FEDERAL LABOR RELATIONS AUTHORITY
1400 K Street, NW, Suite 200
Washington, DC 20424-0001

National Council of HUD Locals 222, AFGE, AFL-CIO Union,	)	
v.	)	Case No.: O-AR-4586
U.S. Department of Housing and Urban Development, Agency.	)	July 29, 2016

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AGENCY'S EXCEPTIONS TO ARBITRATOR AWARD

Pursuant to 5 U.S.C. § 7122(a), the Department of Housing and Urban Development (Agency or HUD) hereby timely files exceptions to the January 10, 2012 Award on Remand and Implementation Meeting Summary 10 dated June 30, 2016 issued by Arbitrator Andree McKissick. Pursuant to 5 C.F.R. § 2425.7 of the Federal Labor Relations Authority (FLRA or Authority) Regulations, the Agency is not requesting an expedited, abbreviated decision.

As set forth fully below, the Agency contends that Arbitrator McKissick's June 30, 2016[1], "Summary No. 10 of Implementation Meeting and Order" (Summary 10) and the original January 2012 Remedial Award, and Implementation Meeting Summaries 1-9, exceed the scope of the government's waiver of sovereign immunity in the Back Pay Act, are not consistent with the Appropriations Clause of the Constitution, are contrary to law, and improperly modify the Remedial Award. Given the resultant lack of waiver

[1] Implementation Meeting Summary 10 contains a Certificate of Service noting it was served via mail on June 30, 2016; thus, the Agency's current Exceptions are timely filed for purposes of 5 C.F.R. §§ 2425.2(b); 2429.22.

of sovereign immunity, the January 10, 2012 Award and all Implementation Meeting Summaries, including Summaries 3 and 6, must be reversed[2] or modified to strike all provisions for retroactive promotion and backpay, including those provisions such as annuity adjustments that are outside the scope of the Back Pay Act. As will be discussed below in detail, claims of sovereign immunity may be raised before the FLRA at any time. *See U.S. Dep't of Homeland Sec.*, 68 F.L.R.A. 253, 257 (F.L.R.A. 2015) *citing* to *U.S. Dep't of the Interior, U.S. Park Police*, 67 FLRA 345, 347 (2014). In the alternative, at the very least, those portions of the award ordering retroactive back pay to employees should be reversed or set aside. In addition, should the January 10, 2012 Award or Summaries not be reversed, but merely set aside, in whole or part, the Agency further asserts arbitrator bias and seeks a remand to a different arbitrator.

Factual and Procedural Background of Grievance, Arbitration, and Award

On November 13, 2002, AFGE Council 222 filed a grievance alleging the Agency posted new positions to the grade 13 with identical job responsibilities of current bargaining unit employees who encumbered similar positions with a career ladder of grade 12. *See* Exh. 8, Grievance. The grievance asserted that new positions created by the Agency offered applicants a higher grade promotion potential to grade 13, compared to the positions encumbered by bargaining unit employees at grade 12 at the time of the job postings. *See id.*

[2] From October 2013 to September 2014 the Agency promoted and paid retroactive back pay to 17 employees, which it identified could have been harmed by improper job announcements. This figure included the 6 employees who testified at the July and August 2008 arbitration hearings. *See* Summary 9, p. 5 (in which Union acknowledges promotion and payment to 17 employees). It is therefore the Agency's position that given the 17 retroactive promotions, should the award or remedy be set aside by the Authority, that the Agency has substantially complied with the January 2012 Award. Nonetheless, if the award or remedy in whole or part is set aside and it is determined that there are outstanding issues, then, as discussed below, the case should be remanded to a different Arbitrator.

The parties participated in an arbitration hearing, and on September 29, 2009, Arbitrator McKissick issued an award (Merits Award), sustaining Council 222's grievance. *See* Exh. 2, Merits Award. The Arbitrator found that the Agency violated Articles 4.01 and 4.06 [grievants were unfairly treated and unjustly discriminated against]; Article 9.01 [classification standards were not fairly and equitably applied]; and Article 13.01 [Agency sought to hire external applicants, instead of promoting and facilitating the career development of internal employees]. *See id.* at p. 15.

In her Merits Award, the Arbitrator ruled that an adverse inference could be made based upon the Agency's failure to preserve and produce related documents and data. *See* Merits Award at pg. 3. The Arbitrator specifically referenced "the Union's request for a specific adverse inference regarding the numbered series vacancy announcements that were not provided to the Union." *See id.* at pg. 10.

As a remedy, Arbitrator McKissick ordered an "organizational upgrade" of affected positions to the GS-13 level, retroactive to 2002. *See* Merits Award at p. 15. The Merits Award also advised the parties that the Arbitrator would maintain jurisdiction for the purpose of implementation of the award. *See id.* There was no mention of the Back Pay Act, 5 U.S.C. 5596, or any indication of the statutory basis upon which the award was based. *See* Merit Award. On October 30, 2009, the Agency filed exceptions to the award before the Authority.

On January 26, 2011, the Authority issued a decision, finding the grievance was arbitral because it dealt with issues of fairness and equity, but that the remedy of an organizational upgrade was contrary to law and thus should be set aside because it concerned classification. *See U.S. Dep't of Housing and Urban Dev.*, 65 FLRA 433

(2011). Notwithstanding this determination, the FLRA remanded the Arbitrator's award for action consistent with its decision and required clarification to determine whether Arbitrator McKissick had jurisdiction over the grievance. *See id.*

On January 10, 2012, Arbitrator McKissick issued a follow up Opinion and Award (Remedial Award), which found that the Agency violated sections 4.01, 4.06, 9.02, and 13.01 of the Collective Bargaining Agreement (CBA) "as it sought to hire external applicants, instead of promoting and facilitating the career development and that but for these violations... [t]he grievants would have been selected for currently existing career ladder positions with promotion potential to the GS-13 level. *See* Exh. 3, Remedial Award, pg. 2. The Agency was directed to "process retroactive permanent selections of all affected bargaining unit employees (BUEs) into currently existing career ladder positions with promotion potential to the GS-13 level." *Id.* at pp. 2-3. The Agency was further directed to "process such promotions" within thirty days and calculate and pay back pay and interest due since 2002. *Id.* at 3. Three alternative remedies were offered by the Arbitrator in case the one discussed above was vacated by the FLRA. *Id.* at pp. 3-4. There was no mention of the Back Pay Act, 5 U.S.C. 5596, or any indication of the statutory basis upon which the award was based. *See* Remedial Award.

On February 10, 2012, the Agency filed exceptions to the Opinion and Award. In its exceptions, the Agency alleged that the Opinion and Award interfered with management's rights and that implementation was not possible. *See* Agency Exceptions (Feb. 10, 2012). On August 8, 2012, the FLRA issued an Order dismissing the Agency's

exceptions, citing the Agency's failure to challenge the proposed remedy prior to filing its exceptions. *See U.S. Dep't of Housing and Urban Dev.*, 66 FLRA 867 (2012).

Implementation before Arbitrator McKissick

On December 9, 2013, Arbitrator McKissick advised the parties of her intent to convene Implementation Meetings (IM) between the parties. *See* McKissick IM Notice. IM participants consist of Arbitrator McKissick and representatives from the Agency and Union. During the IMs, the Union and Agency have discussed compliance with the Opinion and Award, such as the process for identifying grievants, status of responses to requests for information and status of recalculating annuities of retired grievants.

Following each IM, the Union and Agency submit proposed summaries to Arbitrator McKissick outlining the parties' discussions during the most recent IM held. *See* Union Draft IM Summary Submissions 1-10 and Agency Draft IM Summary Submissions 1-10. Arbitrator McKissick reviews the proposed summaries submitted by the parties and then issues a signed IM Summary to the parties. *See* Exhibits 1-1 to 1-10[3], IM Summaries 1-10.

IMs have been held on: February 4, 2014; March 26, 2014; August 28, 2014; February 4, 2015; March 26, 2015; June 2, 2015; January 10, 2016; February 25, 2016; and, April 2, 2016. Signed IM Summaries have been issued by the Arbitrator on: March 14, 2014 (IM Summary 1); May 17, 2014 (IM Summary 2); August 2, 2014 (IM Summary 3); January 10, 2015 (IM Summary 4); February 27, 2015 (IM Summary 5); May 16, 2015 (IM Summary 6); June 27, 2015 (IM Summary 7); February 27, 2016 (IM Summary 8); March 26, 2016 (IM Summary 9); June 30, 2016 (IM Summary 10).

