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

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 19, 2015 Order[1] concerning the promotion of certain Public Housing Revitalization Specialists ("PHRS") and Contractor Industrial Relations Specialists ("CIRS") (the "PHRS/CIRS Order), and must be dismissed or denied. In support, thereof, the Union states as follows:

Background

The instant Exceptions pertain solely to the PHRS/CIRS 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 17, 2015 is without merit. The Order was sent on June 19, 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 PHRS/CIRS Order. **Agency Exhibit 17**.

The instant Exceptions pertain solely to the PHRS/CIRS Order. As discussed *infra,* the PHRS/CIRS 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, including PHRS and CIRS employees are eligible class members subject to the other noted requirements. The Agency's instant Exceptions addressing

challenges to the PHRS/CIRS 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, and specifically the PHRS/CIRS 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.***

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 GS-1101 Order Exception and the instant PHRS/CIRS 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 PHRS/CIRS Order was sent on June 17, 2015, the Order was actually sent on June 19, 2015. **Exhibit E.** On that date, Arbitrator McKissick sent the signed and final PHRS/CIRS Order at issue via facsimile. ***Id.*** The June 17, 2015 date stamp at the top of the PHRS/CIRS 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 GS-1101 Order was dated and received by the Union on June 17, 2015, but contained a June 15, 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 PHRS/CIRS Order was based on non-fact.

The Agency argues that the PHRS/CIRS Order is deficient and must be set aside because it is based on a non-fact. **Exceptions, p. 24**. 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." *Id.* The Agency further argues that "[A] review of the plain language of the PHRS/CIRS Order shows that the Agency's alleged failure to contest the Unoion's PHRS/CIRS class list was a central fact. This central fact resulted in the Order directing the Agency to promote employees listed in the PHRS/CIRS 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 specifically noted:

> The FLRA has upheld this Arbitrator's Award and subsequent August 2, 2014 Summary. In light of these rulings, the Agency, despite being provided the opportunity to do so, has not contested eligibility of the employees listed on the attached Exhibits.
>
> FN1: The Agency has contested these employees' eligibility based upon its own methodology, However, the FLRA has upheld the Award and subsequent Summary and the Agency has not contested that any of the named employees in the attached exhibits 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 PHRS/CIRS Order shows the Agency's alleged failure to dispute the Union's PHRS/CIRS 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 PHRS/CIRS Order which proves that even without the alleged factual finding at issue, the Arbitrator would have reached **the exact same result**.

The PHRS/CIRS 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 PHRS/CIRS employees at issue; (2) Summaries 2 and 3 contained language that supported the conclusion of the PHRS/CIRS Order; (3) the Agency refused to discuss the issue of promoting PHRS/CIRS employees at the June 2, 2015 Implementation Meeting; and (4) the Union presented its method and approach for how it created its class list. **Agency Exhibit 17.** Indeed, even if the alleged fact at issue, that the Agency did not dispute the list, was removed from the PHRS/CIRS 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 PHRS/CIRS Order was incomplete.

The Agency argues that the PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS Order as it pertains to the order to promote a class member is a new requirement. As such, this Exception must be denied.

B. The PHRS/CIRS Order is not incomplete because it provides certain deadlines to implement the Award.

The Agency further argues that the PHRS/CIRS 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.

[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.

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 PHRS/CIRS Order. As such, the Exception must be denied.

C. The PHRS/CIRS 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.

[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.

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 PHRS/CIRS was contrary to law.

The Agency argues that the PHRS/CIRS 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 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 PHRS/CIRS Order is contrary to law because it constitutes a classification. **Exception, p. 29.** However, there is nothing new in the PHRS/CIRS 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 PHRS/CIRS Order that would provide an opening for the Agency to now timely assert this argument. From the Remedial Award up until and

including the PHRS/CIRS 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 PHRS/CIRS Order does not deal with classification.

The Agency argues that the PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS Order is not incorporated within the larger class currently pending on appeal.

The Agency argues that the PHRS/CIRS 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 PHRS/CIRS

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 PHRS/CIRS Order is not subsumed within, nor is it at all related or part of Summary 6. Rather, the PHRS/CIRS 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 PHRS/CIRS 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 PHRS and CIRS 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 PHRS/CIRS 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. ***Id.***

The PHRS/CIRS 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 PHRS/CIRS 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 PHRS/CIRS Order. As explained throughout this opposition the PHRS/CIRS 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

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

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.

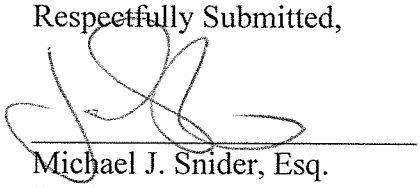
Regarding the Agency's gratuitous request that the case be remanded to another Arbitrator, the Authority has held that this extraordinary move will only be taken when a party demonstrates that the current Arbitrator can no longer effectuate compliance with her Award. The Agency has not demonstrated that 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 PHRS/CIRS 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