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March 23, 2016

SENT VIA CERTIFIED MAIL
Cabrina S. Smith
Chief, Office of Case Intake and Publication
Federal Labor Relations Authority
1400 K Street, NW Suite 201
Washington, DC 20424-0001

Re: ***AFGE Council of Locals, Council 222 v. U.S. Department of Housing and Urban Development*; FLRA Docket No. 0-AR-4586**

Dear Chief Smith,

Attached please find for filing one original and four copies of the Union's Request for Leave to file a Response to the Agency's Motion for Reconsideration and the Union's Response to the Agency's Motion for Reconsideration. A copy has also been send to Agency Counsel and the Arbitrator.

If you have any questions or require any further information, please let me know. Thank you.

Sincerely,

SNIDER & ASSOCIATES, LLC

Jacob Y. Statman, Esq.

Enclosures

Cc: U.S. Department of Housing & Urban Development (with enclosures)
Arbitrator McKissick (with enclosures)

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

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

TABLE OF CONTENTS

Table of Contents.....1

Certificate of Service.....2

Background.....3

Standard of Review.....4

Argument & Analysis.....5

Conclusion.....16

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Union's Request for Leave to file a Response to the Agency's Motion for Reconsideration and the Union's Response to the Agency's Motion for Reconsideration was sent this 23rd day of March, 2016.

FLRA
Cabrina S. Smith
Chief, Office of Case Intake and Publication
Federal Labor Relations Authority
1400 K Street, NW Suite 201
Washington, DC 20424-0001

ONE ORIGINAL & FOUR COPIES SENT VIA CERTIFIED MAIL

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FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

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

UNION'S REQUEST FOR LEAVE TO FILE A RESPONSE IN OPPOSITION TO THE AGENCY'S MOTION FOR RECONSIDERATION AND UNION'S RESPONSE IN OPPOSITION TO THE AGENCY'S MOTION FOR RECONSIDERATION

AFGE Council of Locals 222 (the "Union"), by and through its undersigned counsel, hereby requests leave pursuant to 5 C.F.R. § 2429.26 of the Agency's Regulations, to file a response in opposition to the Agency's Motion for Reconsideration (the "Motion") dated March 9, 2016. In the event such leave is granted, the Union asserts that the Motion must be denied because the Agency has failed to demonstrate the existence of any extraordinary circumstances as the Authority did not err in any of its factual findings and the disputed awards are not contrary to public policy. In support thereof, the Union states as follows:

Background

On February 25, 2016, the Authority issued its consolidated Decision dismissing or denying in their entirety all Exceptions filed by the Agency to: (1) Summary of Implementation Meeting 6; (2) the PHRS/CIRS Order to Promote; and (3) the GS-1101 Order to Promote (the "Decision"). **69 FLRA 213**. On March 9, 2016, the Agency filed a Motion for Reconsideration

in which it argued that the Authority erred in its factual findings and the Decision was improper because it upheld Awards that were contrary to public policy. **Motion, p. 2.** The Motion also requested that the Authority stay its Decision during the pendency of the Agency's Motion.

Specifically, the Agency argued that: (1) the Authority erred in making the factual finding that the Agency did not object to the 45 day deadline in Summary 6; (2) the Authority erred in making the factual finding that the Agency did not show that it would be impossible to implement the 30 day deadline to promote and pay back pay to the named 372 employees in the job-series order and the employees ordered to be promoted with back pay referenced in the position titles order; (3) the Authority erred in making the factual finding that the Agency failed to raise the argument that the ordered remedy concerns classification within the meaning of 5 U.S.C. §7121(c)(5) in any of its prior exceptions; and that (4) the disputed awards are contrary to public policy. As discussed *infra,* the Motion must be denied in its entirety, because the Agency has failed to meet its very heavy burden to demonstrate that reconsideration is warranted.