[3] Exhibits 1-1 to 1-10 correspond to Implementation Meeting Summaries 1-10. For example, Implementation Meeting Summary 1 is Exhibit 1-1 and Implementation Meeting Summary 5 is Exhibit 1-5.

Implementation Meeting Summaries

On February 4, 2014, the parties participated in the first IM. *See* IM Summary 1 at p. 1. In IM Summary 1, issued on March 14, 2014, the Arbitrator identified the issue of a methodology needed to identify grievants eligible for the remedy of a retroactive promotion. The Arbitrator stated that, "... the Agency has unilaterally determined, based on its own methodology, that there are a minimal number of class members ..." IM Summary 1 at p. 2. The Arbitrator did not define what 'minimal' constitutes. *Id.* The Arbitrator further advised that "[i]mpasse in implementation is unnecessary because the Award is clear in its definition of the class." *See* IM Summary 1 at p. 3. The Arbitrator concluded by ordering the parties to continue working to identify additional class members and to submit their respective methodologies for doing so. *See id.* at p. 4. There was no mention of the Back Pay Act, 5 U.S.C 5596, or any indication of the statutory basis upon which the award was based. *See* IM Summary 1. Additionally, the Summary noted that it did not modify or add new requirements to the Award. IM Summary 1 at pg. 2.

In IM Summary 2, issued on May 17, 2014, the Arbitrator recognized the Agency's methodology of identifying the class, stating it was "inadequate." *See* IM Summary 2 at p. 1. The Arbitrator also reiterated her February 2014 direction that the parties "... meet and agree on a methodology, or to present alternative methodologies ..." *See id.* at pg. 2. Summary 2 also indicates that the Agency informed the Arbitrator that its payroll and personnel staff had an internal review process in place, and that, consistent with established office protocols, it was necessary for the Agency's payroll and personnel staff to follow standard protocols and procedures to accurately process

back pay calculations and retroactive promotion actions for the six witnesses at the hearing. *See id.* at pp. 2-3.

The Arbitrator also recorded the Agency's stated disagreement with the Union's list of grievants. *See id.* at p. 4. In the signed Summary, the Arbitrator again addressed the issue of methodology and stated that: "Coming up with a satisfactory methodology should not be difficult." *See id.* She directed the parties to start their review of eligible employees employed in the GS-1101 series, and to then move onto the GS-246 series to identify eligible employees. *See id.* at pg. 5. It was noted that the Award covers all GS-1101 employees who were not promoted to the GS-13 level in 2002 (among others) and that the Agency should work through the public housing revitalization specialist (PHRS) group to identify employees to be promoted. *See id* at 6. (Emphasis added.) There was no mention of the Back Pay Act, 5 U.S.C 5596, or any indication of the statutory basis upon which the award was based. *See* IM Summary 2. Additionally, the Summary declared that it did not modify or add new requirements to the Award. IM Summary 2 at p. 7.

The parties participated in the third IM on June 12, 2014. *See* IM Summary 3 at p. 1. Summary 3, issued on August 2, 2014, reveals that the Agency's February 2014 methodology had identified eleven grievants eligible for the remedy. As of August 2, 2014, the Arbitrator extended her "Orders" to include these additional eleven employees identified by the Agency. *See id.* at pg. 4. Further, although the Arbitrator had not adopted a methodology at this point, she ordered the Agency to process retroactive promotions for all GS-1101 employees. *See id.* at p. 1.

The Arbitrator instructed the Agency that "any use of location, vacancies or any other limiting factor would not comport with the Award." *See* IM Summary 3 at p. 2. In this same IM Summary, the Arbitrator states that she approved the Union's methodology, but was still providing the Agency with an opportunity to compile a list of employees in the Public Housing Revitalization Specialist (PHRS) and Contract Industrial Relations Specialist (CIRS) positions whom the Agency believed should be promoted with back pay. *See id.* This Summary was the first to state that the award was to be paid per the Back Pay Act or otherwise mention the Back Pay Act. *See id.* at 1. Additionally, the Summary repeated that it did not modify or add new requirements to the Award. *See id.* at 5.

In IM Summary 4, issued on January 10, 2015, the Arbitrator determined that the damages period for her January 10, 2012 Order and Remedy would now begin on January 18, 2002, rather than the Agency's proposed date of November 13, 2002, which was the day the grievance was filed, and that bargaining unit employees would be considered class members until the award is fully implemented." *See* IM Summary 4 at pp. 2-3. There was no mention of the statutory basis upon which the award was based. *See* IM Summary 4. Additionally, the Summary again declared that it did not modify or add new requirements to the Award. *Id.* at p. 3.

In early December 2014, between the fourth and fifth IMs, Union and Agency leadership held a meeting regarding the Fair and Equitable case. In this meeting, the Union presented its estimated calculation of damages that it alleged were owed by HUD to potential claimants. The Union's estimation of the cost for implementation of this

case, as of December 2014, totaled $720,296,230.90. *See* Exh. 9, Union's December 2014 Damages Calculation.

IM Summary 5, issued on February 27, 2015, included the Union's allegations of Agency non-compliance with the award. *See* IM Summary 5, p. 3. The Union's approach was that, "... the applicable class consists of at least all GS-12 employees who encumbered a position in any of those 42 jobs series at any time during the relevant damages period." *See id.* at 3. The Arbitrator advised that she believed the Union's interpretation comported with her previous statements on the identification of the class; namely, that the class "includes any employee who encumbered any position in any of the Job Series identified in the Exhibits as noted in the Award and presented by the Union, at any time during the relevant damages period so long as that employee met the required time-in-grade and performance requirements." *See id.* at p. 3.

Notwithstanding this, the Arbitrator stated in signed IM Summary 5 that she was still providing the Agency with an opportunity to "present its approach on identification of the class members." *See id.* at p. 3. Therefore, even though the Arbitrator indicated that she approved of the Union's methodology, it was clear from her signed IM Summary that she had not selected a methodology for compliance for the purpose of identifying additional grievants.

The parties participated in IM Summary 6 on March 26, 2015. *See* IM Summary 6 at p. 1. During the IM, the Agency presented its methodology for compliance. *See* Agency's Draft Submission IM Summary 6. This methodology identified all "previously classified positions" that met the definitions in the Arbitrator's issued order(s). Its methodology took into consideration the FLRA's earlier decision on this case, which

stated that 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. *See Dept. of HUD*, 65 FLRA 433 (2011). The methodology was data driven and used accession lists (enter on duty) information from the National Finance Center (NFC) database. The Agency explained that in order to identify previously classified positions, it searched the (NFC) Database for all new, external hires (accessions), with AFGE bargaining unit (BU) status who entered the Agency at a grade lower than Grade 12, and with a full promotion level (FPL) of Grade 13. HUD's methodology did not include employees who were part of an externally regulated career ladder program (Presidential Management Fellows (PMF), Federal Career Intern (FCI) Program Participants, etc.). The Agency explained that employees hired under externally regulated career ladder programs, such the PMF and FCI, have career ladders established pursuant to these programs, and not by HUD.

The Agency's methodology is based on the identification of all GS-12 employees with Full Performance Level to only Grade 12 and with AFGE BU status who were in similar positions to those previously classified positions identified at the time of the alleged violations (time of the external hires). The Agency's proposed methodology resulted in a total of approximately 439 claimants.

During its presentation the Agency also disputed the Union's methodology on the basis that it did not appear to take into account whether a newly created and previously classified position" existed when it identified its proposed grievants for retroactive promotion.

Immediately following the Agency's presentation, the Arbitrator advised that she did not believe that either the Agency's or the Union's "number" was correct, but that the "number was somewhere in the middle." *See* Agency's Exception to IM Summary 6, p. 13, footnote 5.

