69 FLRA No. 30

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF HUD LOCALS 222
(Union)

0-AR-4586
(65 FLRA 433 (2011))
(66 FLRA 867 (2012))
(68 FLRA 631 (2015))
(69 FLRA 60 (2015))

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DECISION

February 25, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

As relevant here, Arbitrator Andrée Y. McKissick found that the manner in which the Agency posted and filled certain positions violated the parties' collective-bargaining agreement. In a subsequent remedial award (the remedial award), the Arbitrator directed the Agency to redress its contract violations by retroactively promoting certain bargaining-unit employees. Later, the Arbitrator held a series of meetings to discuss with the parties how they would implement the remedy that she directed in the remedial award (the implementation meetings). After each implementation meeting, the Arbitrator issued a written summary, and, at times, she also issued remedial orders that were distinct from, but directly related to, her earlier written summaries.

In the cases currently before us, the Agency has filed exceptions to: (1) the written summary of the sixth implementation meeting (the sixth summary); (2) an order (the job-series order) that identifies the names of all employees working in general schedule job series 1101 (GS-1101) who are entitled to relief under the terms of the remedial award and the Arbitrator's earlier written summaries; and (3) an order (the position-titles order) that identifies the names of all employees holding two particular position titles who are entitled to relief under the terms of the remedial award and the Arbitrator's earlier written summaries. Because these three cases – which we previously designated Case Nos. 0-AR-4586-003 (involving the sixth summary), 0-AR-4586-004 (involving the job-series order), and 0-AR-4586-005 (involving the position-titles order) – arise from the same series of arbitration proceedings and involve the same parties, we have consolidated them here for decision.[1] Together, these cases present seven substantive questions.

The first question is whether the sixth summary, the job-series order, and the position-titles order (collectively, the disputed awards) are based on a nonfact because the Arbitrator found that the Agency did not dispute the Union's proposed list of employees eligible for remedial relief (relief-eligible employees) using the Union's listing methodology. Because the Agency's nonfact arguments reflect a misunderstanding of the disputed awards, the answer to the first question is no.

The second question is whether the job-series order and the position-titles order are so uncertain as to be impossible to implement because they establish deadlines that are, according to the Agency, impossible to satisfy. Because the Agency does not show that the Union's suggested methods for complying with those deadlines are impossible to implement, the answer to the second question is no.

The third question is whether the disputed awards are unlawful because they direct the Agency to work with: (1) the Office of Personnel Management (OPM) to expedite the recalculation of relief-eligible employees' retirement annuities; and (2) the Union, in order to develop a method for obtaining Thrift Savings Plan (TSP) contribution information that is needed to calculate relief-eligible employees' TSP losses. As the Agency does not identify any law that prohibits the Agency from working with OPM or the Union on these matters, the answer to the third question is no.

The fourth question is whether the disputed awards are contrary to § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute), which excludes "the classification of any position" from the scope of negotiated grievance and arbitration procedures.[2] In this regard, the Agency

[1] *See, e.g., U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 960 n.1 (citing *U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 19 n.1 (2012)) (consolidating cases involving the same parties and arising from same arbitration proceedings).

[2] 5 U.S.C. § 7121(c)(5).

contends that the number of relief-eligible employees demonstrates that the retroactive-promotion remedy concerns classification. But, even assuming that the size of the remedial class is relevant to whether the remedy concerns classification, the disputed awards did not change the size of the remedial class, and the Agency failed to raise this classification argument in exceptions to any of the preceding implementation-meeting summaries. As this argument is an untimely challenge to determinations in prior awards, the answer to the fourth question is no.

The fifth question is whether the disputed awards are contrary to law because the Arbitrator addressed matters that were simultaneously pending before the Authority on exceptions that the Agency filed to a prior implementation summary. Because the Authority has since denied those exceptions, this argument is now moot, and the answer to the fifth question is no.

The sixth question concerns the sixth summary only – specifically, whether the Arbitrator violated the doctrine of functus officio by relying on an adverse-inference determination against the Agency that she set forth in a prior award. Because the Arbitrator's reliance on her earlier adverse-inference determination does not modify her prior awards, the Agency has not shown that the Arbitrator violated the doctrine of functus officio. Thus, the answer to the sixth question is no.

The seventh question is whether the Arbitrator has shown bias that would warrant remanding the parties' ongoing remedial-implementation disputes to a different arbitrator. Neither the Arbitrator's disagreement with the Agency's positions, nor her adoption of the Union's proposed remedies or proposed implementation summaries, demonstrates bias. Further, the Agency has not established any deficiencies in the disputed awards to demonstrate unfairness. Consequently, the answer to the seventh question is also no.

II. Background

The parties are engaged in a protracted dispute over a Union grievance that alleged that the Agency posted and filled certain positions with promotion potential to GS-13 in a manner that deprived employees occupying similar positions with promotion potential to GS-12 of the opportunity to be promoted to GS-13, in violation of the parties' collective-bargaining agreement.

The Authority has chronicled this lengthy conflict in five prior decisions and orders that span more than a decade,[3] so this decision discusses only those details that are pertinent to the Agency's exceptions to the disputed awards.

A. Adverse Inference Against the Agency

Before this dispute reached arbitration, the Union requested information from the Agency to identify those employees who were adversely affected by the Agency's posting and filling of certain positions. In particular, the Union cited more than two dozen unique vacancy-announcement numbers, and requested that the Agency provide copies of those announcements, as well as information about any Agency employees hired under the announcements. The Union also stated that its information request was "not limited to" the previously identified vacancy numbers but should also include any "[a]dditional instances [of vacancy announcements] like those" already identified.[4]

When the grievance later reached arbitration, the Union informed the Arbitrator that the Agency had not produced the requested information, and asked the Arbitrator to order the Agency to do so. The Arbitrator issued an order to that effect (the production order) and warned the Agency that she would draw an "adverse inference" regarding all of the requested materials that the Agency did not provide as ordered.[5] The Agency asserted that it "could not locate" several of the requested vacancy announcements, and it did not fully comply with the production order.[6] As a result, the Arbitrator drew an "adverse inference" that any vacancy announcements that were requested, but not produced, would have allowed the Union to identify the employees entitled to relief with greater specificity.[7]

Although the Agency subsequently filed exceptions to the award in which the Arbitrator made her adverse-inference finding, those exceptions did not challenge that finding or the production order itself.[8]

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[3] *U.S. Dep't of HUD*, 68 FLRA 631 (*HUD IV*) (Member Pizzella dissenting), *recons. denied*, 69 FLRA 60 (2015) (*HUD V*) (Member Pizzella dissenting); *U.S. Dep't of HUD*, 66 FLRA 867 (2012) (*HUD III*); *U.S. Dep't of HUD*, 65 FLRA 433 (2011) (*HUD II*); *U.S. Dep't of HUD, Wash., D.C.*, 59 FLRA 630 (2004).