Standard of Review

Section 2429.17 of the Authority's Regulations permits a party who can establish in its moving papers "extraordinary circumstances" to request reconsideration of a final Authority decision. 5 CFR 2429.17; See *United States Dep't of the Air Force, 375th Combat Support Group, Scott Air Force Base, Ill.*, 50 FLRA 84 (1995) (*Scott AFB*). In *Scott AFB*, the Authority identified a **limited number** of situations in which extraordinary circumstances have been found to exist. These include situations where a moving party has established that the Authority erred in its remedial order, process, conclusion of law, or factual finding. *Id.* "The party seeking reconsideration of a final decision of the Authority has the **heavy burden** of establishing that extraordinary circumstances exist to justify this unusual action." *Id.* (emphasis added). In this

case, the Agency has not established **any** extraordinary circumstances that would warrant the granting of its Motion for Reconsideration. As such, the Motion must be denied.

Argument and Analysis

I. The Agency's request to stay the Decision must be denied.

In its Motion, the Agency requests, without providing any legal justification, that the Authority stay its Decision during the pendency of the Agency's Motion for reconsideration. **Motion, p. 1.** The request for stay must be denied.

A. The Authority's regulations are clear that, absent an explicit order to the contrary, a Motion for reconsideration shall not stay the effectiveness of the Decision.

Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision. The regulation also states that: [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 (emphasis added). Because the Authority has not ordered a stay, the Agency is required to implement Summary 6, the PHRS/CIRS Order, and GS-1101 Order, during the pendency of its Motion[1].

B. The Authority has ruled that a stay is not available when the remedy seeking to be stayed is from an arbitrator's award.

The Authority has held that the Authority's Regulations do not provide a basis for filing requests for stays of arbitrators' awards. *NTEU v. U.S. Department of* Treasury, 57 FLRA 592 (2001). ***Id.* at fn.2** ("[T]he Authority's Regulations do not provide a basis for filing requests for

[1] Despite being made aware of the FLRA's caselaw on point disallowing stays of arbitral awards, the Agency has still refused to implement any promotions or backpay while its Motion for Reconsideration is pending. The Union requests that the Authority instruct the Agency that such behavior is inappropriate.

stays of arbitrators' awards. Effective December 31, 1986, the Authority's Regulations were revised to revoke those portions pertaining to the filing of requests for stays of arbitration awards (51 Fed. Reg. 45,754). Therefore, we deny the Agency's request."

The procedural posture of *NTEU* is identical to the instant matter. In *NTEU* the Agency was seeking a Stay of an Authority Decision on an underlying arbitrator's award. *Id.* Here too, the Agency is seeking to Stay the remedy ordered by an Arbitrator, and subsequently upheld by the Authority. Upon information and belief, there are no cases subsequent to 2001 concerning a review of an arbitrator's award in which a request for a stay has been granted. Because the Authority does not permit an underlying Arbitrator's Award to be Stayed, the Agency's request must be denied.

II. The Authority did not err in finding that the Agency did not object to the 45-day deadline contained in Summary 6.

In its Motion, the Agency argues that the Authority erred when it found that the Agency was precluded from raising the argument that it was impossible to implement the award within the 45-day deadline contained in Summary 6. **Motion, p. 4.**

Summary 6 states in relevant part:

> Therefore, the Agency is directed to, within forty-five (45) days, retroactively promote and make whole these three-thousand, seven-hundred, seventy-seven (3,777) employees that have so far been identified, back to January 18, 2002 or the earliest date of eligibility, in accordance with the findings and Analysis set forth above (i.e. after meeting minimum time in grade and fully satisfactory performance).

Summary 6, p. 15.

The Decision states in relevant part:

> 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. 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; (2) the Agency filed two responses with the Arbitrator challenging various aspects of the Union's submissions; 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.

69 FLRA 213 (emphasis added).

In reviewing the Motion, it appears that the Agency brings two completely contradictory arguments concerning the allegation that the Authority erred in finding that the Agency did not object to the 45-day deadline contained in Summary 6. First, the Agency argues that it never had an opportunity to raise the argument at the IM (even though it was raised in communications subsequent to IM 6), and therefore should be able to raise them before the Authority; and second, that it did raise the argument before the Arbitrator, but that the FLRA made a factual error when it found that a general demurrer does not count as a specific factual argument. Both arguments fail.