In signed IM Summary 6, issued on May 16, 2015, the Arbitrator adopts in the entirety the Union's comments challenging the Agency's methodology — most notably that a distinction between Headquarters and Field positions due to reporting structure was not valid, that the Agency's use of accessions lists from the National Finance Center constituted an "unknown source," and that the Agency was improperly limiting the class through the use of data being employed from the Agency's systems of record. IM Summary 6, pp. 8-12. IM Summary 6 identified the totals from the parties' respective grievant listings. The Arbitrator noted in IM Summary 6 that the results of the Union's methodology totaled 3,777 grievants. *See id.* at p. 9. The Arbitrator also indicated that the Agency's proposed grievant list totaled 439 employees. *See id.* at p. 7. The Arbitrator then ordered the Agency to retroactively promote and pay back pay to 3,777 employees effective January 18, 2002 or the earliest date of eligibility within 45 days. *Id.* at p. 15. There was no mention of the statutory basis upon which the award was based. *See* IM Summary 6. Again, the Summary stated that it did not modify or add new requirements to the Award. *Id.* at p. 17.

Signed IM Summary 6 also included the Union's contention that the Agency's grievant list did not comport with the Award, and the Union's position that the class definition explicitly included additional job series beyond those listed in the grievance due to the adverse inference ruling, as though the adverse inference ruling was inclusive

of all issues. *See id.* at p. 9. This is in spite of the Union's request for a specific adverse inference regarding the numbered series vacancy announcements that were not provided to the Union. *See* Merits Award at p. 10.

The parties participated in IM 7 on June 2, 2015. During the IM, the Agency challenged the Arbitrator's Order that the Agency retroactively promote and make whole, at a minimum, 3,777 employees dating back to January 18, 2002, citing the inability to complete the Award, as written. In particular, the Agency challenged the incompleteness of the Award, and argued that the Award could not be implemented without additional information. In particular, the Agency advised that in order to effectuate promotions from the grade 12 to grade 13 levels it would be necessary to identify a classified position at the grade 13. The Agency also advised that it would also be necessary to identify the job title at the grade 13 level. For example, the 1101 job series is a general, "catch all" series that includes numerous job titles. Thus, under the GS-1101 job series it would be necessary to review the job titles listed under this job series for each of the identified grievants. Therefore, the Order, as written, does not provide sufficient detail to the Agency in order to identify the corresponding job title and classified position for promotion to the grade 13. Lastly, from a position management perspective, the Agency argued that the Order would effectively contravene the Agency's position management structure and eliminate grade 12 AFGE bargaining unit employees from the Agency.

During IM 7, the Agency arranged for a court reporter to obtain an accurate record of the meeting. However, the Arbitrator advised that she desired to have a "free-flowing" discussion. Over the Agency's objection. the Arbitrator ruled that discussions

would be off the record and any decisions, or summaries of disputes, could be placed on the record as she saw fit.

The Agency reiterated its objection to the Union's methodology used to identify grievants based upon a failure to connect the date of eligibility to the alleged harm in order to qualify for the remedy. In particular, the Agency again stated that, similar to its presentation at IM 5, the Union's failure to identify timeframes made it impossible to effectively remedy the alleged violations. Under the Union's methodology, employees would be eligible for the award at any time during the claims period, regardless of when data revealed the presence of a corresponding grade 13 announcement within this same claims period.

The Agency further challenged the Arbitrator's ruling that adverse inferences preclude the use of NFC data (accession lists) to identify grievants. That data is the only empirical basis for identifying grievants based on the parameters of the grievance and the Arbitrator's findings of fact. Once again, there was no mention of the statutory basis upon which the award was based. *See* IM Summary 7. The Summary again incanted that it did not modify or add new requirements to the Award. IM Summary 7 at p. 4.

The parties participated in the eighth IM on January 20, 2016. *See* IM Summary 8 at p. 1. IM Summary 8, issued on February 27, 2016, notes that the Agency was attending only to preserve its appeal rights because its Exception to Summary 6 was pending with the FLRA. IM Summary 8, p. 2. The Agency stated that it would not engage in piecemeal implementation. Id. at 6. Various other matters, including what the Arbitrator termed a "chilling effect email," Agency contact with OPM, contact information for potential class members, Thrift Saving Plan (TSP) information, and a

current bargaining unit list were discussed. *Id.* at pp. 7-10. Regarding the TSP information, the Arbitrator stated that TSP damages for eligible employees is a critical step in implementation as damages can exceed $500 per year. *Id.* at pp. 9-10. There was no mention of the statutory basis upon which the award was based. *See* IM Summary 8. The Summary repeated that it did not modify or add new requirements to the Award. IM Summary 8 at p. 11.

The parties participated in the ninth IM on February 25, 2016. *See* IM Summary 9, p. 1. IM Summary 9, issued on March 26, 2016, notes that the Agency was attending only to preserve its appeal rights because its Motion for Reconsideration of the FLRA's denial of its Exception to Summary 6 was pending with the FLRA. IM Summary 9, p. 4. The Agency responded to inquiries from Union counsel that it would not discuss the existence of a supplemental fiscal year 2016 appropriation request as such a request, if it exists, is pre-decisional and deliberative. *Id.* at 3. The Arbitrator also noted that she agreed to the Union's request to conduct a formal hearing on the record, with testimony, if necessary. Id. at 4. (Emphasis added). The Union indicated its intention to timely serve a witness list and subpoena. *Id.* at 4-5. Other issues such as revisiting an earlier back pay date for the 17 award recipients already compensated by the Agency and what was termed the "chilling effect" email were discussed. There was no mention of the statutory basis upon which the award was based. *See* IM Summary 9. Additionally, the Summary noted that it did not modify or add new requirements to the Award. *Id.* at p. 6.

The parties participated in the tenth IM on April 12, 2016. *See* IM Summary 10 at p. 1. IM Summary 10, issued on June 30, 2016, notes that prior to the meeting, the Union requested that the Arbitrator issue three subpoenas for the testimony of Deputy

Secretary Coloretti, Acting Chief Financial Officer Hundgate, and Chief Human Capital Officer Brooks. *Id.* at 2. The Summary notes that while the Arbitrator signed the subpoenas, a copy of the signed subpoenas was only sent the Union and that the Union did not serve them to the Agency. *Id.* Other issues such as the Union's Fair Labor Standards Act Request for Information so that adjustments to overtime paid to class members could be made and the "chilling effect" email were discussed. The Summary states "the next meeting will be a formal, evidentiary hearing." *Id.* at p. 5. There was no mention of the statutory basis upon which the award was based. *See* IM Summary 10. Once again, the Summary declared that it did not modify or add new requirements to the Award. *Id.* at p. 5.

Preliminary Matters

I. Claims related to Sovereign Immunity can be raised at any time before the FLRA

Sovereign immunity is a matter of "jurisdiction and may properly be raised at any time." *SSA Office of Disability Adjudication v. AFGE Local 1164*, 65 FLRA 334 (2010); *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098 (D.C. Cir. 2005); *Department of the Army v. FLRA*, 56 F.3d 273 (D.C. Cir. 1995).

Generally pursuant to 5 C.F.R.§§ 2425.4(c) and 2429.5, the FLRA will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator. However, the Authority has declined to apply §§ 2425.4(c) and 2429.5 to bar claims regarding sovereign immunity because such claims may be raised at any time. *U. S. Dep't of Homeland Sec.*, 68 F.L.R.A. at 257 *citing* to U.S. *Dep't of the Interior, U.S. Park Police*, 67 FLRA at 347; *SSA,*

Office of Disability Adjudication & Review, Region I, 65 FLRA 334, 337 (2010). (Emphasis added.)

Below the Agency advances arguments related to the scope of the Agency's waiver of sovereign immunity in the Back Pay Act. Pursuant to the above precedent, the FLRA must consider these arguments despite the fact that they were not raised with the Arbitrator. *See DHS*, 68 FLRA at 257 (noting that "[al]though the record does not indicate that the Agency presented its sovereign-immunity argument to Arbitrator Meredith, §§ 2425.4(c) and 2429.5 do not preclude the Agency from raising this claim before the Authority.")

Additionally, as will be discussed below, this case involves important Constitutional issues related to the Appropriations Clause of the U.S. Constitution, Art. I, § 9, Cl. 7, and other issues of sovereign immunity; given this, the Agency's arguments contained in this Exception require the Authority's review. *See DHS*, supra.