[4] Opp'n in 4586-003, Attach., Ex. A at 3 (quoting Exceptions in 4586-003, Ex. 1 (Grievance) at 3).

[5] *Id.* at 4.

[6] Exceptions in 4586-003, Attach., Ex. 2 (Merits Award) at 7.

[7] *Id.* at 11 ("[T]he Union was unable to amend this grievance due to the Agency's omission[s in] . . . furnish[ing] . . . needed materials.").

[8] *See HUD II*, 65 FLRA at 434 (citing Merits Award at 10-11) (noting Arbitrator's adverse-inference determination); *id.* at 434-35 (summarizing arguments from Agency's exceptions).

B. Authority's Remand and Arbitrator's Later Remedial Award

After finding merit in the Union's grievance, the Arbitrator initially directed a remedy that the Agency successfully challenged before the Authority as unlawful. In particular, the Arbitrator initially directed the Agency to "upgrade" the grievants' *existing* positions so that those positions had a higher promotion potential.[9] But the Authority found that this remedy violated § 7121(c)(5) of the Statute,[10] which, as mentioned earlier, prohibits grievances and arbitration concerning "the classification of any position."[11] The Authority set aside the unlawful remedy and remanded the determination of an alternative remedy to the parties for resubmission to the Arbitrator, absent settlement.[12]

The parties did not settle the remedial question on remand, at which point "the Union requested that the Arbitrator exercise her authority to award alternative relief."[13] When the Arbitrator reconvened proceedings to determine an alternative remedy, the Agency: (1) refused to participate in those proceedings; (2) failed to respond to the Arbitrator's written order to propose alternative remedies; and (3) chose not to file with the Arbitrator an opposition to the Union's remedial proposals.

Thereafter, in the remedial award, the Arbitrator directed "the Agency, in pertinent part, to 'process retroactive permanent selections of all affected [bargaining-unit employees] into currently existing career[-]ladder positions with promotion potential to the GS-13 level.'"[14] The Arbitrator explained that this direction meant that "[a]ffected [bargaining-unit employees] shall be processed into positions at the grade level [that] 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."[15]

Despite having refused to participate in the remand proceedings, the Agency filed exceptions to the remedial award. As relevant here, the Agency contended in its exceptions that the remedial award: (1) was "incomplete to the extent that it ma[de] implementation . . . impossible" because it did not specifically identify the "existing . . . career[-]ladder positions" with GS-13 promotion potential to which the grievants could be promoted, as the Arbitrator directed;[16] and (2) "violate[d] management's rights to determine the . . . numbers, types[,] and grades of positions under . . . [§ 7106(b)(1)] of the Statute."[17] But the Authority dismissed all of the exceptions to the remedial award as barred by the Authority's Regulations because the Agency failed to present its remedial challenges to the Arbitrator in the remand proceedings.[18]

C. Implementation Meetings and Written Summaries

After the Authority dismissed the Agency's exceptions to the remedial award, a year and a half passed without the Agency retroactively promoting any employees, as the Arbitrator had directed. Consequently, the Arbitrator began holding the implementation meetings with the parties. After each implementation meeting, both parties would provide the Arbitrator with a proposed written summary, and the Arbitrator would later issue a single summary with her signature as the official record of the meeting. In some instances, the Arbitrator adopted the Union's proposed summary, without substantive changes, as the official record.[19]

1. Second and Third Implementation Meetings and Summaries

As relevant here, in the written summary of the second implementation meeting (second summary), the Arbitrator stated that

> witnesses who testified at the hearing were in two job series, *GS-1101* and GS-2[4]6. *Employees encumbering those job series are clearly within the scope of the* [*remedial a*]*ward . . .* , and[,] therefore[,] will serve as the basis for the next round of [g]rievants to be promoted with [backpay] and interest. A subset of the GS-1101 series is the PHRS (Public Housing Revitalization Specialist) job title. Although *the* [*remedial a*]*ward covers all GS-1101 employees who were not promoted to the GS-13 level (among others)*, the PHRS group is

[9] *Id.* at 434 (quoting Merits Award at 16).
[10] *Id.* at 436.
[11] 5 U.S.C. § 7121(c)(5).
[12] *HUD II*, 65 FLRA at 436.
[13] *HUD III*, 66 FLRA at 868.
[14] *HUD IV*, 68 FLRA at 632 (alterations in original) (quoting Remedial Award at 2).
[15] *Id.* (alterations in original) (quoting Remedial Award at 2-3).
[16] Exceptions in 4586-003, Attach., Ex. 14 (Exceptions to Remedial Award) at 4-5.
[17] *Id.* at 6.
[18] *HUD III*, 66 FLRA at 869.
[19] *Compare, e.g.*, Exceptions in 4586-003, Attach., Ex. 5 (Union's Proposed Summary of Implementation Meeting Feb. 2014), *with* Exceptions in 4586-003, Attach., Ex. 7 (Summary of Implementation Meeting Feb. 2014 (First Summary)).

> discrete and therefore the [p]arties were directed to work through the GS-1101 series to identify all eligible class members in the PHRS position, and to work to have them retroactively promoted with [backpay] and interest . . . . The [p]arties 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 other applicable job series, until implementation is complete.[20]

In addition, in the second summary, the Arbitrator discussed the Agency's ongoing attempts to limit the class of relief-eligible employees by relying on the very data that it had failed to provide the Union in the earlier stages of the parties' dispute – including the vacancy announcements and hiring information mentioned previously. In that regard, the Arbitrator explained that the scope of the class of relief-eligible employees could "not [be] vacancy[-]announcement driven, as is clear from the . . . [a]dverse [i]nference drawn due to the Agency's failure to produce" the vacancy announcements in response to the production order.[21]

"Because of ongoing delays in the implementation of the remedial award," the Arbitrator met with the parties for a third time,[22] and, in her implementation summary from that meeting (third summary), she repeated her earlier directions from the second summary. In particular, she reiterated that the Agency must promote the PHRS and CIRS grievants, and then promote the remaining GS-1101 grievants, in order to make substantial progress toward complying with the remedial award. Further, the Arbitrator "reminded" the Agency that "any use of . . . vacancies . . . [as a] limiting factor would not comport with the [remedial a]ward."[23]

The Agency filed exceptions to the third summary, but the Authority dismissed them as untimely.[24] Specifically, the Authority found that: (1) the Agency's exceptions to the *third* summary challenged findings that originally appeared in the remedial award or, at the latest, the *second* summary; and (2) both the remedial award and second summary had become final and binding before the Agency filed exceptions to the third summary.[25] The Agency moved for reconsideration of the dismissal of its exceptions to the third summary, but the Authority denied the reconsideration motion.[26]

2. Sixth Implementation Meeting and Summary, Seventh Implementation Meeting, and Other Remedial Orders

As the fourth and fifth implementation meetings and summaries are not pertinent to the disputed awards, we do not discuss them here.

