IN THE MATTER OF ARBITRATION BETWEEN:

American Federation of Government, Employees (AFGE), Council of HUD Locals 222, **UNION,** **v.** **U.S. Department of Housing & Urban Development,** **AGENCY.**	**Issue: Fair and Equitable Grievance** **Case No. 03-07743** **Arbitrator:** **Dr. Andrée Y. McKissick, Esq.**

SUMMARY No. 8 OF IMPLEMENTATION MEETING AND ORDER

This Arbitrator met with the Parties on January 20, 2016 to discuss the progress of the Parties with implementation of the January 10, 2012, Opinion and Award (the "Award") in the above captioned matter. Present for the Union were: Michael J. Snider, Esq., Yehuda Goldberg, Esq. and Rabbi Hershel Goodwin, IT Director and Paralegal, from Snider & Associates, LLC, and Holly Salamido, Union Council President. Present for the Agency were: Tresa A. Rice, Esq. and Javes Myung, Esq. This is the eighth Summary of Implementation Meeting ("Summary No. 8"), the first seven (7) having been issued on March 14, 2014 ("Summary No. 1"), May 17, 2014 ("Summary No. 2"), August 2, 2014 ("Summary No. 3"), January 10, 2015 ("Summary No. 4"), February 27, 2015 ("Summary No. 5"), May 16, 2015 ("Summary No. 6") and June 27, 2015 ("Summary No. 7"), respectively.

I. Current Case/Appeal Status

The Agency filed Exceptions before the Federal Labor Relations Authority (FLRA) to Summary No. 3; those Exceptions were dismissed by the FLRA on May 22, 2015 (**68 FLRA 631**).

The Agency filed a Motion for Stay and Request for Reconsideration to the FLRA's May 22, 2015 Decision on June 8, 2015; both were denied by the FLRA on November 4, 2015 (**69 FLRA 60**). The Agency has also filed Exceptions to Summary No. 6, as well as two Orders subsequently issued by this Arbitrator regarding promotions of certain GS-1101 and Public Housing Revitalization Specialist (PHRS)/Contract Industrial Relations Specialist (CIRS) employees. Those Exceptions are still pending, and are not the subject of this Implementation Meeting and Summary.

The Union provided an Agenda for the Implementation Meeting ("IM"). The items described herein generally follow that Agenda.

As a preliminary matter, the Union arranged for a court reporter at this Implementation Meeting, and requested that, as has been the practice in prior Implementation Meetings, the court reporter would be used when the Arbitrator deemed necessary. This proposal was not objected to by the Agency.

The Agency notified this Arbitrator and the Union via email in advance of the Implementation Meeting that: "The Agency will attend the January 20th meeting for the limited purpose of preserving any appeal rights." At the onset of the Implementation Meeting the Agency again stated in part that it continues to object to these Implementation Meetings pending the specific FLRA exceptions (Transcript of January 20, 2016 IM, p. 7). The Union contended that it intended to only raise at the Implementation Meeting specific matters not currently on appeal before the FLRA and the Agency contended that depending on how the FLRA ruled, the issues raised in its exceptions could materially affect further processing of the case. The Agency also stated its position that the exceptions were analogous to a court appeal, and that it would be harmful to proceed with matters pending before the FLRA. In fact, the Union contended, the only matters discussed at the Implementation Meeting and those matters discussed in this Summary are not on appeal to the FLRA. The Agency disagreed with this contention and contended that its pending

Exceptions with the FLRA materially affect the further processing of the case and that the Agency objected to the Implementation Meeting being held. The Union maintained that any reference to items on appeal to the FLRA are incidental, and are not to be construed as addressing those matters. The Council President spoke on the impact of HUD's failure to comply as part of a larger strategy geared toward impacting the Union's credibility. To her, the lack of compliance shows anti-union animus and that Fair and Equitable is part of a broader agency initiative against the Union.

The United States Department of Housing and Urban Development (HUD) informed the Arbitrator and Union that, in its opinion, its pending exceptions to the Arbitrator's PHRS/CIRS rulings and claims of bias pending before the FLRA challenged the Arbitrator's order to promote at least three thousand, seven hundred and seventy-seven (3,777) employees, adoption of Union methodology, and the Arbitrator's continued jurisdiction. The Union contends that a mere allegation of bias does not divest an arbitrator of jurisdiction over those matters not currently before the FLRA in pending Exceptions. This Arbitrator agrees with the Union that a mere allegation of bias by one party does not divest an arbitrator of jurisdiction. The Union also contends that aside from generally raising the issue, the Agency has not presented any case law or legal arguments in support of its position.

Regarding the issue of attorney fees, the Union identified the firm's ongoing projects, and went through the firm's compliance and implementation efforts to identify claimants and damages. HUD objected that the proper recourse for attorney fees was to submit a fee petition where it can lay out its outreach efforts in support of a fee request.