II. Arbitrator McKissick's Assertion of Continued Jurisdiction

Implementation Summary 10, p. 5, notes that Arbitrator McKissick's "jurisdiction extends to all outstanding items in this matter." The "outstanding items" in this matter include the orders in Summary 3 and Summary 6 to promote 3,777 employees with backpay and TSP/annuity adjustments pursuant to the Back Pay Act, which, as will be shown below, is contrary to law, violates the government's immunity from money damages because it exceeds the scope of the government's waiver of sovereign immunity in the Back Pay Act, and violates the Appropriations Clause of the Constitution. Therefore, the Arbitrator lacks continuing jurisdiction to implement or effectuate her unlawful award and orders, and, given her assertion of jurisdiction in Implementation Meeting Summary 10, the Agency can properly bring an

exception to it in under 5 U.S.C. § 7122(a) and 5 C.F.R. §§ 2425.2, 2425.6.

III. Modification

Alternatively, the Agency's exception should be considered by the FLRA because IM Summary 10 improperly modifies the award. The original Merit and Remedial Award made no mention of a formal hearing on the record with testimony from Agency officials compelled by subpoenas. Similarly, no IM Summary Order prior to the current IM Summary 10 has ordered the Agency to produce witnesses to give testimony in the effort to implement the award. *See* IM Summary 10, p. 5. Rather, IM Summary 9, stated only that the Arbitrator agreed to "a conduct formal hearing on the record, with testimony, if necessary." IM Summary 9, p. 4. (Emphasis added.) Thus, it is indisputable that the current IM Summary 10 has modified the January 12, 2012 Remedial Award and subsequent Summary Orders 1-9 by including a requirement or order that formal evidentiary hearing will be conducted with testimony from Agency officials. Thus, the award has been modified by adding an additional order or requirement. An arbitrator may clarify an ambiguous award, but the clarification must conform to the arbitrator's original findings. *See, SSA, Region 1, Boston, Mass.*, 59 F.L.R.A. 614, 616, (2004) *citing* to *U.S. Dep't of the Army, Army Info. Sys. Command*, 38 FLRA 1464, 1467 (1991). Here the Arbitrator modified the terms of the original award without the joint consent of both parties and because the original award made no mention of subsequent "formal hearings." Exh. 7, Agency's comments on proposed Summary 10 (showing that the Agency objected to and thus did not consent to having a formal hearing). Thus, it is not possible that Summary 10's order for Agency officials to participate in a formal hearing by giving testimony

under oath is a clarification, but rather is plainly an additional requirement that modifies the original award.

Argument

The remedy ordered in the Award is beyond the scope of the limited waiver of sovereign immunity in the Back Pay Act and therefore is contrary to law.

Introduction

Arbitrator McKissick found that the Agency violated several provisions of its collective bargaining agreement with the Union requiring it to provide "fair and equitable" treatment to its employees by advertising positions with promotion potential to a GS 13 and discouraging current GS 12 employees, some of whom performed identical duties, from applying for the positions. *See* Merit and Remedial Awards. She based this finding on the testimony of three employees who applied, but were not selected, for positions and one who failed to apply because she had heard that external recruits were desired. *See* Merit Award, p. 12-13. As a remedy for this finding, the Arbitrator has ordered in Summaries 3 and 6 that all 3,777 GS-12 employees in forty-two (42) grade series be retroactively promoted with back pay and interest, which the Union has estimated would cost more than $700 million.[4] Summary 6, pp. 12 and 15. Quite apart from the vastly disproportionate nature of this remedy, the award of backpay and interest violates the sovereign immunity of the United States because such payment is not authorized by the Back Pay Act or any other statute.

[4] See Exh.4. For Fiscal Year 2016, HUD's entire Salary and Expense Appropriation was $1.1 billion.

Sovereign Immunity

The United States, as sovereign, is immune from suit save as it consents to be sued. *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941), citing *United States v. Thompson*, 98 U.S. 486 (1878); *United States v. Lee*, 106 U.S. 196 (1882); *Kansas v. United States*, 204 U.S. 331 (1907); Minnesota v. United States, 305 U.S. 382, 387 (1939); *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 388; (1939) *and United States v. Shaw*, 309 U.S. 495 (1940). Thus, as the FLRA has recognized, "there is no right to money damages in a suit against the United States without a waiver of sovereign immunity." *U.S. Dep't of Transp., FAA*, 64 FLRA 325 (2009), citing *U.S. Dep't of Transp., FAA*, 52 FLRA 46, 49 (1996).

"A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187 (1996). It is insufficient if it is merely implied. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990). "This expression must appear on the face of the statute; it cannot be discerned in (lest it be concocted out of) legislative history." *Department of the Army, U.S. Army Commissary v. FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995), citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992). "An Act of Congress is not unambiguous, and thus does not waive immunity, if it will bear any 'plausible' alternative interpretation." *Id.,* citing *Nordic Village*, 503 U.S. at 34. In other words, "[a]mbiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Southwestern Power Admin. v. FERC*, 763 F3d 27 (D.C.Cir. 2014), quoting *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012).

Back Pay Act

The only statute allegedly waiving sovereign immunity so as to permit back pay and interest in this case, which was not contained in the Merit or Remedial Awards, but rather in Summary 3,

which noted that it did not modify or otherwise change the Awards, is the Back Pay Act, 5 U.S.C. § 5596(b). *See* IM Summary 3, p. 1. It does no such thing.

The Back Pay Act provides, in relevant part:

(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period. (Emphasis added).

At 5 CFR § 550.803, the Office of Personnel Management Regulations define "pay, allowances, or differentials" as "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment."

"Thus, in order to constitute 'pay, allowances, and differentials' recoverable under the Back Pay Act, a remedy must not only constitute "pay, leave, [or] other monetary employment benefits[,]' but also must be something to which the employee 'is entitled by statute or regulation.'" *U.S. D.O.T. F.A.A. Detroit*, 64 FLRA 325 (2009), quoting *U.S. Dep't of HHS, Gallup Indian Med. Ctr., Navajo Area Indian Health Serv.*, 60 FLRA 202, 212 (2004). (Emphasis added). The Arbitrator herein has not identified any statute or regulation entitling Union members to back pay in the Awards or Summaries aside from the Back Pay Act in Summary 3 as discussed above. Rather, her award is based strictly on a finding of a violation of

the very general provisions of the collective bargaining agreement requiring the Agency actions to be "fair and equitable."

A. The Award recipients have not suffered a withdrawal or reduction of pay, allowances, or differentials.

Even if there were a violation of some statute or regulation, the Back Pay Act would not apply because Union members suffered no withdrawal or reduction of pay, allowances, or differentials. In *United States v. Testan*, 424 U.S. 392 (1976), GS-13 employees claimed they should have been paid as GS-14 employees because they were performing similar work to GS-14 employees at other agencies. The Supreme Court ordered the suit dismissed, noting:

> There is no claim here that either respondent has been denied the benefit of the position to which he was appointed. The claim, instead, is that each has been denied the benefit of a position to which he should have been, but was not, appointed. The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it (citations omitted). 424 U.S. at 402.

Turning to the Back Pay Act, the Court reiterated,

> "the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade. Congress did not override this rule, or depart from it, with its enactment of the Back Pay Act." 424 U.S. at 406.

Since *Testan,* Federal courts have repeatedly held the Back Pay Act inapplicable to claims that employees should have obtained more pay or a higher position. See, *Carroll v. U.S.* 67 Fed. Cl. 82 (2005) ("Alleging the performance of duties warranting or justifying higher pay than that previously received does not state a valid claim under the BPA"); *Collier v. U.S.* 379 F.3d 1330, 1333 (Fed Cir. 2004) (Precedent establishes that this language ["withdrawal or reduction"] precludes the Act from applying to the government's failure to pay an employee at a higher rate than that at which he was paid, in the absence of an actual overall reduction of pay or benefits);

Favors v. Ruckleshaus, 569 Fed. Supp. 363 (N.D. Ga 1983); *Batten v. U.S.* 220 Ct Cl. 327 (Ct. Cl 1979).