In the sixth summary, before discussing the parties' respective positions, the Arbitrator again noted that "due to the Agency's historical failure to produce information and data to the Union – even after being ordered to do so . . . – the Agency's data systems may be used to expand . . . , but not limit[,] the [c]lass [of grievants]. This is the result of the adverse inference that has been drawn in this case . . . ."[27]

Then, the Arbitrator examined the parties' competing approaches to identifying relief-eligible employees by name. The Arbitrator found that the Agency's proposed method for identifying relief-eligible employees relied on the "use of invalid distinctions," including some distinctions "utiliz[ing] . . . information that contradicts the adverse inference previously found."[28] When the Agency stated that it was unwilling to propose a list of relief-eligible employees without relying on those "invalid distinctions,"[29] the Arbitrator adopted the Union's proposed method for identifying relief-eligible employees by name. In that regard, the Arbitrator noted that the Union had already provided the Agency with a list of names of relief-eligible employees "[*a*]*pplying the Union's methodology* . . . [, and t]he Agency ha[d] not disputed this list."[30] Thus, the Arbitrator found that the Union's list accurately reflected the names of relief-eligible employees, and she ordered the Agency to promote all of the listed employees.

As for the deadline for completing those promotions, the Arbitrator adopted the Union's proposed timeline – specifically, that the Agency should process

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[20] *HUD IV*, 68 FLRA at 633 (alterations in original) (emphases added in *HUD IV*) (quoting Summary of Implementation Meeting May 2014 (Second Summary) at 5).

[21] Exceptions in 4586-003, Attach., Ex. 7 (Second Summary) at 4.

[22] *HUD IV*, 68 FLRA at 633.

[23] *Id.* (alterations in original) (quoting Summary of Implementation Meeting Aug. 2014 (Third Summary) at 2).

[24] *Id.* at 635 (citing *U.S. Dep't of VA, Northport VA Hosp., Northport, N.Y.*, 67 FLRA 325, 326 (2014) (*Northport*); 5 C.F.R. § 2425.2(b)).

[25] *Id.*

[26] *HUD V*, 69 FLRA at 64.

[27] Summary of Implementation Meeting May 2015 (Sixth Summary) at 7.

[28] *Id.* at 13; *see also id.* at 14 (listing further distinctions based on information Agency failed to provide).

[29] *Id.* at 13.

[30] *Id.* at 15 (emphasis added).

the promotions within forty-five days of the Arbitrator's issuing the sixth summary. But the Arbitrator also noted that, beyond processing the promotions themselves, the Agency must "work together" with the Union "to determine a reasonable and appropriate . . . method of obtaining" certain TSP-contribution information for relief-eligible employees.[31] In that regard, the Arbitrator found that the Union required the information to accurately estimate relief-eligible employees' TSP losses resulting from the Agency's failure to comply with the parties' agreement and the Arbitrator's prior awards.

By the time that the seventh implementation meeting took place, the Authority had dismissed the Agency's exceptions to the third summary.[32] (Recall that the third summary directed the Agency to promote relief-eligible PHRS employees, then CIRS employees, and then the remaining GS-1101-series employees.) Thus, at the seventh meeting, the Arbitrator planned to discuss with the parties the names of the employees who should be promoted under the schedule set forth in the then-final-and-binding third summary. However, "the Agency refused to discuss the issue of GS-1101 promotions, claiming that it was planning on filing" a motion for reconsideration regarding its dismissed exceptions to the third summary.[33] Further, when the Agency informed the Arbitrator that it also planned to file exceptions to the sixth summary, the Arbitrator "stayed" her remedial directions – including the timeline for promotions – from the sixth summary "until [the sixth summary] is final and binding."[34]

After the seventh implementation meeting concluded (but before the seventh summary was issued), the Arbitrator issued two separate remedial orders to clarify the Agency's remedial obligations following her stay of the sixth summary. Specifically, she found in these orders – the job-series order and the position-titles order – that the Agency remained obligated to process the retroactive promotions of those employees identified in the third summary, as the third summary had become final and binding when the Authority dismissed the Agency's exceptions to it.[35]

Thus, in the job-series order, the Arbitrator clarified that the Agency remained obligated under the third summary to effect the retroactive promotion, with backpay and other benefits, of all of the GS-1101-series employees identified on the Union's list of relief-eligible employees. Regarding her use of the Union's list to identify the GS-1101 employees, the Arbitrator explained that 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*."[36] As for the timeline for completing these promotions, the Arbitrator directed the Agency to process them within thirty days for all current GS-1101 employees at the GS-12 level. The Arbitrator noted that the Agency had asserted that it was "impossible" to meet that thirty-day deadline – which the Union had proposed – but the Arbitrator credited the Union's contrary view and found that the timeline "may be difficult, but it is not impossible."[37] Further, the Arbitrator directed the Agency to "work with OPM in order to expedite the processing" of recalculated annuities for any retired employees affected by the job-series order.[38]

The day after issuing the job-series order, the Arbitrator issued the position-titles order, which clarified that the Agency remained obligated under the third summary to effect the retroactive promotion, with backpay and other benefits, of the subset of relief-eligible employees whom the Union identified as working in PHRS and CIRS positions. And the Arbitrator made the same findings in the position-titles order as in the job-series order discussed above – specifically, that the Agency: (1) had not contested the accuracy of the PHRS and CIRS eligibility list "based on the methodology adopted by the Arbitrator";[39] (2) must effect the promotions of all current PHRS and CIRS employees on the Union's list within thirty days; and (3) must "work with OPM in order to expedite the processing" of recalculated annuities for any retired employees affected by the position-titles order.[40]

Thereafter, the Agency filed exceptions to each of the disputed awards, and the Union filed oppositions to each of the Agency's exceptions.