A. The Authority properly found that the Agency did not object to the 45-day deadline contained in Summary 6.

The Agency argues that it did contest the 45-day deadline in two subsequent submissions: (1) in its own proposed Summary 6; and (2) in an email to the Arbitrator on April 28, 2015. **Motion, p. 5.**[2] The Agency's argument fails, as the Authority specifically addressed the Agency's submissions in its Decision and <u>still</u> found that the Agency did not object to the

[2] The Agency fails to reference the May 5, 2015 Email from HUD Deputy Assistant General Counsel, which the FLRA found to be a general demurrer but which did not specifically mention or dispute the Union's proposed compliance deadline. Similarly, the Agency's own proposed Summary 6 did not include any Order to promote any employees and therefore had no deadline in it at all – which cannot be viewed in any light as being a specific contest to the Union's proposed deadline. In fact, neither the Agency in its Exceptions, nor the FLRA in its Decision, mentioned the Agency's proposed Summary 6 as an example of contesting the compliance deadline, and therefore it should not be addressed by the Authority now.

Union's proposed compliance deadline. **69 FLRA 213, fn. 61**[3]. It is clear that the Authority is and was completely knowledgeable and aware of **all of the details** of the record. The Decision includes the Authority's analysis on the same details raised now by the Agency, as it pertains to the Agency's subsequent submissions, and the Decision concluded - as a matter of law - that the Agency failed to properly, specifically, and in detail raise its disagreement with the compliance timeline before the Arbitrator. The Agency's argument in the Motion is simply a disagreement with the **legal conclusions** of the Authority.

Even if the Decision which raised and dismissed this same argument decided a matter of fact, the Agency misses the point. The Agency's general demurrer in its first email ("request[ing] that [Arbitrator] disregard the Union's submission in its entirety") and in its second email (contending that Union's submission was not "accurate," but not mentioning the Union's proposed compliance deadline at all) were already found by the FLRA to be legally insufficient to count as objecting to the Union's proposed timeline, adopted by the Arbitrator. **69 FLRA 213, fn. 61** ("the Agency's arguments before the Arbitrator regarding the Union's proposed sixth summary – ***none of which concerns the proposed timeline***") (emphasis added). As such, this argument must fail.

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[3] **Footnote 61** states: 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).

B. The Agency had the opportunity to contest the compliance deadline and failed to do so.

While not fully clear, it appears that the Agency argues that it did not have the opportunity to contest the 45-day deadline because that deadline was not raised at the IM. The Agency references 75 FR 42283 noting that if a party could not reasonably know to raise an argument or a challenge to an awarded remedy, then the party would not be precluded from filing an exception raising that argument or challenge. **Motion, p. 6, fn. 10**. The Agency's argument fails.

The Agency's argument could arguably have merit if a compliance deadline had not been mentioned at the IM, subsequent to the IM the Parties submitted briefs simultaneously, and then the Arbitrator adopted the Union's compliance timeline. *AFGE Local 12 v. Department of Labor*, 60 FLRA 363 (2004). "*Local 12.*" In Local 12, the Authority granted a request for reconsideration because an argument was raised "for the first time in the Union's post-hearing brief to the Arbitrator, which was submitted to the Arbitrator **at the same time** the Agency submitted its own post-hearing brief." *Id.* (emphasis added).

Here, however, the Union provided its draft Summary to the Agency for comment, and the Agency was given a full and fair opportunity to reply and comment on whichever details it sought to contest. The Agency did indeed reply, but failed to include any concern with the Union's included compliance deadline. Therefore, the Agency cannot allege that it "could not reasonably know to raise an argument or challenge." ***Id.***

If a party fails to raise an argument before an Arbitrator – whether at a meeting **or in subsequent communications**, such as in post-hearing briefs (as long as both Parties had an opportunity to challenge that argument is waived and cannot be argued before the Authority for

the first time). The Agency's failure to do so, even when given ample opportunity, is fatal to their argument, herein. The Motion must be denied.

III. The Authority did not err in finding that the Agency did not show that it would be impossible to implement the PHRS/CIRS Order.

