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.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Union's Response in Opposition to the Agency's Exceptions to Arbitrator's Award, with exhibits were served on this 12th day of September, 2016.

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

UNION'S RESPONSE IN OPPOSITION TO AGENCY'S EXCEPTIONS TO ARBITRATOR AWARD

AFGE Council of Locals 222 (the "Union"), by and through its undersigned counsel, and pursuant to the Authority's Order dated August, 19, 2016, hereby timely files its Response in Opposition to the Agency's Exceptions to Arbitrator Award. The Exceptions do not contain any legal reason to disturb either the Award on Remand, dated January 10, 2012, (the "Remedial Award"), or any of the subsequent Implementation Meeting Summaries, including Summary 10, dated June 30, 2016, and must be dismissed or denied. In support thereof, the Union states as follows:

Background

This matter is before the Authority yet again, as the Agency continues with its apparent desire to litigate (instead of resolve) this case for many more years. As is well known by the Authority, this case has an extensive procedural history dating back to the filing of the Grievance on November 13, 2002.

It is unclear over which filing(s) the instant Exceptions were filed. In its introduction to the Exceptions, the Agency states that the Agency "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." **Exceptions, p.1**. However, in the next paragraph the Agency contends that in addition to the Remedial Award and Summary 10, "Implementation Meeting Summaries 1-9, exceed the scope of the government's waiver of sovereign immunity…" **Exceptions, p.1**. In the first sentence, the Agency claims it is filing Exceptions to two documents (the Remedial Award and Summary 10); in the next paragraph the Agency addresses its Exceptions to 11 documents (the Remedial Award, and Summaries 1-10). In any event, and as the Authority has already ruled, the Arbitrator's findings in this case are valid, enforceable, and not contrary to law and do not form the basis for any valid appeal. Moreover, the Agency's Exceptions are not timely as the Agency asserts, other than as to Summary 10. *Infra.*

I. The Underlying Adverse Inference.

On May 29, 2008, after years of Agency non-responsiveness to the Union's Request(s) for Information, the Arbitrator granted the Union's Motion to Compel and warned the Agency that failure to provide properly requested information would result in an adverse inference**. Exhibit A.** In that Order, the Arbitrator noted that the Union had properly requested certain data pursuant to 5 U.S.C. § 7144(b), that the Agency had been previously ordered to produce the data, but that the "Agency refused to fully comply with the breadth of that request." ***Id.*** The Union had requested, among other items:

> Information Requested:
>
> A. Please furnish the personnel action of each person selected to fill the attached vacancy announcements. Listed by announcement number on the

attached spreadsheet. You may delete those items, which may be subject to the Privacy Act, such as social security numbers, date of birth etc.

B. Please furnish the previous personnel action prior to selection, prior to the current position.
C. Please furnish the successful applications' resume, SF 171 or OF-612 application.
D. Please identify and furnish any vacancy announcements in which a waiver of qualifications was given for the other person selected for the vacancy.
E. Please furnish the vacancy announcements that were withdrawn or canceled prior to the selecting of any applicant, from the spreadsheet attached.

Id.

After proceeding to list certain vacancy announcements which the Union knew were at issue, the Union further requested:

> 7. Additional instances like those listed above. Union is requesting copies of certain vacancy announcements in order to make an assessment. These announcements include, but are not limited to…
> …
> 9. Finally, we need to know if persons were hired under each of the vacancy announcements listed in the fact section above. For each person hired, please advise of his/her name, duty station, grade at which s/he was hired, and the vacancy announcement under which s/he was hired.

Id.

The Arbitrator provided the Agency with a final warning:

> In light of the foregoing, the Agency is again **ordered** to fully comply with this information request immediately, but no later than **June 30, 2008.** If this order is not fully complied with by the above date, this Arbitrator is compelled to draw an adverse inference that the unreleased information must be adverse to the Agency.

Id.

On September 29, 2009, the Arbitrator issued the Merits Award in this matter. **Agency Exhibit 2.** While the Authority set aside the remedy in that decision, it noted that: "[I]n cases where the Authority sets aside an entire remedy, but an arbitrator's finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy." ***AFGE 222 v. HUD*, 65 FLRA 433 (2011)**. In the Merits Award, the Arbitrator ruled

that she issued an adverse inference against the Agency because it failed to provide the requested information. **Agency Exhibit 2**. In the Merits Award, the Arbitrator stated:

> Clearly, there is a right to an adverse inference because there is duty to preserve and protect pertinent and relevant documents, as here. It is important to note that there does not have to be a showing of willful or intentional conduct for this inference to be made. That is, mere ordinary negligence is sufficient for this doctrine to be viable, as here.
>
> In response to the Agency's argument that the missing announcements were for intern positions only, this apparently means that such positions were temporary as opposed to being career conditional. Thus, intern positions simply do not have promotion potential to the GS-13 level, even if converted such positions are prohibited from going higher than GS-12. However, evidence presented by the Union was incongruent with the Agency's assessment. (See U-7(G) and U-3) Such evidence was exemplary of a marked-up numbered vacancy announcement and a full-time permanent position, only open at GS-7 level with promotion potential to the GS-13 level. Applying this case law to this grievance, the requested documents were necessary for the Union to amend the grievance. Again, this Arbitrator has right to an adverse inference that the missing documents would have been unfavorable to the possessor of these germane documents, the Agency. Second, in response to the Agency's argument that the Union failed to amend this grievance, it is well established that the exclusive representative is entitled to necessary information to enable one to effectively carry out one's representational duties. These duties include the acquisition of information which will assist in the "investigation, evaluation, and processing of a grievance."
>
> Applying this case law to this grievance, the requested documents were necessary for the Union to amend the grievance. However, such necessary and pertinent materials were not forthcoming. Thus, the Union was unable to amend this grievance due to the Agency's omission to furnish such needed materials.
>
> Third, in response to the request for an adverse inference regarding the absence of Agency's witnesses, it is well recognized that the failure of one party to call sufficient witnesses to rebut the other party's case allows this Arbitrator to make an adverse ruling. Applying this case law to this grievance, the Agency only presented one witness. That is, the Agency did not present the persons who posted the vacancy announcements nor any supervisor in the various divisions to rebut the plethora of Union witnesses' testimony. Thus, the record reflects that evidence presented by the Union was largely unrebutted. Specifically, the Agency failed to present evidence via witnesses to rebut the Union's GS-12 witnesses' testimony that they performed the same work as the GS-13 employees and they trained employees who subsequently leapfrogged them to the GS-13 level. Still further, the Agency failed to present witnesses to rebut that they were told by their supervisors that their