In 1978, Congress amended the Back Pay Act to include a provision that defined "personnel action" as including "the omission or failure to take an action or confer a benefit." 5 C.F.R. § 5596(b)(5). The amendment left intact, however, the requirement that the unjustified or unwarranted action result in the withdrawal or reduction in pay, allowances, or differentials. The Federal Circuit Court of Appeals reconciled these provisions *in Spagnola v. Stockman*, 732 F.2d 908, 912 (Fed. Cir. 1984). The Court held that, "the 1978 amendment was not designed to provide payment for all actions which should or might well have been taken, but only for those payments or benefits which were required by law (a statute or regulation)." *Id.* After surveying the legislative history, the Court found the purpose of the amendment to be to cover "*additional* payments that were mandated by law, e.g., a statutory periodic increase or a benefit conferred by a non-discretionary administrative regulation." *Id.* Furthermore, in *SSA, Baltimore*, 201 F.3d 465, 472 (D.C. Cir. 2000), the Court stated "[t]hus, because the employees in *Testan* had been paid the appropriate amount for the grade to which they were appointed, and had not experienced a reduction in pay or a decrease in grade, the Court held that they had not suffered a withdrawal or reduction of their pay, allowances, or differentials as required for recovery under the Back Pay Act, even though they rightly should have been classified at the higher grade from the beginning. [*Testan]* at 407."

Thus, a plain reading of the Back Pay Act and the above cited cases clearly show that the Union members ordered to receive retroactive backpay suffered no withdrawal or reduction of pay, allowances, or differentials because they were never duly appointed in GS-13 positions and

therefore experienced no reduction in pay by not being paid GS-13 salaries. *See Testan*, supra; *Carroll,* supra; *Collier* supra; *SSA, Baltimore*, supra.

B. Even assuming a reduction in pay, allowances, or differentials, the Award cannot be implemented under Federal courts' or FLRA's interpretation of the Back Pay Act.

Federal courts, including the D.C. Circuit, have interpreted the Back Pay Act to allow retroactive backpay only for non-selections involving noncompetitive, mandatory promotions and specifically exclude discretionary promotions of the type in the current case. In *Brown v. Secretary of the Army*, 918 F.2d 214, 216 (D.C. Cir. 1990), the D.C. Circuit Court of Appeals followed the rationale of the Court in *Spagnola*, supra., The Court stated:

> "... we comprehend the 1978 Back Pay Act definitional amendment to mean that if an upgrade is mandatory once specified conditions are met, the Act now affords a retrospective remedy. If an upgrade is not of that virtually automatic, noncompetitive kind, the Act affords no relief. Only in the former case will the employee be treated as one already 'duly appointed' to the higher position, so that the failure to confer the benefit constitutes a "withdrawal or reduction" in compensation." *Brown,* 918 F.2d at 217-218. (Emphasis added).

The *Brown* Court did state backpay was permissible for a failure to promote claim under Title VII (42 U.S.C. § 2000e) because that statute waives sovereign immunity with respect to it. In view of the requirement to avoid construing waivers of sovereign immunity, the Court resisted the argument that any unlawful failure to promote involved the withdrawal or reduction of pay under the Back Pay Act. The 10th Circuit followed *Brown* in *Edwards v. Lujan*, 40 F.3d 1152 (10 Cir. 1994) cert den. 516 U.S. 963. The 4th Circuit followed suit by denying back pay in a failure to promote case in *Woolf v. Bowles* 57 F.3d 407 (4th Cir 1995). In *Bowden v. United States*, 106 F.3d 433, 440 (D.C. Cir. 1997), the Court flatly declared that the Back Pay Act "does not cover denials of discretionary promotions; it covers only denials of otherwise mandatory promotions, such as upgrades required under seniority systems." It then pointedly added,

"Whether a claim falls within the scope of the Act turns not on the mandatory character of the remedy, but on the mandatory nature of the denied promotion." 106 F.3d at 441. More recently, the D.C. Circuit reiterated the *Brown* standard in *SEC v. FLRA,* 568 F.3d 990, 996 (D.C.Cir. 2009). It restated:

> if an upgrade is mandatory once specified conditions are met, the Act now affords a retrospective remedy. If an upgrade is not of that virtually automatic, noncompetitive kind, the Act affords no relief. Only in the former case will the employee be treated as one already 'duly appointed' to the higher position, so that the failure to confer the benefit constitutes a 'withdrawal or reduction' in compensation.

The Merit and Remedial Awards, even as modified by the Summary Orders, made no findings regarding the types of GS-13 job selections that the Agency allegedly denied employees. The Merit Award, p. 9, found that "the Union contends that although there were postings both internally and externally for vacancies... current employees were discouraged from applying." Additionally, "when a current employee was told she was not selected for a position... she trained the actual selectee." Merit Award, p. 9. The Merit Award makes clear the interview process she found unfair was for competitive promotions rather than career ladder promotions or some other type of virtually automatic promotion. Additionally, there are no specific findings that any of the 3,777 employees were actually minimally qualified for the GS-13 positions into which they were ordered. Thus, under the above precedent from Federal courts it is obvious that the promotions ordered by Arbitrator McKissick were not mandatory promotions of the virtually automatic, noncompetitive type, but rather, to the extent that the limited number of positions that were actually advertised were discretionary, competitive promotions. Under the precedent set out in *Brown*, supra, *Bowden*, supra., and *SEC*, supra., retroactive backpay cannot be paid under the Back Pay Act to remedy these types of purely discretionary, competitive promotions.

Furthermore, there is no finding by the Arbitrator in any Award or Summary that any of the GS-13 positions she ordered employees into were mandatory non-competitive promotions. There is not even a finding that the GS-13 positions actually ever existed or that they were advertised from 2002 to the present. Indeed, as noted above, during Implementation Meeting 7, the Agency informed the Union and Arbitrator that it could not effectuate promotions because it could not even identify a classified job position at the GS-13 level for 1101 series employees. Finally, the Awards and Summaries make no findings as to whether any of the specific 3,777 employees ordered to be promoted were even minimally qualified for any of the positions to which they are to be promoted, let alone that they were the best qualified for the position. Absent such findings it is clear that even if the Agency advertised 3,777 GS-13 positions, the award recipients would not have been automatically selected for them. Thus, under the applicable Federal precedent discussed above, the Awards are deficient as a matter of law.

Assuming *arguendo* that the Authority does not find the above cited Federal court cases dispositive, the Authority's precedent also establishes that none of the requirements of the Back Pay as interpreted by the FLRA have been met by Arbitrator McKissick's Awards and Summaries and therefore they must be set aside or reversed. Specifically, her Awards and Summaries are deficient because they provide absolutely no factual support or analysis for the finding that the Agency's improper actions resulted in the non-selection of the individual employees who were awarded retroactive back pay. The Arbitrator's analysis of causation is wholly lacking and therefore her conclusory award is deficient as a matter of law under the Authority's applicable precedent. [5]

[5] As will be discussed below in detail, neither the Authority nor Federal courts have ever held that the government's immunity from suit can be waived by an interpretation of a vague sanction or adverse inference by a single arbitrator as Arbitrator McKissick has done. *See Lane v. Pena*, 518 U.S. 187 (1996) (noting that a waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text.) (Emphasis added).

The Authority has upheld an award ordering a retroactive promotion where the arbitrator found that, but for the Agency's unlawful discrimination, the grievant would have been selected for the position where the arbitrator made detailed findings that the grievant was more qualified than the selectee and no evidence was submitted as to the other applicants' qualifications. *United States GPO Wash., DC*, 62 F.L.R.A. 419, 424 (F.L.R.A. 2008) *citing* to *Soc. Sec. Admin., Woodlawn, Md.*, 54 FLRA 1570, 1578 (1998). (Emphasis added).

In *VA Cleveland,* 41 FLRA 514, 517-19 (1991), the Authority upheld an award of a retroactive promotion with backpay, finding that there was a direct connection between the unjustified and unwarranted inclusion of a particular evaluation factor in the rating and ranking process in a job selection and the grievant's failure to be one of the six candidates selected for promotion. "The Agency claimed that the Arbitrator failed to find that, but for the unwarranted actions, the grievant would have been promoted..." and therefore that the award was deficient under the Back Pay Act. *See VA Cleveland,* 41 FLRA at 518. The Authority concluded that the Arbitrator specifically reviewed and reconstructed the ranking to delete the improper evaluation factor involving use of leave to rank the candidates and found that the grievant's overall ranking would have placed her fourth among the top six rated candidates - all of which the Agency conceded were selected. *VA Cleveland,* 41 FLRA at 517-19.