HUD also objected to witness statements which were presented as evidence during the Implementation Meeting citing that the Union had an opportunity to call the employees it subsequently received statements from during the arbitration hearings, and that subsequent statements were not appropriate in the Implementation Meeting setting. The Arbitrator overruled

HUD, citing HUD's continued failure to provide information to the Union that would identify the scope of damages.

This Implementation Meeting Summary and Order contains a summary of the matters discussed at the Implementation Meeting, as well as rulings based upon those discussions and subsequent written communications.

II. Agency Position on Summary No. 3

As discussed *supra*, the FLRA has upheld Summary No. 3 and that Summary is now final and binding Subsequent to the FLRA's denial of the Agency's Motion for Reconsideration, the Union raised the issue of implementing the rulings contained in Summary No. 3 with the Agency in two (2) phone conversations, in November and December 2015. The Union sent an email summary of the two (2) conversions with the Agency to Mr. Peter Constantine, Associate General Counsel at the Agency. Mr. Constantine edited the Union's email summary and sent the revised summary back to the Union, which adopted the Agency's edits and reordered the email and sent it to the Arbitrator. Copies of all of these emails, as well as other documents, were introduced as exhibits during the Implementation Meeting, and none were disputed by the Agency.

In Summary No. 3 (upheld by the FLRA on May 22, 2015 and again on November 4, 2015), this Arbitrator noted that the Award covers "all GS-1101 employees" employed during the relevant damages period, and that the Agency was to retroactively promote them, with back pay and interest pursuant to the Back Pay Act.

In the Agency's October 23, 2014 Response to Order to Show Cause to the FLRA's Order to Show Cause, as well as in its June 8, 2015 Motion for Stay filed to the May 22, 2015 FLRA Decision (**68 FLRA 631**), the Agency represented to the FLRA that summary "establishes an absolute requirement that eligible class members are based solely upon encumbering a position in the GS-1101 series, with no related requirement to identify eligible class members" (Agency's

October 23, 2014 Response to Order to Show Cause). "Absent a stay of the Authority's Order, the Agency will have to consider whether approximately 2,500 current and former GS-12 employees are entitled to a retroactive promotion..." (Agency's June 8, 2015 Motion to Stay Authority's Order). Since the FLRA has issued its decision, the Agency, by its own admissions and representations, is now required to undertake those efforts. According to the Union, the Agency is estopped from changing its argument at this time, after it has lost before the FLRA. This Arbitrator agrees. Notwithstanding the FLRA's ruling, the Agency asserts that it cannot implement Summary No. 3's order to promote "all 1101 employees at the GS-12 level from 2002 to the present" because Summary No. 6, which is currently on exception at the FLRA, ordered the Agency to produce new announcement listing data dating back to 1999, and instructed that such data should not "yet be construed as a finding that the damages period extends back to July 1999." Given that Summary No. 6 is currently on exception with the FLRA, the effective date of the award is still subject to change by the Arbitrator and therefore it cannot begin implementing the third Implementation Meeting, especially given the time and expense of recalculating back pay, interest, annuity, and TSP calculations should the Arbitrator find that the effective date should be extended to as early as July 1999.

However, the Union inquired as to the status of the Agency's plan for implementation, both in emails and in phone calls. The Union contends that the Agency responded in writing that it did not have the resources to come up with a plan to implement the final and binding Award. The Agency stated that it not only has not devoted resources to coming up with a plan, but that it had no plans to discuss any efforts until February 2016 when the President's budget would be released.

At the Implementation Meeting the Union inquired as to the Agency's efforts at implementation. The Agency, as noted above, stated that it was present at the Implementation Meeting only to register an objection to having to attend the IM, but declining to participate. As such, it had no response to the Union's inquiry. The Agency's responses are disappointing and

worrisome. This Arbitrator expects the Agency to comply with the Award as upheld by the FLRA. The Agency's representations to the FLRA were that it now must promote and pay up to two thousand, five hundred (2,500) employees. The Agency cannot represent one thing to the FLRA and then fail to honor that representation later. It is estopped from changing its position.

Especially disconcerting is information pointed out by the Union (relying upon the data it received from the Agency) that there were only nine (9) employees on the Agency's Methodology List who are currently in GS-1101-12 positions, and questioned why HUD has not at least promoted those employees. The Union noted that the reason stated by the Agency for not promoting these employees was because, in HUD's words, the Agency was "not able to take steps to effectuate promotions based on HUD's list of claimants until the effective date issue is resolved" (December 18, 2015 email from Peter Constantine, Esq.).

