222***
Charge No.: WA-CA-13-0034

Dear Mr. Weinstein:

I am in receipt of the Agency's Implementation Plan in the above referenced Charge. The purpose of this letter to seek clarification and set forth certain objections that the Union has with the Agency's plan.

The Union objects to a plan that will take an additional one year to complete. The Arbitrator's Opinion in this matter ordered the Agency to implement Remedy No. 1, within 30 days. While the Union might be agreeable to provide a brief extension to that deadline, March 2014 is more than eighteen months after the Authority upheld the Arbitrator's Opinion. Such a time frame does not comply with the Award and is objectionable to the Union.

The Union would also like additional information on how the Agency intends to ascertain the specifics of which employees encompass the class. The Agency previously informed the Arbitrator and the Union that many of the applicable and relevant records including vacancy announcements and applications were destroyed. This was the reason that the Arbitrator ordered an adverse inference against the Agency. As such, what specifically does the Agency plan on doing to rectify that harm and create a complete and accurate list of class members?

The Agency's plan includes "calculate back pay entitlement and other benefits for valid claimants." The Union would like specific information on what the Agency considers recoverable in this matter?

Moreover, nothing in the Arbitrator's Opinion allows the Agency to "pay claims as funding becomes available." The Agency was found to have violated the Parties' CBA and a valid and binding order has been issued. The Agency does not have the choice to pay as funding becomes available, and believes that failure to pay immediately constitutes a further ULP.

I would like to note that the Union submitted a proposed settlement agreement to the Agency in an effort to fully finalize this matter. The Agency rejected that agreement and did not provide any type of counteroffer. If you believe that viewing the draft agreement would be helpful to you in understanding the Union's position on this matter, I would be happy to provide you with a copy.

Thank you for your time and attention to this matter. If you require any additional information, please do not hesitate to contact me. I look forward to hearing from you.

Sincerely,

SNIDER & ASSOCIATES, LLC

Michael J. Snider, Esq.
Jacob Y. Statman, Esq.

Cc: AFGE Council 222

EXHIBIT

J

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE

State of: Washington, D.C.
Case Name: Department of Housing and Urban Development and American Federation of Government Employees, Council 222, AFL-CIO
Case No.: WA-CA-13-0034

AFFIDAVIT

I, Michael J. Snider, make the following voluntary statement in cooperation with an official investigation being conducted pursuant to the Federal Service Labor-Management Relations Statute. I have been assured by an Agent of the Federal Labor Relations Authority that this statement will be considered confidential by the United States Government and will not be disclosed as long as the case remains open, unless I testify at a formal hearing and it then becomes necessary to produce the statement at the hearing. Upon the closing of the case, the statement may be subject to disclosure in accordance with the Freedom of Information Act, as amended.

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Position: Counsel for AFGE, Council 222

I am Counsel for AFGE, Council 222, AFL-CIO. I have been Counsel for AFGE, Council 222, AFL-CIO (Union) since 2005. There is currently a CBA between the Department of Housing and Urban Development and American Federation of Government Employees, AFL-CIO. This CBA was signed in 1998 and is subject to roll-overs.

I am clarifying the charge to allege that the Department of Housing (Agency or Management) violated section 7116 (a)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute) when Management refused to follow an arbitration award issued on January 10, 2012.

MJS Initials

In August 2002, the Agency advertised six positions; Program Analyst, GS-0343-09, Contract Industrial Relations Specialist, GS-0246-09/11/12, Engineer, GS-0801-08/13, Financial Analysts, GS-1160-09/13, Construction Analysts, GS-0828-11/13 and Public Housing Revitalization Specialists, GS-1101-09/13. The Agency advertised all of these positions open to current and federal employees and the general public with a maximum grade potential of a GS-13. Additionally, it was the belief of the Union at the time the Agency announced these positions, the Agency employed individuals who held the same positions, but only allowed for a maximum grade potential of a GS-12. The Union filed an information request on October 9, 2002, to confirm the individuals who held the positions within the Agency and to determine whether the Agency hired anyone under the August 2002, advertised positions.

On November 13, 2002, the Union filed a grievance alleging a breach of the collective bargaining agreement (CBA) and another information request after not receiving the information in the first information request. The harm suffered was that Agency employees held certain positions with career ladder potential to the GS-12 level, whereas the Agency advertised positions allowed for promotional potential to a GS-13. Additionally, in order for the employed personnel of the Agency to seek a promotion to a GS-13, it required any current GS-12 to apply for the position they already held and take a downgrade to a GS-9. Additionally, other employees not in the position but who were qualified for the position would also have to take a downgrade to enter the career ladder to the GS-13. The employees did not have the opportunity to be promoted to a GS-13 without competition. To remedy the situation, the Union sought the full promotional potential for all similarly situated employees; that is, to have the promotional potential for a career ladder equal to that of the advertised positions, a GS-13.

Initials

The Agency argued that this grievance concerned a classification matter and was not arbitrable. On June 23, 2003, the arbitrator ruled that the grievance was arbitrable as it pertained to issues of fairness of advertisements and vacancy announcements and not classification. The Arbitrator further ordered the Agency to provide the data requested by the Union to allow for the complete identification of all potential grievants.