Here, the Merit and Remedial Awards made no findings that any specific employee of 3,777 employees ordered to be promoted other than those who testified would have been even minimally qualified for any of the positions to which they are to be promoted, let alone that they were the best qualified for the position. *See GPO Wash., DC*, supra. The Arbitrator did not attempt to carefully reconstruct the selection process for any vacancy as the arbitrator in *VA Cleveland*, supra., did. Nor did Merit or Remedial Awards or Summary Orders attempt to make

such findings as the number of award recipients increased to 3,777 employees. The Arbitrator could not have made such a finding because she never identified the positions to which employees were to be promoted or identified vacant positions that were actually advertised and filled by the Agency. *See* Merit and Remedial Awards and Summaries 1-10. Rather the Arbitrator merely recited in the Merit and Remedial Awards that "but for" the Agency's supposed unjustified action that the "affected positions" would have been upgraded. *See* Merit Award, p. 16; Remedial Award, p. 2. After the FLRA struck the upgrading of "positions" as contrary to law in *U.S. HUD*, 65 F.L.R.A. 433 (2011), in the January 2012 Remedial Award found that "but for" the Agency's actions the grievants would have been selected into positons. Remedial Award, p. 2. It is clear that the Arbitrator couched her award in the "but for" language in the Merit and Remedial Awards without making any actual findings regarding causation of individual employees and then latter used "implementation meetings" to expand the award recipients from six witnesses to class of recipients of 3,777 employees based on the sanction/adverse inference in the Merit Award. *See* Summary 3, p. 2 (noting that the Agency was reminded "any use of location, vacancies, or any other limiting factor would not comport with the Award) and Summary 6, p. 14 (noting that the "adverse inference precludes the usage of data to limit the class, as explained to the Parties repeatedly. New data may be used to expand the class, but not to limit it.")

Under the rationale of *VA Cleveland*, supra., and *GPO Wash., DC*, supra., the Authority does not merely look for the magic words "but for," to assess causation under the Back Pay Act, but rather looks to the Arbitrator's analysis of causation. Arbitrator McKissick's award is deficient as a matter of law because it contains literally no causation analysis of how the Agency's alleged improper actions reduced the award recipient's pay, allowances, or

differentials. *See also Social Security Administration, Office of Hearings and Appeals, Falls Church*, 55 FLRA 349, 353[6] (1999) (noting that "the 'but for' requirement is not a separate element of the Back Pay Act; it merely amplifies the statutory language of the Back Pay Act." *See Social Security Administration, Office of Hearings and Appeals, Falls Church*, 55 FLRA 349, 353 (1999); *SSA Office of Hearings & Appeals*, 54 F.L.R.A. 609, 612[7] (1998) (noting that the "Authority has repeatedly stated that "the 'but for' test does not require a 'specific recitation of certain words and phrases' to establish a direct connection between an unwarranted or unjustified personnel action and an employee's loss of pay or differentials.")

The Authority has struck an arbitrator's order of a retroactive promotion with backpay as deficient and contrary to the Back Pay Act in a case where the arbitrator reviewed the selection process, including the ratings of the applicants and, rejected the Agency's proffered justification for its selections. *SSA Office of Hearings & Appeals,* 54 F.L.R.A. at 613-614. The Authority noted that "the Arbitrator's findings only address why the selection process was improper, and do not address, either explicitly or implicitly, what would have happened if a proper selection process had been used.... [t]hus, nothing in the Arbitrator's review and findings sufficiently supports a conclusion that... but for the 'arbitrary and capricious' nature of the selection process, the grievant would have been selected and promoted." *Id.* at 614. (Emphasis added.)

Here, the Arbitrator's finding of causation is similarly deficient because she made absolutely no findings, either explicitly or implicitly, in the Merit and Remedial Award or any Summary Order that addressed what would have happened (i.e., why the award recipients would have been selected for the GS-13 position) if a proper selection had been conducted for the

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[6] *Citing* to *U.S. Department of Health and Human Services and National Treasury Employees Union*, 54 FLRA 1210, 1219 (1998).

[7] *Citing* to *U.S. Department of the Air Force, Warner Robins Air Logistics Center*, 52 FLRA 938, 942 (1997).

original 6 employees who testified at the hearing, or any of the 3,777 employees whom she ordered to be awarded retroactive promotions from GS-12 to GS-13 with backpay and interest for up to 14 years. Thus, under the *SSA Office of Hearings & Appeals*, supra, the award is deficient as a matter of law.

Furthermore, during the Implementation Meeting process the Agency specifically objected to the Union's methodology used to identify grievants based upon a failure to connect the date of eligibility to the alleged harm in order to qualify for the remedy. In particular, the Agency stated during the sixth Implementation Meeting that, similar to its presentation at IM 5, the Union's failure to identify timeframes meant that the Agency could not effectively remedy employees. *See* Exh. 5, "Agency Comments on Proposed Summary 6," pp. 15-16. At the sixth IM, the Agency also argued that under the Union's methodology, employees would be eligible for the award at any time during the claims period, regardless of when data revealed the presence of a corresponding grade 13 announcement within this same claims period. *See id.* Thus, under the *SSA Office of Hearings & Appeals*, supra, and the other FLRA and Federal court cases cited above, the award is deficient as a matter of law.

The head of the Government Accountability Office (GAO), the Comptroller General has authority to answer questions on the proper use of appropriated funds. The Comptroller General has consistently found that "[e]mployees have no vested right to be promoted at any specific time. *See* Comp. Gen. No. B-26159221 (1995) *citing* to 21 Comp. Gen. 95 (1941). The effective date of salary changes resulting from administrative action exclusively is the date the action is taken by the administrative officer vested with the proper authority, or a subsequent date specifically fixed." *See Id.*

Although the Comptroller General has recognized that backpay may be awarded under the authority of 5 U.S.C. § 5596 as a remedy where unjustified and unwarranted personnel actions affecting pay or allowances have been taken, as a general rule, a personnel action may not be made retroactive so as to increase the rights of an employee to compensation. *See In re Rita H. Rains - Retroactive Promotion & Backpay*, 1985 U.S. Comp. Gen. LEXIS 351 (1985).

In *SSA, Local 3342,* 51 F.L.R.A. 1700, 1706-1707 (F.L.R.A. 1996), the Authority found that certain Comptroller General decisions relied on by the agency, including *In re Rita H. Rains*, supra., were inapposite because they dealt with discretionary promotions, rather than nondiscretionary, career ladder promotions. Here, the promotions in question are clearly discretionary, competitive promotions that increase the grade level from GS-12 to GS-13 for the award recipients. Thus, under *SSA, Local 3342,* the general rule that a personnel action may not be made retroactive so as to increase the rights of an employee to compensation should apply in the absence of specific findings showing that individual employees have suffered unjustified or unwarranted personnel actions denying them virtually automatic, noncompetitive kinds of promotions that affected their pay or allowances. *See SEC,* 568 F.3d at 996; *Brown,* supra.; *In re Rita H. Rains - Retroactive Promotion & Backpay,* supra.; Comp. Gen. No. B-26159221; 21 Comp. Gen. 95.

Here, the promotions at issue were not mandatory, nor were they virtually automatic or noncompetitive. The affected employees in this case would have had to apply for the positions in question, and their selections for the positions were not guaranteed. Indeed, neither the Union nor the Arbitrator have ever identified those "previously classified" positions that any of the employees would have applied for or whether they were even minimally qualified for the positions. The Arbitrator could not have because, as the Agency pointed out in its September 4,

2014, Exception to Summary Order 3, the GS-13 positions that the over 1900 GS-1101 series GS-12 employees were ordered to be promoted into simply did not exist and the Arbitrator at the time failed to identify them. *See* Agency's Exceptions to IM Summary 3, pp. 9-10. By the Agency's estimation the 3,777 employees represent 73 percent of the Agency's GS-12 positions.[8] It is inconceivable that the Agency would have permanently converted almost three-quarters of its GS-12 positions to GS-13 positions by posting 3,777 positions at the GS-13 level. Furthermore, for those GS-13 positions that were actually posted during the claims period as identified during the July and August 2008 arbitration hearings, there were no specified conditions which would have made the promotions mandatory as all of the positions were discretionary, competitive job vacancy announcements. *See* Merits Awards, pp. 12-13. Thus, any promotions that did occur were purely discretionary in nature. Therefore, the retroactive promotions ordered by the Arbitrator could not fall within the scope of the sovereign immunity waiver of the Back Pay Act.