The Union showed at the IM, however, that the Agency has already promoted seventy-two (72) PHRS employees prospectively, without a retroactive promotion. Further, the Union demonstrated, and this Arbitrator has ruled that the retroactive promotion date has been settled, absent new and material evidence, as being the later of January 18, 2002 or the employee's earliest date of eligibility for promotion to the next highest grade (i.e. twelve (12) months' time in grade and satisfactory performance) (Summary No. 4, p. 2).

Again, the Agency had no response to these points raised by the Union and did not dispute the Union's statements. The Agency representatives at the Implementation Meeting did, however, agree to look into the issue of promoting prospectively the nine (9) employees referenced by the Union. In a subsequent email to the Union, however, the Agency disclaimed making this statement. The Agency now asserts that it will not engage in piecemeal implementation. In light of these pending exceptions, the Agency maintains that even piecemeal implementation would be ill advised and premature.

III. Union Implementation Efforts

At the Implementation Meeting the Union presented evidence of the efforts it has made in preparation for implementation and/or settlement of this matter. Specifically, the Union explained the process it had undertaken and continues to undertake to obtain data from eligible class members including: evidence of agency violations, class eligibility, and damages. The Union's efforts, it claims, include significant fees, costs, and expenses. The Union claims that much of the extensive time and effort put forth by the Union were in large part necessary due to the Agency's refusal and unwillingness to comply with this Arbitrator's prior orders and instructions. As an example, the Union has propounded numerous requests for information pursuant to 5 U.S.C. § 7114 (b) during the years that this case has been active. The Union claims that the Agency has either ignored these requests, refused to provide the information, or provided partial or inaccurate information. The Agency claims that it has provided many responses to the Union's Requests for Information. Notwithstanding the Agency's claims this Arbitrator finds that there have been failures on the part of the Agency, which left the Union with no choice but to undertake the efforts made to compile the data relevant to proof of class eligibility and specific examples of violations as well as damages. The Arbitrator noted that the efforts described by the Union, and proven with samples of the resulting evidence, were necessary and proper to carry out. This Arbitrator urged the Agency to comply immediately with outstanding items so that the Union's attorneys would not have to do the time consuming job of gathering the information necessary for implementation itself.

IV. Outstanding Items

At the Implementation Meeting, the Union raised several outstanding issues which required the Agency's cooperation and attention. In Summary No. 7, this Arbitrator ordered the Parties to work together to resolve various issues related to: a) a blast email to the Bargaining Unit; b) a meeting with the Office of Personnel Management; c) class member contact information; and d)

Thrift Savings Plan information. The Union informed this Arbitrator, and the Agency did not deny, that no progress had been made on any of these fronts. The Union also raised an issue again about the Agency's production of Bargaining Unit Employee lists.

a. Chilling Effect Email

The Union informed this Arbitrator that pursuant to Summary No. 7, on June 8, 2015, it sent the Agency a revision of the Agency's proposed language for the blast email informing Bargaining Unit Employees that they are permitted to interact with Snider & Associates, LLC, concerning their potential involvement and damages in this case. To date, the Agency has not responded to the Union's draft and has not sent the blast email. The Agency stated that it had been in further conversations with the Union, which the Union disputed. The Agency indicated that it would check on the status of the blast email. The Agency is ordered to update this Arbitrator and the Union as to the Union's draft within ten (10) days. The Agency is further ordered to send the agreed upon language to the Bargaining Unit within one (1) day of the Parties' agreement.

b. Office of Personnel Management (OPM) Contact

In Summary No. 7, this Arbitrator ordered the Agency to request a meeting with OPM to discuss the re-calculation of annuities for retired employees. This Arbitrator is not aware that any of those efforts were made. The Agency is ordered to request a meeting with OPM, to include OPM Office of General Counsel (OGC) and the Office of the Chief Human Capital Officer (OCHCO) representatives to prepare and implement a timely plan to process the large volume of retroactive promotion calculations that have been ordered. This order for a plan is necessary in light of the fact that processing fewer than ten (10) retirement recalculations took OPM more than one (1) year to complete. The Agency shall update this Arbitrator as to the status of the meeting request on a bi-weekly basis, via email with a copy to the Union, until the meeting takes place.

c. Contact Information for Class Members

In Summary No. 7 this Arbitrator ordered the Parties to work together to determine a reasonable and appropriate manner and method of obtaining the Union's requested information, namely contact information for current and former class members. Contacting class members is a critical step in the implementation of the Award and Summaries. The Union has not received the contact information from the Agency and has had to research the contact information for class members itself. The Union explained during the Implementation Meeting that it was incurring significant amounts of fees and expenses locating class members due to the Agency's unwillingness to work with the Union to provide the requested information. This Arbitrator reiterates the Order for the Agency to work with the Union to work out a permissible method to provide contact information, including last known contact information for eligible class members. If the Agency fails to comply with this Order, it does so at its own peril, as the Union explained and this Arbitrator agreed, that it is reasonably incurring significant fees locating eligible employees. Further, if the Agency does not work with the Union as instructed, it will shortly have to show cause and risk sanctions.

d. Thrift Savings Plan (TSP) Information

In Summary No. 7 this Arbitrator ordered the Parties to work together to determine a reasonable and appropriate manner and method of obtaining the Union's requested information as it pertains to eligible class members' Thrift Savings Plan (TSP) information. This Arbitrator further ordered the Agency to provide written proof from TSP which sets forth the Agency's position in this regard.