[31] *Id.* at 2-3.
[32] *See HUD IV*, 68 FLRA at 635 (citing *Northport*, 67 FLRA at 326; 5 C.F.R. § 2425.2(b)) (dismissing exceptions to third summary as untimely).
[33] Arbitrator's Order (June 18, 2015) (Job-Series Order) at 2.
[34] Exceptions in 4586-004, Attach., Ex. 19 (Summary of Implementation Meeting June 2015 (Seventh Summary)) at 3.
[35] *See HUD IV*, 68 FLRA at 635 (citing *Northport*, 67 FLRA at 326; 5 C.F.R. § 2425.2(b)).
[36] Job-Series Order at 3 (emphasis added).
[37] *Id.* at 5.
[38] *Id.* at 6.
[39] Arbitrator's Order (June 19, 2015) (Position-Titles Order) at 2 n.1.
[40] *Id.* at 3.

III. Preliminary Matters

A. Under § 2429.26 of the Authority's Regulations, we do not consider the Agency's reply to the Union's opposition, or the Union's response to that reply, in Case No. 0-AR-4586-003.

Section 2429.26(a) of the Authority's Regulations states that the Authority "may in [its] discretion grant leave to file" documents other than those specifically listed in the Regulations (supplemental submissions).[41] But the Authority has held that a filing party must show why its supplemental submission should be considered.[42] Where a party seeks to raise issues that it could have addressed, or did address, in a previous submission, the Authority ordinarily denies requests to file supplemental submissions concerning those issues.[43] Moreover, where the Authority declines to consider a supplemental submission, the Authority also declines to consider a response to that submission because the response is moot.[44]

Here, more than two months after the Union filed its opposition to the Agency's exceptions to the sixth summary in Case No. 0-AR-4586-003, the Agency requested permission to file, and did file, a reply to the Union's opposition (Agency's reply).[45] But the Agency's reply merely repeats and builds upon arguments that the Agency already made in its exceptions.[46] With its reply, the Agency also submitted two sworn statements to establish that the Agency presented certain arguments to the Arbitrator at the third and fourth implementation meetings,[47] but the Agency could have provided the same sworn statements with its exceptions and did not do so. Consistent with the principles concerning supplemental submissions discussed above,[48] the Agency has not demonstrated why the Authority should consider the Agency's reply or the sworn statements attached to it.[49] Thus, we do not consider those submissions.

Three months after the Agency filed its reply, the Union requested permission to file, and did file, a response to the Agency's reply (and the statements attached to the reply).[50] Because we do not consider the Agency's supplemental submissions, the Union's response is moot, and we decline to consider it on that basis.[51]

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[52]

As discussed earlier, when the Agency filed exceptions to the remedial award on remand, the Authority dismissed those exceptions under §§ 2425.4(c) and 2429.5, due to the Agency's failure to present any of its remedial challenges to the Arbitrator in the remand proceedings.[53] And as also mentioned above, two of the arguments that the Agency made in those dismissed exceptions were that the remedial award was: (1) "incomplete to the extent that it ma[de] implementation . . . impossible" because it did not identify the "existing . . . career[-]ladder positions" with GS-13 promotion potential to which the grievants could be promoted (the incompleteness argument);[54] and (2) in "violat[ion of] management's rights to determine the . . . numbers, types[,] and grades of positions under . . . [§ 7106(b)(1)] of the Statute" (the § 7106(b)(1) argument).[55]

More than three years after the Authority dismissed those arguments as barred, the Agency is attempting to advance the very same challenges to

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[41] 5 C.F.R. § 2429.26(a).
[42] *U.S. Dep't of Transp., FAA*, 66 FLRA 441, 444 (2012) (*FAA*) (citing *NTEU*, 65 FLRA 302, 305 (2010)).
[43] *AFGE, Local 3652*, 68 FLRA 394, 396 (2015) (*Local 3652*) (citing *U.S. DHS, U.S. CBP*, 68 FLRA 184, 185 (2015)).
[44] *See, e.g.*, *id.* at 396-97 (citing *Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011)).
[45] *See generally* Agency's Reply to Union Opp'n (Oct. 19, 2015).
[46] *Compare* Exceptions in 4586-003 at 22-24 (arguing that sixth summary is incomplete as to make implementation impossible), 25-27 (arguing that sixth summary is contrary to § 7121(c)(5) of the Statute), *with* Agency's Reply to Union Opp'n at 2-6 (arguing that sixth summary is incomplete as to make implementation impossible), 6-9 (arguing that Agency timely presented its § 7121(c)(5) argument to the Arbitrator so as to preserve argument for review on exceptions).
[47] *See* Agency's Reply to Union Opp'n, Attach. 1, Decl. of Jim E. Fruge (concerning arguments at the third implementation meeting); Agency's Reply to Union Opp'n, Attach. 2, Aff. of Towanda Brooks (concerning arguments at the fourth implementation meeting).
[48] *See, e.g.*, *U.S. Dep't of the Army, Corps of Eng'rs, Portland Dist.*, 61 FLRA 599, 601 (2006) (declining to consider a supplemental submission that challenged a portion of the award that could have been addressed in the party's exceptions).
[49] *See FAA*, 66 FLRA at 444-45.
[50] *See generally* Union's Mot. for Leave & Resp. to Agency's Reply (Jan. 14, 2016).
[51] *See Local 3652*, 68 FLRA at 396-97.
[52] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. DOL*, 67 FLRA 287, 288-89 (2014) (citing *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012); *AFGE, Local 1546*, 65 FLRA 833, 833 (2011); 5 C.F.R. §§ 2425.4(c), 2429.5).
[53] *HUD III*, 66 FLRA at 869.
[54] Exceptions to Remedial Award at 4-5.
[55] *Id.* at 6.

aspects of the remedy that have not changed in the interim.[56] But because the Authority has already determined that the Regulations barred the incompleteness and § 7106(b)(1) arguments in exceptions to the remedial award,[57] those arguments remain barred from consideration as part of the Agency's exceptions to clarifications of the remedial award, including the disputed awards.[58] Consequently, we do not consider those arguments.

Further, with regard to the forty-five-day deadline set forth in the sixth summary, the Agency contends that satisfying this deadline is "impossible" in this case.[59] But the parties' submissions to the Arbitrator following the sixth implementation meeting show that: (1) the Union specifically requested this forty-five-day compliance deadline;[60] (2) the Agency filed two responses with the Arbitrator challenging various aspects of the Union's submissions;[61] but (3) the Agency did not object to the Union's proposed compliance deadline. Because the Agency could have raised its challenge to the Union's requested forty-five-day deadline before the Arbitrator, but failed to do so, §§ 2425.4(c) and 2429.5 bar consideration of that argument in the exceptions to the sixth summary.