As there is no evidence in this case that any statute or regulation mandated virtually automatic, noncompetitive promotions, nor is there any evidence that individual employees were affected by an unjustified or unwarranted personnel action that resulted in a withdrawal or reduction of all or part of their pay, allowances, or differentials, the Back Pay Act cannot afford relief. Even if there was evidence to show that union members in this case somehow suffered withdrawal or reduction in pay, there is no evidence to support the finding that the Agency's "unfair" actions caused that to occur. Compare, *United States Dep't of Transp. FAA and National Air Traffic Controllers Association*, 64 FLRA 922 (2010). First, one of the allegedly

[8] *See* Exhibit 6, as part of HUD's publically available FY 2016 Budget Justifications, it has 8,935 employees in total.

unfair acts the Agency engaged in was to advertise positions with a promotional potential to GS 13. If the Agency had not done so, however, the union would have had nothing to grieve at all. Even if we posit that the Agency would have advertised the positions and been scrupulously fair and equitable to all applicants, there is no basis for belief that any particular employee, much less all 3,777 GS 12s in the requisite job series, would have been promoted. Indeed, in the Arbitrator's initial Award, she both gave no number and said only that some employees "should" have been promoted and she provided no particularized findings regarding the qualifications of any specific employee beyond, perhaps, the six witnesses who testified at the arbitration hearings before the Arbitrator in July and August 2008. *See* Merit Award, p. 15.

C. The Agency's immunity against an award of money damages cannot be waived by the sanction or adverse inference of an arbitrator.

The award and order to promote 3,777 employees is based on sanctions and adverse inferences drawn from the July and August 2008 arbitration hearings. *See* IM Summary 6, pp. 12 and 15; Merits Award. However, because sovereign immunity against the government can only be waived by a clear, unequivocal statute allowing for waiver, the Arbitrator's Awards to the effect of $700 million must be reversed or set-aside.

In *Lane* the Supreme Court stated:

> "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text... and will not be implied... Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." 518 U.S. at 192.

The original grievance filed by the Union on November 13, 2002, only lists six job series and 18 vacancy announcements. *See* Merits Award, pg. 7. It is only because of the adverse inference drawn in the Merits Award and applied in subsequent Summary Orders that the class of grievants to which the Agency was ordered to pay back pay expanded from the original

grievance which alleged 18 vacancy announcements in six job series to 3,777 employees in virtually all of the Agency's job series in Summary Order 6. *See* Summary Order 6 noting 42 job series, pp. 12 and 15; *see also* respectively, Merits Award and Summary Order 6. However, no legal authority identified by the Arbitrator provides a basis for money payments to be made pursuant to a sanction or adverse inference. Therefore, under the Supreme Court's holding in *Lane*, supra., the Awards are contrary to law. *See Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) ("Limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.")

Thus, given that the Arbitrator's Awards are contrary to the Back Pay Act and she has identified no other statutory basis for the award, but rather has based it on sanctions and adverse inferences, the Awards and Summaries cannot be allowed to stand. To construe her sanction as a proper basis for the Award to promote 3,777 employees under the Back Pack Act would be to imply a new basis for the waiver of sovereign immunity into the Back Pay Act in violation of the Supreme Court's ruling in *Lehman*, supra. To the extent that there is an ambiguity regarding the proper statutory basis upon which to base the Arbitrator's Awards, they must be resolved in favor of the Agency rather than the Union. *See FAA v. Cooper*, 132 S. Ct. 1441, 1444 (2012) *citing* to *U.S. v. Williams*, 115 S. Ct. 1611, (1995) (stating that "... any ambiguities are to be construed in favor of immunity.")

In short, none of the requirements of the Back Pay Act are present here. Inasmuch as that is the only act that could conceivably be the basis for a claim of waiver of sovereign immunity, payment of back pay is precluded. The Arbitrator's unlawful remedy of back-pay amounting to $700 million must be set aside and she should not be permitted to go forward with a formal hearing with witness testimony to implement an unlawful award. *See Social Security*

Administration, 201F.3d at 468, (the Court set aside an FLRA award of money, holding that the Back Pay Act waiver is "effective only as to awards that come within the scope of the statute;") *Cooper*, 132 S.Ct. at 1448).

The September 2009 Merits Award and January 2012 Remedial Award did not provide any statutory authority supporting the award of damages and thus as a matter of law the Agency has not consented to be sued.

The September 2009 Merit Award does not mention, or in any way reference, the Back Pay Act or 5 U.S.C. 5596; nor does the Remedial Award or Summaries 1 and 2. *See* Merit Award, Remedial Award, Summary 1, and Summary 2, respectively. Summary 3 notes the all GS-1101 (approximately 1900) employees were to be promoted with back pay and interest "per the Back Pay Act." Summary 3, pg. 1. Summary 3 also states that nothing discussed or stated at the meeting or in the Summary should be construed as a new requirement or modification of the existing Award. As noted above, all of the Summaries contain this language noting that they should not be construed to contain new requirements or modify the Award. Given that the Arbitrator's Summary Orders state they are not to be construed to modify the original award, it is indisputable that the September 2009 and January 2012 Awards contain no reference to the Back Pay Act or any other statute or regulation that waives the Agency's sovereign immunity.

In *Fed. Bureau of Prisons Fed. Det. Ctr.*, 66 F.L.R.A. 858, 859 (F.L.R.A. 2012), the FLRA found that an award was contrary to law and set it aside because the arbitrator awarded monetary damages to an employee, but provided no statutory authority supporting the award of damages. *See also Soc. Sec. Admin., Office of Disability Adjudication & Review, Region 1*, 65 FLRA 334, 338 (2010) (setting aside the award and finding that it was contrary to law because the Union failed to cite a statutory waiver of sovereign immunity to support the award.)

In *U.S. Dep't of the Air Force Minot Air Force Base*, 61 F.L.R.A. 366, 369-370, (F.L.R.A. 2005) the FLRA found that the Arbitrator's award of pay was contrary to law because it did not point to any statutory authorization for the payment, but rather found the sole basis on which to award the grievants straight time pay was, as here, the Agency's violation of certain articles of the collective bargaining agreement. *See also Puerto Rico Army Chapter*, 60 FLRA at 1006 ("the Authority's decisions establish the need for independent and express statutory authorization for the expenditure of funds separate and distinct from the duty to bargain imposed by the Statute").

Thus, because the Merit and Remedial Award failed to identify the Back Pay Act or any other law or regulation that waives the Agency's sovereign immunity and then specifically noted in subsequent Summary Orders that they did not in any way modify or change the Merit or Remedial Awards as a matter of law those provisions of the award mandating retroactive back pay are unlawful and must be set aside under the above FLRA precedent. *See Fed. Bureau of Prisons Fed. Det. Ctr.*, supra; *Soc. Sec. Admin., Office of Disability Adjudication & Review, Region 1,* supra; *Minot Air Force Base,* supra.

Even assuming for the sake of argument, however, that the Arbitrator's September 2009 or January 2012 awards did incorporate by later reference the Back Pay Act, the award still fails to waive sovereign immunity. A critically important limitation on the Back Pay Act is that "[u]nless some other provision of law commands payment of money to the employee for the 'unjustified or unwarranted personnel action,' the Back Pay Act is inapplicable." *Spagnola v. Stockman*, 732 F.2d 908, 912 (Fed. Cir. 1984). In short, the Back Pay Act "was not designed to provide payment for all actions which should or might well have been taken, but only for those

payments or benefits which were required by law (a statute or regulation)." *Spagnola* , 732 F.2d at 912; *see also Brown*, 918 F.2d at 219 (following *Spagnola*). The Supreme Court has similarly instructed that "the asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Testan*, 424 U.S. at 400; *see also United States v. Mitchell*, 445 U.S. 535, 538-39 (1980). Thus, because the Arbitrator's Merit and Remedial Award and Summaries 1-10 all fail to identify any statute or regulation that the Agency violated, even assuming all 3,777 employees actually applied for GS-13 positions from 2002 to present, the Arbitrator's awards and summaries could not lawfully award money damages because they failed to identify a money-mandating statute.

Those aspects of the Award ordering the Agency to pay Thrift Saving Plan (TSP) and other annuity and retirement benefits pursuant to the Back Pay Act is prohibited by OPM regulation and thus are contrary to law.