On February 11, 2004, the Authority remanded the matter back to the arbitrator for clarification to determine whether the grievance was arbitrable, as the Authority determined that the arbitrator's reference to reclassified positions was unclear; the arbitrator would not have jurisdiction over a grievance concerning the promotion potential of employees' permanent positions, but would have jurisdiction over a grievance that alleged a right to be placed in previously classified positions. On June 23, 2006, a second hearing was held on the issue of arbitrability. On January 24, 2007, the arbitrator found that the Grievance alleged a right to be placed in previously classified positions and was arbitrable pursuant to the CBA, and that the arbitrator retained jurisdiction in the matter. Further, the arbitrator found that the possible remedy of reassignment to the newly classified positions with promotional potential to a GS-13 was but one possible remedy, and that alternative remedies which would attain fairness and equity were also viable and would not be not excluded. The arbitrator indicated that a hearing would be forthcoming and ordered the Agency to provide the Union with the information requested to identity potential grievants. Additionally, the arbitrator stated that should a preponderance of evidence on the merits of the grievance prevail and the arbitrator finds unjustified or unwarranted personnel actions by the Agency, the Agency would be required to provide retroactive back pay with interest. Finally, the arbitrator stated that if a violation of the

CBA was found, the 'but for' formula should be applied.

The Agency filed Exceptions. On April 19, 2007, the Authority issued an order directing the Agency to show cause why its exceptions to the arbitrator's January 24, 2007, award filed with the Authority on March 1, 2007, should not be dismissed as untimely filed. On August 3, 2007, the Authority dismissed the Agency's exceptions as untimely.

On May 29, 2008, the arbitrator again ordered the Agency to fully comply with the Union's information request, to provide data in the regular course of business to allow for the complete identification of all potential grievants. The arbitrator ordered the Agency to fully comply with the information request immediately, by no later than June 30, 2008, and if the order was not fully complied with by the date, the arbitrator was compelled to draw an adverse inference to the Agency's failure to comply, which could result in sanctions. Additionally, the arbitrator found that if the order was not timely complied with, the arbitrator would bar any evidence on the part of the Agency on these issues in the forthcoming hearing on the merits of this grievance.

The Agency released some documents, but not all the requested information. An arbitration hearing was held on July 15, 2008, and continued on August 28, 2008. On September 29, 2009, the arbitrator ruled that the grievance should be sustained due to the Agency's violation of the CBA. She ordered an organizational upgrade of affected positions by upgrading the journeyman level for all the affected GS-12 employees to a GS-13, retroactive from 2002.

On January 26, 2011, the Authority set aside the arbitrator's remedy for resubmission to the arbitrator to formulate an alternative remedy. On January 10, 2012, the arbitrator issued a remedy award in response to the Authority January 26, 2011 decision. The arbitrator formulated

an alternative remedy. The arbitrator found that the grievants were unfairly treated and were unjustly discriminated against by the Agency in violation of the CBA. The arbitrator also found that the Agency violated the CBA by seeking to hire external applicants, instead of promoting and facilitating the career development of internal employees and that but for these violations, the grievants would have been selected for the existing career ladder positions with promotion potential to the GS-13 level. The arbitrator provided four remedies and found all to be appropriate, but stated that if the Authority found that the first remedy was not appropriate, and vacated it, then the next numbered remedy would apply.

In response to the arbitrator's award, the Agency filed exceptions and the Union filed opposition to the exceptions. On August 8, 2012, the Authority dismissed the Agency's exceptions because the Agency did not present the arguments it raised in its Exceptions before arbitrator, but only to the Authority and ruled that the challenges to the arbitrator's remedies had to have been raised with the Arbitrator prior to raising them with the Authority. The Authority barred the consideration of the exceptions and dismissed them. After the Authority dismissed, the Agency refused to implement remedy number one.

On October 9, 2012, the Agency sent an email to me stating that it could not implement remedy one, two and four because it would cause Management to violate the Code of Federal Regulations and/or the Statute. The Agency indicated, with respect to remedy number three, that it was working to identify the incumbents identified in the Union's November 13, 2002, grievance, currently remaining at the Agency. The Agency indicated that this would constitute the group of employees eligible for relief pursuant to remedy number three.

On October 25, 2012, the Union filed an unfair labor practice, based on the Agency's

refusal to implement remedy number one, in compliance with the arbitrator's award, ordered on January 10, 2012 and upheld by the Authority on August 8, 2012 The Award and subsequent Authority decision make it abundantly clear that Remedy No. 1 is to be implemented. As such, Remedy No. 1 is the only available remedy that the Agency can choose from.

I have further evidence with regard to the Union's charge and have supplied it to the FLRA Investigator and can provide additional information upon request.

The information I provided in this affidavit consists of relevant evidence I have in this case at this time. I have read, and have had an opportunity to correct, this affidavit consisting of 6 pages, including the signature page, and affirm that the facts asserted are true and correct to the best of my knowledge and belief.

(Signature) (Date) 1/7/13

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