Gathering TSP information regarding class members is a critical step in the implementation of the Award and Summaries. Based on data provided to the Union without confirmation as to

accuracy, TSP damages for eligible employees who had selected the full five percent (5%) contribution can easily exceed five hundred dollars ($500) per year of damages. The Union has not received the TSP from the Agency for remaining class members numbering in the thousands, and has had to research this information with class members directly itself.

The Union explained during the eighth Implementation Meeting that it was incurring significant amounts of fees and expenses in obtaining and analyzing TSP data received from class members due to the Agency's unwillingness to work with the Union to provide the requested information. This Arbitrator reiterates the Order for the Agency to work with the Union to work out a permissible method to provide the requested TSP information. If the Agency fails to comply with this Order, it does so at its own peril as the Union explained and this Arbitrator agreed, that it is reasonably incurring significant fees due to the TSP data calling project.

Further, if the Agency does not work with the Union as instructed, it will shortly have to show cause and risk sanctions.

e. Current Bargaining Unit List

The Union also raised the issue that it had requested an updated Bargaining Unit list and had not yet been provided with the list. In fact, the Union proved by emails that the Agency had provided an incorrect list, retracted it and, nearly two (2) months ago, promised a corrected list. On December 2, 2015, the Union requested an updated Bargaining Unit list from the Agency. On December 16, 2015, the Agency responded to the request and, shortly thereafter, rescinded and recalled the response. To date, the Agency has not provided the requested information. The Agency has failed to provide any reason or explanation for its actions other than the "wrong version of the document was attached."

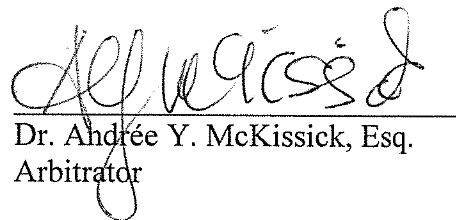
A Federal Agency the size of HUD should have no difficulty providing a simple spreadsheet of Bargaining Unit Employees. This is data that is maintained in the regular course

of business. The Agency is directed to provide an updated Bargaining Unit list within ten (10) days of this Summary and Order, with a copy to the Arbitrator.

V. Conclusion

The purpose of the January 20, 2016 Implementation Meeting was to monitor and oversee implementation, which the Agency objected to, and which was overruled, and compliance of the Award. Nothing discussed or stated at the meeting or in this Summary should be construed as a new requirement or modification of the existing Award. This Arbitrator continues to maintain jurisdiction over the award and all subsequent Summaries. This Arbitrator shall continue to retain jurisdiction over any Union request for attorney fees, costs and expenses until the matter is completed.

The next Implementation Meeting will take place on February 25, 2016, at the law offices of Snider & Associates, LLC.



Dr. Andrée Y. McKissick, Esq.
Arbitrator

February 27, 2016

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In the Matter of the Arbitration between:
U.S. Department of Housing
and Urban Development
(HUD)

and

American Federation of Government
Employees, AFL-CIO
(AFGE)

IMPLEMENTATION MEETING

Remanded from:
59 FLRA 630
65 FLRA 90
66 FLRA 867
68 FLRA 631
69 FLRA 60
69 FLRA 30

SERVICES RENDERED: Oversees IM and monitors progress of implementation of remedy.

PROFESSIONAL FEES: **Implementation Meeting: January 20, 2016**

Per Diem: $ 1,500.00

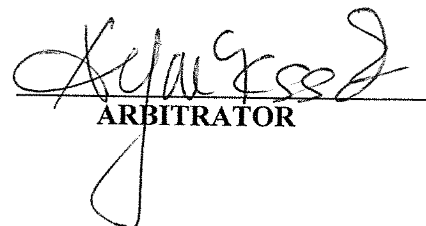
1 Day $1,500.00
Monitoring communications........ $500.00
Subtotal for Professional Fees $2,000.00

TOTAL........ $2,000.00

Payable by Management........ $1,000.00

Payable by the Union........ $1,000.00

This bill is due in thirty (30) days. If this invoice is unpaid by sixty (60) days from the initial bill date, a ten percent (10%) charge on the remaining balance will ensue. If this invoice is unpaid by ninety (90) days from the initial bill date, a twenty percent (20%) charge on the remaining balance will then be assessed.



ARBITRATOR

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