Moreover, the Agency filed exceptions to all of the disputed awards asserting that the Arbitrator was biased against it.[62] The Authority has held that bias claims must be raised first at arbitration, if they can be raised there.[63] Regarding the sixth summary in particular, the Agency challenges it as biased due to: (1) the Arbitrator's "continued jurisdiction";[64] and (2) her adoption of the Union's proposed implementation summaries.[65] The Agency could have presented both of those arguments to the Arbitrator before she issued the sixth summary, but the Agency concedes that it did not do so.[66] Thus, §§ 2425.4(c) and 2429.5 bar consideration of the Agency's bias exception to the sixth summary.[67] However, because the Agency presented its bias allegations to the Arbitrator before she issued the job-series order or the position-titles order,[68] we address the bias exceptions to those two orders on their merits in Section IV.E. below.

[56] *See* Exceptions in 4586-005 at 26 (advancing the incompleteness argument against the position-titles order), 30-31 (making the § 7106(b)(1) argument against the position-titles order); Exceptions in 4586-004 at 26 (advancing the incompleteness argument against the job-series order), 30 (making the § 7106(b)(1) argument against the job-series order); Exceptions in 4586-003 at 22 (advancing the incompleteness argument against the sixth summary), 26 (making the § 7106(b)(1) argument against the sixth summary).

[57] *See HUD III*, 66 FLRA at 869 (dismissing all exceptions to the remedial award under §§ 2425.4(c) and 2429.5); Exceptions to Remedial Award at 4-5 (making the incompleteness argument), 6 (making the § 7106(b)(1) argument).

[58] *See AFGE, Council of Prison Locals, Local 4052*, 68 FLRA 38, 40-42 (2014) (Member Pizzella dissenting) (on exceptions to an arbitrator's remedial award after remand from the Authority, party was precluded from re-litigating issue that Authority decided in earlier stage of the proceedings).

[59] Exceptions in 4586-003 at 22.

[60] *Id.*, Attach., Ex. 5 (Union's Proposed Summary of Sixth Implementation Meeting) at 16 (proposing forty-five-day deadline for compliance).

[61] Exceptions in 4586-003, Attach., Ex. 13, Email from HUD Senior Att'y Advisor to Arbitrator (Apr. 28, 2015, 4:32 PM) ("request[ing] that [Arbitrator] disregard the Union's submission in its entirety"); Exceptions in 4586-003, Attach., Ex. 13, Email from HUD Deputy Assistant General Counsel to Arbitrator (May 5, 2015, 5:56 PM) (contending that Union's submission was not "accurate," but not mentioning the Union's proposed compliance deadline at all); *see also* Exceptions in 4586-003 at 14 (restating the Agency's arguments before the Arbitrator regarding the Union's proposed sixth summary – none of which concerns the proposed timeline).

[62] Exceptions in 4586-005 at 33-36 (bias exception to the position-titles order); Exceptions in 4586-004 at 33-37 (bias exception to the job-series order); Exceptions in 4586-003 at 29-33 (bias exception to the sixth summary).

[63] *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 57 FLRA 417, 422 (2001) (*Indian Head*) (citing *U.S. Dep't of the Air Force, Air Force Logistics Command, Hill Air Force Base, Utah*, 34 FLRA 986, 990 (1990); *Food & Drug Admin., Cincinnati Dist. Office*, 34 FLRA 533, 535-36 (1990)).

[64] Exceptions in 4586-003 at 29.

[65] *Id.* at 32.

[66] *Id.* at 18-20 (Agency first alleged bias at seventh implementation meeting); *see also* Exceptions in 4586-005 at 18-21 (same); Exceptions in 4586-004 at 18-21 (same).

[67] *See Indian Head*, 57 FLRA at 422.

[68] *See* Exceptions in 4586-003 at 18-20 (Agency alleged bias at seventh implementation meeting, which preceded job-series order and position-titles order); *see also* Exceptions in 4586-005 at 18-21 (same); Exceptions in 4586-004 at 18-21 (same).

IV. Analysis and Conclusions

A. The disputed awards are not based on nonfacts.

In each of the disputed awards (the sixth summary, the job-series order, and the position-titles order), the Arbitrator found that the Agency did not contest the accuracy of the Union's relief-eligible-employees list, based on the methodology that the Arbitrator approved.[69] The Agency contends that each of these findings is a nonfact because the Agency did contest the Union's list by offering its own, different eligibility list.[70]

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[71] But arguments based on a misunderstanding of an award do not provide a basis for finding the award deficient as based on nonfacts.[72]

As mentioned earlier, the Arbitrator found that the Agency did not contest the Union's relief-eligible-employees list *using the Union's identification methodology*, which the Arbitrator approved.[73] And the Agency does not argue that it contested the accuracy of the Union's list using the Union's methodology. To the extent that the Agency is arguing that the disputed awards held that the Agency failed to produce a distinct relief-eligible-employees list *using the Agency's identification methodology*, that argument reflects a misunderstanding of the awards. And as misunderstandings do not provide a basis for finding the awards deficient,[74] we deny the nonfact exceptions.

B. The job-series order and position-titles order are not so uncertain as to make implementation impossible.

The Agency argues that the thirty-day promotion timelines in the job-series order and position-titles order make implementation of those orders impossible.[75] In contrast, the Union argues that the Agency could satisfy the thirty-day deadlines by: (1) hiring or transferring employees temporarily to process the personnel actions; (2) paying overtime to existing staff; or (3) "approach[ing] the Union and negotiat[ing] a different time period to complete the promotions,"[76] which we find is an indication of the Union's willingness to consider a longer, negotiated timeline.

The Authority will set aside an award that is "incomplete, ambiguous, or contradictory as to make implementation of the award impossible."[77] Here, the Union proposed the thirty-day timelines for the job-series order and the position-titles order,[78] and the Agency argued that the Union's proposed timelines "cannot be accomplished."[79] After weighing the parties' competing assertions, the Arbitrator adopted the Union's proposed timelines.[80] And in that regard, the Agency has not shown that it would be impossible to implement any of the Union's suggested methods for compliance. Because the Agency has not established that the orders would be impossible to implement, we deny the exceptions contending otherwise.

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[69] *See* Position-Titles Order at 2 n.1; Job-Series Order at 3; Sixth Summary at 15.