The Agency next argues that the Authority erred in finding that the Agency did not show that it would be impossible to implement the 30-day deadline contained in the PHRS/CIRS Order. **Motion, p. 7.** In this regard, the Decision states in relevant part:

> The Authority will set aside an award that is "incomplete, ambiguous, or contradictory as to make implementation of the award impossible." Here, the Union proposed the thirty-day timelines for the job-series order and the position-titles order, and the Agency argued that the Union's proposed timelines "cannot be accomplished." After weighing the parties' competing assertions, the Arbitrator adopted the Union's proposed timelines. 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.

69 FLRA 213.

The Motion alleges that the Agency cannot comply with the "30-day timeline order to promote the 372 employees listed in the orders because, among other reasons, it lacked the funding to comply with the orders and risks an Anti-Deficiency Act violation if it did comply with them." **Motion, p. 7.** The Agency made this exact same argument in its original Exceptions to the Order, and the Authority still upheld the Arbitrator's award, finding that the Agency's impossibility argument fails. **Exceptions, pp. 26-27.** In other words, the Agency has not shown that it is impossible to comply – it merely repeats an already rejected argument. It is unclear how the Agency believes that, by repeating an already rejected arguments, it can meet its **extremely heavy burden** of proving that extraordinary circumstances exist.

The Motion continues, "[T]he Agency clearly established that it was impossible to comply with the 30-day requirement in the job-series order and position-titles orders." **Motion, p. 9.** However, it did no such thing. Rather, the Agency simply raised some potential difficulties with implementing the Award and, rather than try and work through those difficulties, it simply claimed - and continues to claim - impossibility.

The Agency failed to provide any legal support for its impossibility argument in either the Exceptions or in the instant Motion. Similarly, the Agency failed to provide any factual support for its impossibility argument in either the Exceptions or in the instant Motion. Indeed, the Agency failed to provide any evidence, such as an affidavit from an employee in the office of the Chief Financial Officer or of anyone in the Chief Human Capital Office (personnel department), establishing actual facts or asserting the alleged impossibility; failed to submit a copy of the Agency's budget, its rules on fiscal reprogramming, balance sheets, or financial statements. It is not clearly "impossible" for the Agency to process promotions in the 30-day time period or - in concert with the Union - to work out another timeframe.

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 could hire additional employees or transfer existing employees into the personnel division to assist the other employees, or it could 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 Orders. It is not impossible to comply. As such, the Motion must be denied.

IV. The Authority did not err in finding that the Agency failed to timely raise classification defenses.

The Motion yet again raises and argument which the Authority has repeatedly ruled untimely. In the Motion, as it did in the Exceptions (and other filings), the Agency argues that it had raised classification arguments at prior implementation meetings and should, therefore, not be precluded from raising those arguments before the Authority. **Motion, pp. 9-10; Reply, p. 6.** The Agency does not raise any new argument in the Motion for Reconsideration, but rather it simply reasserts what the Authority has already ruled upon.

As set forth in the Union's Opposition to the Agency's Exceptions (p. 26), there is nothing new in Summary 6 that would provide an opening for the Agency to now timely set forth an argument concerning classification. From the Remedial Award, up to and including Summary 6, the Arbitrator has consistently required as a remedy permanent retroactive promotions of class members. 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 and to have raised classification as an issue. Because the Agency failed to do so, an Exception based upon classification is untimely.

Moreover, even if the Agency had timely raised classification defenses at the implementation meeting which preceded the issuance of Summary 6, the Motion should still be denied because Summary 6 does not deal with classification.

The Authority ruled in 2011:

> 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). Nothing has changed to now make this case into one affecting classification.