The broad-sweeping remedy of retroactive promotions and backpay, to include TSP payment and annuity and retirement benefits ordered by the Awards and Summaries, is far greater than what is permitted by the limited scope of relief provided for in the Back Pay Act.

OPM regulations state:

> "Pay, allowances, and differentials means pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment. Agency and employee contributions to a retirement investment fund, such as the Thrift Savings Plan, are not covered. Monetary benefits payable to separated or retired employees based upon a separation from service, such as retirement benefits, severance payments, and lump-sum payments for annual leave, are not covered." (Emphasis added.)

5 C.F.R. § 550.803. *See also U.S. HHS Gallup Indian Med. Ctr. Navajo Area Indian Health Serv.*, 60 F.L.R.A. 202, 212 (2004) ("Applying this regulation [5 C.F.R. § 550.803], we conclude

that the Back Pay Act does not authorize the award of lost retirement benefits, and we set aside that portion of the award); *see also SSA, Baltimore v. FLRA*, 201 F.3d 465, 470 (D.C. Cir. 2000) (noting that "[t]he OPM also stated that benefits received after retirement were not encompassed by its definition of pay, allowances, or differentials, despite the connection of such benefits to federal employment.")

The January 2012 Award notes that affected employees are to be paid all back pay and interest. *See* Remedial Award, p. 3. Summary 3, which was confirmed the FLRA, then ordered the Agency to inform the Arbitrator and Union as to "whether retirement and/or TSP contributes have been deducted from the payments to current employees; [and] whether the Agency has paid its portion of any retirement and/or TSP payments to current employees." IM Summary 3, p. 3.[9] Likewise, IM Summary 5 ordered the Agency to provide a detailed status of the recalculated annuities and TSP contributions and contact OPM regarding these matters. *See* IM Summary 5, p. 2. Similarly, Summary 6, ordered the Agency to produce certain TSP data from class members and potential class members requested by the Union within 14 days and Summary 7 required the Agency to request a meeting with OPM regarding "recalculated annuities for retired class members" and to provide written proof from the Federal Retirement Thrift Investment Board regarding whether TSP information for individual employees could be released to the Agency. Summary 6, p. 2; Summary 7, p. 4, respectively. Summary 8, pp. 9-10 also notes that "TSP information regarding class members is a critical step in the implementation of the Award and Summaries."

[9] Summary 3 was upheld by the Authority in *U.S. HUD*, 68 F.L.R.A. 631 (2015).

Thus, the record clearly shows that the Arbitrator and Union's position is that the January 2012 award includes retroactive increases to TSP and annuity payments for both current and retired employees.

Consequently, it is clear that Arbitrator McKissick's award, including the above mentioned Summaries, which were either not appealed by the Agency or were upheld after the Agency appealed them by the FLRA, are contrary to law because they order retroactive payments to current and retired employees of money that cannot be paid under the Back Pay Act or OPM regulation. *See* 5 C.F.R. § 550.803; *U.S. HHS Gallup Indian Med. Ctr. Navajo Area Indian Health Serv.*, 60 F.L.R.A. at 212; *SSA, Baltimore*, 201 F.3d at 470.

Thus, the remedy ordered by the Arbitrator is contrary to law, beyond the scope of the Agency's limited waiver of sovereign immunity, and, if complied with by Agency officials, would violate the Anti-Deficiency Act. *See* 31 U.S.C. § 1341. Thus, these portions of the Award and Summaries must be reversed.

Because the Back Pay Act cannot be used to pay the award, the government has not waived sovereign immunity and therefore the Award violates the Appropriations Clause of the Constitution; as such the FLRA must review the Agency's arguments contained in this Exception.

This case involves the important constitutional issue of the limits of an arbitrator in a Federal sector employment dispute to order the U.S. taxpayers to foot a windfall to federal employees up to $700 million that is contrary to law and in violation of the Appropriations Clause. An unauthorized award of money from the Treasury, as here, violates the Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7, which provides that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *See Dep't of Air Force*, 648 F.3d at 844-45 (drawing a parallel between Appropriations Clause issues

and sovereign immunity issues). Likewise, "Federal collective bargaining is not exempt from the rule that funds from the Treasury may not be expended except pursuant to congressional appropriations." *U.S. Dep't of the Navy v. Fed. Labor Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012).

The principle of sovereign immunity rests on fundamental jurisdictional limitations, necessarily implicating courts recognition in *Treasury* that judicial and FLRA review is permitted when an arbitrator exceeds her jurisdiction. *See*, e.g., *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) ("[s]overeign immunity is jurisdictional"), quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Appropriations Clause issues are also fundamental to the separation of powers. For example, the D.C. Circuit recognized in *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013), that the Executive cannot act where "Congress appropriates no money for a statutorily mandated program." Similarly, *OPM* holds that courts "cannot grant respondent a money remedy that Congress has not authorized." 496 U.S. at 426. These principles bear on the scope of the FLRA's review under Section 7122(a) and the Federal court's review under Section 7123(a)(1) because, as the D.C. Circuit stated in *Treasury*, "an unenforceable award is a nullity." 43 F.3d at 687.

Given that the Back Pay Act cannot be used to pay the Awards, the current case involves an order to pay a massive unauthorized amount of approximately $700 million in violation of the Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7. As such the Award is contrary to law and must be struck.

The Arbitrator's disregard for the law shows bias.

The Agency further challenges the Arbitrator's partiality and continued jurisdiction over the Fair and Equitable implementation proceedings, and requests that the Award be remanded to another arbitrator for further processing if the Remedial Award is not reversed entirely. To establish that an arbitrator is 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. *See U.S. Dep't of the Navy, Naval Surface Warfare Ctr.*, 57 FLRA 417 (2001).

The record reveals that the Arbitrator has demonstrated partiality through her continued attempts to usurp the Authority's rulings, parties' negotiated agreement, the proper scope of the Back Pay Act and implementing OPM regulations, and the limitations of her authority based on the Appropriations Clause. The Agency incorporates by reference its argument in its Exceptions to Implementation Meeting Summary 6 dated June 22, 2015, pp. 29-33, including its argument related to the Authority's February 11, 2004, remand of Arbitrator McKissick's finding that she had jurisdiction for this case based on her reference to "reclassified positions." *See U.S. Dep't of Housing and Urban Dev.*, 59 FLRA 116 (2004). Likewise, in her Merit Award Arbitrator McKissick determined that, "the appropriate remedy is an organizational upgrade of affected positions by upgrading the journeyman level for all the subject positions to GS-13 level retroactively from 2002." *In U.S. Dep't of Housing and Urban Dev.*, 65 FLRA 433 (2011), the Authority found that this remedy was unlawful and remanded it back to the same Arbitrator.

Currently, the Arbitrator's Awards and Summary Orders related to payments of TSP and annuity adjustments to current and retired employees is a clear violation of the Back Pay Act and

its implementing OPM regulations as discussed. Consequently, the Awards and Summaries order Agency officials to take a course of action that is in direct violation of the Anti-Deficiency Act. *See* 31 U.S.C. § 1341. Had Agency officials and employees complied with Arbitrator McKissick's unlawful order, these officials and employees could have been subject to removal from Federal service and even criminal liability under 31 U.S.C. § 1350.

Based upon the Arbitrator's ongoing orders to violate the law, orders that are based on no legal authority, and attempts to establish an unlawful organizational upgrade, the Arbitrator is no longer able to properly effectuate compliance with her award. *See AFGE, Local 1757,* 58 FLRA 575 (2003) (Authority remanded award to another arbitrator, citing Arbitrator's disregard of issue the arbitrator was to address on remand). Remanding the Fair and Equitable case to another arbitrator ensures that compliance will be completed in an impartial manner.

CONCLUSION

Based on the foregoing, the Merit and Remedial Awards and Implementation Summaries, including Summary 10, is contrary to law, violates the Back Pay Act and Appropriations Clause, and is contrary to the to the principal of sovereign immunity. Accordingly, the Agency requests that the Remedial Awards and Implementation Meeting Summaries 1-10 be reversed or at the least set aside. Further, the Arbitrator has exhibited bias in the implementation proceedings and the Agency requests the Order be remanded to another arbitrator if the case is remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Agency's Exceptions have been served on all parties on the date below, and via the method indicated:

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July 29, 2016
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