[70] *See* Exceptions in 4586-005 at 24-25; Exceptions in 4586-004 at 24-25; Exceptions in 4586-003 at 20-22.

[71] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).

[72] *E.g., U.S. DHS, CBP*, 68 FLRA 157, 160 (2015) (*CBP*) (citing *AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010) (*Food Inspection*)).

[73] Sixth Summary at 13; *see also id.* at 14, 15.

[74] *CBP*, 68 FLRA at 160 (citing *Food Inspection*, 64 FLRA at 1118).

[75] Exceptions in 4586-005 at 26-28; Exceptions in 4586-004 at 27-28.

[76] Opp'n in 4586-004 at 23.

[77] 5 C.F.R. § 2425.6(b)(2)(iii).

[78] *See, e.g.*, Opp'n in 4586-005, Attach., Ex. C, Email from Union's Counsel to Arbitrator & Agency's Counsel, with Proposed Job-Series Order Attached (June 8, 2015, 1:19 PM).

[79] *See, e.g.*, Opp'n in 4586-005, Attach., Ex. D, Email from Agency's Counsel to Arbitrator & Union's Counsel (June 15, 2015, 2:32 PM) (Agency arguing that "Union continues to propose that the Agency process retroactive promotions actions . . . that . . . cannot be accomplished").

[80] *See* Position-Titles Order at 2 (setting forth thirty-day deadline); Job-Series Order at 5 (setting forth thirty-day deadline).

C. The disputed awards are not contrary to law.

The Agency argues that the disputed awards are contrary to law in several respects,[81] each of which is discussed further below. When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law de novo.[82] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[83] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[84]

1. The directions to work with the Union and OPM regarding TSP information and retirement annuities are not contrary to law.

In the sixth summary, the Arbitrator directed the Agency to "work together" with the Union "to determine a reasonable and appropriate . . . method of obtaining" TSP-contribution information for relief-eligible employees.[85] And in the job-series order and the position-titles order, the Arbitrator directed the Agency to "work with OPM in order to expedite the processing" of recalculated annuities for any retired employees affected by those orders.[86]

The Agency argues that the direction to work with the Union to determine how the Union may obtain the TSP information violates § 7114(b)(4)(A) of the Statute.[87] That section obligates an agency to furnish a union with information under certain circumstances, if that information "is normally maintained by the agency in the regular course of business."[88] Here, the Agency argues that it does "not maintain" the TSP information that the Union is seeking, so the direction to work with the Union is unlawful.[89] But the Arbitrator did not find that the Agency maintained such information; nor did she direct the Agency to provide any particular TSP information to the Union. Rather, she directed the Agency to *work with* the Union, and nothing in § 7114(b)(4)(A) makes that direction unlawful. The Agency also cites the Privacy Act[90] as prohibiting it from working with the Union to obtain TSP information, but nothing in the sixth summary directs the Agency to act in violation of the Privacy Act.

Regarding the direction to work with OPM, the Agency contends that this direction is unlawful because the Agency "cannot take actions within the purview of a third party."[91] But the Agency fails to explain how the Arbitrator's direction that the Agency work with OPM is unlawful, and the disputed awards do not require the Agency to act on behalf of any entity but itself.

For the foregoing reasons, we reject the Agency's arguments that it would be unlawful to work with the Union and OPM as the Arbitrator directed.

2. The disputed awards are not contrary to § 7121(c)(5) of the Statute.

The Agency recognizes that the Authority has already held that an arbitrator's direction to place a grievant in a previously classified position does not concern classification[92] within the meaning of § 7121(c)(5) of the Statute.[93] But the Agency argues that, because the disputed awards affect such a large number of its GS-12 employees, the remedy that the Arbitrator directed in this case violates § 7121(c)(5).[94]

The Agency does not cite any authority for the proposition that the number of relief-eligible employees affects a determination of whether a remedy involves classification under § 7121(c)(5). But, even assuming that the size of the remedial class is relevant to whether the remedy concerns classification, the disputed awards did not change the composition of the remedial class, and the Agency failed to raise this classification argument in exceptions to any of the preceding implementation-meeting summaries, which involved the same remedy. Consequently, this argument is an untimely challenge to determinations in prior awards, and

[81] *See* Exceptions in 4586-005 at 28-32; Exceptions in 4586-004 at 28-33; Exceptions in 4586-003 at 24-29.
[82] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[83] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).
[84] *U.S. DHS, U.S. CBP*, 66 FLRA 567, 567-68 (2012) (citing *U.S. DHS, U.S. CBP*, 66 FLRA 335, 340 (2011)).
[85] Sixth Summary at 2-3.
[86] Position-Titles Order at 3; Job-Series Order at 6.
[87] Exceptions in 4586-003 at 28.
[88] 5 U.S.C. § 7114(b)(4)(A).
[89] Exceptions in 4586-003 at 28.
[90] 5 U.S.C. § 522a.
[91] Exceptions in 4586-004 at 31 (citing *U.S. INS*, 20 FLRA 391 (1985) (*INS*)); *see also* Exceptions in 4586-005 at 31-32 (citing *INS*, 20 FLRA 391).
[92] *See, e.g.*, Exceptions in 4586-003 at 25 (citing Remedial Award at 2; *HUD II*, 65 FLRA 433).
[93] *See HUD II*, 65 FLRA at 436.
[94] *E.g.*, Exceptions in 4586-003 at 26.

does not establish that the disputed awards violate § 7121(c)(5).[95]

3. The Agency's argument about certain matters pending simultaneously before the Authority and the Arbitrator is moot.

The Agency contends that the job-series order and the position-titles order are unlawful because the selection methodology on which they are based is "currently on appeal" before the Authority.[96] However, those orders relate *only* to employees whom the Arbitrator already directed the Agency to promote in the third summary, and the third summary is now final and binding because the Authority dismissed the Agency's exceptions to it.[97] Thus, the argument that certain matters were pending simultaneously before the Authority and the Arbitrator is now moot,[98] and we deny the argument on that basis.