The Agency previously argued that: "a review of the Union's methodology reveals that it concerns solely the grade level of duties permanently assigned to grievants and, thus, deals with the classification of positions." **Exceptions, p. 25.** The Agency relied upon the definition of 5 C.F.R. §511.701(a) in support of its argument that the Award deals with classification. Section 511.701(a)(1) states:

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

5 C.F.R. §511.701(a)(1).

A plain reading of the definition provides that a classification action is based upon a position itself, or the establishment or change in the title, duties, etc., of the position. But Summary 6 and the methodology to identify affected BUEs **do not deal with establishment or change of duties at all.** Indeed, the Arbitrator herein as not changed the position title, duties, or grade of any position. Rather, the Remedial Award, upheld by the FLRA and as clarified in the subsequent Summaries, contain Orders for the Agency to process retroactive 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. **Exceptions, Agency Exhibit 3.** The remedy is a reconstruction of exactly

what would have occurred "but for" the violations noted in the prior merits decisions. **65 FLRA 433.** The fact that a grievant may end up with a promotion as a result of the Arbitrator's order does not mean that the order improperly deals with matters pertaining to classification. As such, Summary 6 does not include any classification issue and is not contrary to law. Similarly, the Decision does not include any erroneous factual findings in this regard, and must be upheld.

V. The Awards are not contrary to public policy.

The Agency's final argument alleges that the disputed awards which were upheld by the Authority are contrary to public policy. **Motion, p. 10**. This argument must fail because the Agency never raised a public policy defense, and the Award is not contrary to public policy as prior Authority decisions and the Arbitrator's previously upheld adverse inference support the approved methodology.

A. The Agency is barred from raising a public policy defense.

As an initial matter, the Agency's argument concerning alleged public policy violations is barred. It is well established that the Authority will not consider claims raised for the first time in a motion for reconsideration that could have been, but were not, raised in the underlying exceptions to an arbitration award. *NTEU Chapter 229 v. Health and Human Services,* 51 FLRA 982 (FLRA 1996) (internal citations omitted). The Agency argues that it previously raised this issue with the Arbitrator "when it proposed its methodology which would limit the class of eligible grievants to those 439 employees who were actually identified as being harmed by the Agency's improper job posting." **Motion, p. 11.** However, the Agency did not challenge any methodology or remedy on the grounds that it would violate public policy, and indeed, does not even allege that it raised the argument in its underlying Exceptions. As such this argument is barred.

B. The Arbitrator's order of relief is supported by the previously upheld adverse inference.

Notwithstanding, the fact that the Agency's public policy argument is barred pursuant to Authority precedent, the argument must also fail because the Decision is supported by the Arbitrator's methodology and the adverse inference ruling. The Decision does not serve to provide relief to any employee who did not suffer harm nor does it constitute a punitive damage.

First, the Agency here is attempting to re-litigate the issue of methodology before the Authority. The Authority has upheld the Arbitrator's decision to adopt the Union's methodology. **69 FLRA 213.** Re-clothing the argument over methodology as an allegation of being contrary to public policy should not give the Agency another bite at the apple.

Further, as was set forth more fully in the Union's Opposition to Agency Exceptions, the Arbitrator issued an adverse inference ruling in this matter due to the Agency's failure to provide properly requested information. **65 FLRA 433, Opposition to Exceptions, pp. 4-6.** While the Authority set aside the remedy found in the Merits Award, it upheld the finding of liability and approved the adverse inference finding:

> Because the Agency did not disclose information, including vacancy announcements, that the Arbitrator had previously directed it to provide to the Union, the Arbitrator drew an adverse inference against the Agency regarding the advertising and selection for newly-created positions with promotion potential to GS-13. *Id.* at 10-11.

65 FLRA 433 (2011). More recently, the Authority again upheld the adverse inference ruling in the instant Decision at issue. **69 FLRA 213.**

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

The Agency's argument that the award violates public policy because it orders relief for employees that *might* not have been harmed, relies on data and evidence which the Arbitrator and Authority have already ruled is inadmissible. As such, the award is not a punishment or punitive damage as alleged by the Agency; it is a legal award based upon a legally founded adverse inference. The award does not violate public policy and the Agency's argument must fail.

Conclusion

The Agency's Motion for Reconsideration must be denied. The Agency failed to meet its extremely heavy burden of proving that extraordinary circumstances exist which would warrant reconsideration. The Authority did not err in any of its factual findings; rather, the Agency simply disagrees with them. Moreover, the Awards are not contrary to public policy. As such, the Agency's Motion must be denied.

Respectfully Submitted,

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