D. The Arbitrator did not exceed her authority by violating the doctrine of functus officio.

The Agency contends that the Arbitrator violated the doctrine of functus officio in the sixth summary by modifying her application of the prior adverse-inference finding.[99] Assuming that this argument adequately raises an exceeded-authority exception,[100] we address the argument under that standard.[101] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed within the grievance.[102]

The Agency contends that the Arbitrator impermissibly modified her adverse-inference determination by finding that the inference prevented the Agency from introducing vacancy announcements other than those specifically enumerated in the Union's original grievance.[103] But the Union's information request stated that it was "not limited to" the previously identified vacancy numbers; rather, it included any "[a]dditional instances [of vacancy announcements] like those" already identified.[104] Moreover, in the production order, the Arbitrator directed the Agency to provide all of the information that the Union requested (not merely the vacancy announcements identified by number), and the Agency's failure to comply with the production order resulted in the adverse inference.[105] Consequently, the Arbitrator's adverse-inference determination precluded the Agency from later attempting to limit the remedial class based on the numbered vacancy announcements listed in the grievance, *as well as* "[a]dditional instances like those" already listed.[106]

As such, when the Arbitrator in the sixth summary relied on her earlier adverse-inference determination to preclude the Agency from using vacancy announcements to limit the remedial class, she was acting consistently with that earlier determination, rather than modifying it. Thus, the Agency has not established that the Arbitrator exceeded her authority by violating the doctrine of functus officio, and we deny this exception.

[95] *See Nat'l Archives & Records Admin.*, 42 FLRA 664, 669 (1991) (dismissing as untimely an exception arguing that a retroactive-promotion remedy concerned classification, where party did not file exception until after arbitrator clarified backpay dates, because an earlier award directed the retroactive promotion).

[96] Exceptions in 4586-005 at 32.

[97] *HUD IV*, 68 FLRA 631, *recons. denied*, *HUD V*, 69 FLRA 60.

[98] *See Moot Case*, *Black's Law Dictionary* (10th ed. 2014) (a "matter in which a controversy no longer exists").

[99] Exceptions in 4586-003 at 33.

[100] *E.g.*, *U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012) (*Marshals Serv.*).

[101] Chairman Pope finds that this allegation does not raise a "ground[]" for finding the awards deficient under § 7122(a)(2) of the Statute and § 2425.6 of the Authority's Regulations. In this regard, functus officio is one theory for showing that an arbitrator exceeded his or her authority. *See, e.g.*, *Marshals Serv.*, 67 FLRA at 22. But the Agency has neither cited one of the grounds for review that the Authority recognizes (which are easily found in § 2425.6(a)-(b) of our Regulations) nor provided citation to legal authority under § 2425.6(c) that would establish a ground not currently recognized. Thus, Chairman Pope would dismiss this exception. *See, e.g.*, *AFGE, Gen. Comm.*, 66 FLRA 367, 370 n.4 (2011).

[102] *U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995) (citing *AFGE, Local 916*, 50 FLRA 244, 246–47 (1995); *U.S. DOD, Def. Logistics Agency*, 50 FLRA 212, 217 (1995); *Dep't of the Air Force, McGuire Air Force Base*, 3 FLRA 253, 255 (1980)).

[103] Exceptions in 4586-003 at 33-34.

[104] Opp'n in 4586-003, Attach., Ex. A at 3 (quoting Grievance at 3).

[105] Merits Award at 11.

[106] Opp'n in 4586-003, Attach., Ex. A at 3 (quoting Grievance at 3).

E. The Agency has not established that either the job-series order or the position-titles order demonstrates bias that would warrant a remand to a different arbitrator.

With regard to the job-series order and the position-titles order, the Agency contends that the Arbitrator has shown bias by trying to "usurp the Authority's rulings."[107] In addition, the Agency raises all of the arguments that it has previously presented in exceptions to the Authority throughout the long history of this case as alleged proof of bias.[108] Moreover, the Agency argues that the Arbitrator's "whole-cloth" adoption of the Union's proposed remedies and implementation summaries demonstrates bias.[109] And the Agency contends that this matter should be remanded to a different arbitrator due to the Arbitrator's alleged bias.[110]

To establish that an arbitrator was biased, the moving party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party.[111] A party's assertion that an arbitrator's findings were adverse to that party, without more, does not demonstrate that an arbitrator was biased.[112] Moreover, the Authority has found that an arbitrator's adoption of one party's proposed decision does not render that decision deficient, even where the arbitrator adopts the proposal "verbatim."[113]

The Agency's complaints about the Arbitrator allegedly usurping the Authority's role fail because the Agency has not established any deficiencies in the Arbitrator's implementation proceedings thus far. As for the Agency's complaints about the Arbitrator's decisions against it, we note initially that the Agency's refusal to cooperate or attempt to comply with the Arbitrator's remedial award has prompted many of these adverse decisions. In that regard, the Arbitrator did not begin implementation meetings until a year and a half passed without the Agency fulfilling its remedial obligations to any relief-eligible employees.[114] In addition, as stated earlier, adverse decisions by themselves do not establish bias.[115] Further, as the Authority has recognized that an arbitrator may adopt one party's proposal as the arbitrator's decision, the Arbitrator's adoption of the Union's proposed remedies and implementation summaries does not establish bias.[116] Therefore, we deny the Agency's bias exceptions to the job-series order and the position-titles order. And, as a consequence, there is no basis for granting the Agency's request to remand this matter to a different arbitrator.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[107] Exceptions in 4586-004 at 33.
[108] *Id.* at 35-36.
[109] *Id.* at 36.
[110] *Id.* at 37.
[111] *AFGE, Local 3438*, 65 FLRA 2, 3 (2010) (citing *U.S. Dep't of VA, Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 398 (1996)).
[112] *AFGE, Local 3354*, 64 FLRA 330, 332 (2009) (*Local 3354*) (citing *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 56 FLRA 381, 384 (2000) (*Charleston*)).
[113] *Pension Benefit Guar. Corp.*, 68 FLRA 916, 923 (2015) (*PBGC*).
[114] *See HUD III*, 66 FLRA at 867 (order on Aug. 8, 2012, dismissing exceptions to remedial award); Exceptions in 4586-003, Ex. 7 (First Summary) at 1 (indicating that first implementation meeting occurred on Feb. 4, 2014); *id.* at 2-3 (stating Agency had not fully implemented remedial award as to any relief-eligible employees).
[115] *Local 3354*, 64 FLRA at 332 (citing *Charleston*, 56 FLRA at 384).
[116] *PBGC*, 68 FLRA at 923.

Member Pizzella, dissenting:

Nobel-Prize-winning economist Milton Friedman once noted: "If you put the federal government in charge of the Sahara Desert, in [five] years there'd be a shortage of sand."[1] I believe that many other stakeholders in the federal labor-management relations community would agree with me that intramural bureaucratic workplace disputes of this nature most certainly contribute to taxpayers' growing perception of an unmanageable federal government and lead those taxpayers and Congressional leaders to question the efficacy of the dispute-resolution process put into place by the Federal Service Labor-Management Relations Statute (Statute).[2]

This is not the first case about which I have felt compelled to remind parties of their obligations to utilize the collective-bargaining process in a manner that, as required by the Statute, "contributes to the effective conduct of public business" and "encourages the amicable settlement[] of disputes between employees and their employers." But this never-ending dispute accomplishes neither of those goals.

Consider that two years *after* this case *first* came to the Authority (in 2004), NASA launched the *New Horizons* spacecraft.[3] Since then, *New Horizons* has visited and left Jupiter (as scheduled), reached its next destination of Pluto and its moons (as scheduled), and has gone on to explore the distant Kuiper Belt, *in less time* than it has taken AFGE and its National Council of HUD Locals 222 to pursue a venture (which is barred by statute) to unilaterally reclassify and upgrade 73% (3,777 employees) of HUD's General Schedule (GS)-12 workforce (occupying forty-two (42) job series[4] including 1101 and 246[5]) to GS-13[6] regardless of whether or not there are any "vacancies" or whether there are any "factor[s]" that should "limit[]" the remedy.[7]

The dispute began in 2002. Since then (if you are counting, that is *fourteen* (*14) years*), the case has been returned to Arbitrator Andrée McKissick at least *thirteen* (*13)* times and now returns to the Authority for the *sixth* time. When it first considered the dispute, the Authority determined that the grievance concerned "classification"[8] and rejected Arbitrator McKissick's award because the "organizational upgrade"[9] which she ordered was barred by § 7121(c)(5).

Somewhere along the way, however, my colleagues changed their minds simply because Arbitrator McKissick gave her directed remedy a new name.[10] On a remand which never should have occurred,[11] Arbitrator McKissick simply changed the name of the Authority-rejected "organizational upgrade"[12] to "retroactive promotion"[13] and ordered that the Agency retroactively promote, from GS-12 to GS-13, any employee "who encumbered a position in any of . . . 42 job series at any time during the relevant damages period."[14] That is 73% of the U.S. Department of Housing and Urban Development's (HUD's) GS-12 workforce![15]

In *U.S. Dep't of HUD* (*HUD IV*),[16] I did not agree when the Majority determined that Arbitrator McKissick was acting within her authority and explained that because the grievance and ever-morphing remedies issued by the Arbitrator involved classification, the grievance and remedies were barred by 5 U.S.C. § 7121(c)(5).[17] The last I checked, the Office of Personnel Management still defines "[a]gency classification action" as "a determination to establish or change the title, series, [or] grade" of a position.[18] Therefore, I do not agree with the Majority that the remedy does not "concern[] classification" and is "not contrary to § 7121(c)(5)."[19]

The Majority, however, will not even address HUD's classification arguments. According to the Majority, HUD "failed to raise this classification

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[1] *BrainyQuote*, http://www.brainyquote.com/quotes/quotes/m/miltonfrie387252.html (last visited Feb. 23, 2016).

[2] 5 U.S.C. §§ 7101-7135.

[3] New Horizons: *The First Mission to the Pluto System and the Kuiper Belt*, *Nat'l Aeronautics & Space Admin.*, https://www.nasa.gov/mission_pages/newhorizons/overview/index.html (last updated Aug. 24, 2015).

[4] Exceptions in 4586-003 at 24.

[5] *U.S. Dep't of HUD*, 68 FLRA 631, 633 (*HUD IV*) (Member Pizzella dissenting), *recons. denied*, 69 FLRA 60 (2015) (*HUD V*) (Member Pizzella dissenting) (citing Exceptions in 4586-003, Ex. 7 (Summary of Implementation Meeting May 2014 (Second Summary)) at 5).

[6] Exceptions in 4586-003 at 26.

[7] Summary of Implementation Meeting Aug. 2014 (Third Summary) at 4; *see also HUD IV*, 68 FLRA at 637 (Dissenting Opinion of Member Pizzella).

[8] *U.S. Dep't of HUD, Wash., D.C.*, 59 FLRA 630, 632 (2004) (*HUD I*).

[9] *HUD IV* at 637 (Dissenting Opinion of Member Pizzella) (quoting *U.S. Dep't of HUD*, 65 FLRA 433, 436 (2011) (*HUD II*)) (emphasis omitted).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 634.

[14] Exceptions in 4586-003 at 24 (citing *id.*, Ex. 7 (Summary of Implementation Meeting Feb. 2015 (Fifth Summary) at 3).

[15] *Id.*

[16] 68 FLRA 631.

[17] *Id.* at 637, 639 (Dissenting Opinion of Member Pizzella).

[18] 5 C.F.R. § 511.701(a).

[19] Majority at 15.

argument in exceptions to any of the preceding implementation-meeting summaries."[20] For the reasons that I explained in *HUD IV*, I do not agree that HUD's exceptions should be dismissed summarily just because it did not repeat the same argument each and every time Arbitrator McKissick issued one of her four awards, seven summaries, and two remedial orders.[21] HUD properly raised its classification concerns at an appropriate earlier stage of this ongoing proceeding and thus preserved those arguments. It is worth repeating that the Authority ought not to go out of its way to catch parties in "trapfalls" just to avoid addressing difficult, and outcome-determinative, issues[22] particularly here, where the Union's grievance, and the Arbitrator's award, should have been declared contrary to § 7121(c)(5) in 2004,[23] again in 2011, and again in 2015.

Furthermore, the Majority was wrong in *U.S. Dep't of HUD* (*HUD III*)[24] when they refused to consider HUD's argument that the Arbitrator's award and remedy violates its § 7106(b)(1) rights "to determine the . . . numbers, types[,] and grades of positions";[25] the Majority was wrong when they declined to consider that same argument in *HUD IV*;[26] and the Majority is wrong again today when they refuse to consider this important argument (in this case which I assume will go down in history as *HUD VI*).[27] Stay tuned for coming attractions . . . .

Thank you.

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[20] *Id*.

[21] *See id.* at 8.

[22] *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 69 FLRA 10, 17 (2015) (Dissenting Opinion of Member Pizzella) (quoting *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 607 (2014) (Dissenting Opinion of Member Pizzella)).

[23] *HUD IV*, 68 FLRA at 637 (Dissenting Opinion of Member Pizzella) (citing *HUD I*, 59 FLRA at 632).

[24] 66 FLRA 867 (2012).

[25] Majority at 11 (alteration and omission in original) (quoting Exceptions to Remedial Award at 6).

[26] 68 FLRA at 637 (Dissenting Opinion of Member Pizzella).

[27] *See* Majority at 11.