> applications to various positions would be destroyed, or not considered, and they should not apply.

***Id.*, pp. 10-12**.

The Authority set aside the remedy found in the Merits Award, but upheld the finding of liability. The Authority 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).

In short, the Agency's own failure to preserve or produce evidence relevant to the matter, and failure to present testimonial evidence from key witnesses to rebut the Union's evidence 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 Arbitrator drew reasonable inferences, and those were upheld by the Authority – multiple times. As an aside, the Union's thorough investigation of this case through one-on-one interviews reveals that, in fact, thousands of Bargaining Unit Employees were truly directly impacted by the Agency's violative actions, in the same way as the Witnesses who testified.

II. The Remedial Award.

On January 26, 2011, the Authority issued its decision on the Arbitrator's Merits Award, dated September 29, 2009. ***AFGE 222,* 65 FLRA 433 (2011)**. In its decision, the Authority set aside the Arbitrator's remedy but left intact the finding of the underlying violation with instructions of a remand for the remedy. ***Id.***

On January 10, 2012, pursuant to the remand order from the Authority, the Arbitrator issued her Remedial Award. **Agency Exhibit 3**. The Remedial Award was upheld by the FLRA on August 8, 2012. ***AFGE 222 v. U.S. Department of HUD*, 66 FLRA 867 (2012)**. In the Remedial Award the Arbitrator ordered the following relief:

> That the Agency process retroactive permanent selections of all affected BUE's into currently existing career ladder positions with promotion potential to GS-13 level. Affected BUE's shall be processed into positions at the grade level which they held at the time of the violations noted in my prior findings, and (if they met time-in-grade requirements and had satisfactory performance evaluations), shall be promoted to the next career ladder grade(s) until the journeyman level. The Agency shall process such promotions within (30) thirty days, and calculate and pay affected employees all back pay and interest due since 2002.

Agency Exhibit 3, pp.2-3.

The Arbitrator defined the class of Grievants as follows:

> All Bargaining Unit employees in a position in a career ladder (including at the journeyman level), where the career ladder lead to a lower journey man grade than the journeyman (target) grade of a career ladder of a position with the same job series, which was posted between 2002 and present. These include BUE's in positions referenced in Joint Exhibits 2, 3, 4, 7G and Union Exhibits 1 and 9.

***Id.*, p. 4**

In sum, the Remedial Award, which was upheld, identified the class in this matter. All that should have been required to implement the Remedial Award was a review of the employees who encumbered the positions in the Series listed in the exhibits anytime during the relevant damages period (2002-present), ensured that they met the performance and time-in-grade requirements, and calculate the back pay, interest, and emoluments owed. The Agency, however, attempted to set forth its own class definition, which significantly limited the class covered by the Remedial Award, thereby necessitating subsequent implementation meetings.

III. Summary 1.

Subsequent to the Remedial Award being upheld by the Authority, the Parties engaged in Implementation Meetings ("IM"). After each IM, the Arbitrator would issue a Summary of Implementation Meeting. On March 14, 2014, the Arbitrator issued Summary 1. **Agency Exhibit 1(1)**. The Agency did not file exceptions to Summary 1, so it became final and binding thirty-days after service. **5 U.S.C. § 7122(b), 5 CFR § 2425.2(b)**. Implementation meetings and subsequent Summary Orders became necessary because the Agency refused to implement the Remedial Award as it was written. As the Arbitrator noted:

> The purpose of the implementation meeting was to clarify the members of the class that was defined in my January 10, 2012 Award. **Nothing discussed or stated at the meeting should be construed as a new requirement or modification of the existing Award. Rather, the meeting and this summary were, to the extent necessary, intended to clarify** with specificity which Bargaining Unit Employees are eligible class members….
>
> …The Agency has requested written clarification of my Award (including on August 7, 2013 and November 13, 2013). **I indicated that no clarification was necessary as my Award was clear and unambiguous**. More recently, however, the Agency has unilaterally determined, based on its own methodology, that there are a minimal number of class members which it was able to identify. The Union's methodology has identified thousands of potential class members through data provided by the Agency. **Despite the clarity of my Award, the Agency has failed to timely implement the Award as ordered**.

Agency Exhibit 1(1), Summary 1, p. 2 (Emphasis added).

The Arbitrator further noted:

> Moreover, the Parties are at an impasse regarding the appropriate methodology for identifying the class of employees eligible for backpay and promotions. **Impasse in implementation is unnecessary because the Award is clear in its definition of the class. The Class definition is data driven, not announcement driven, as is clear from my Award and the Adverse Inference drawn due to the Agency's failure to produce data, as I told the Agency previously last spring and summer**…[1]

[1] On May 30, 2013, the Arbitrator held a conference call with the Parties to discuss implementation. That call was memorialized via a letter from the Union on June 5, 2013. **Exhibit B.** The Agency never contested the contents of the letter. The memorialization of the conference call reveals that the Arbitrator

> …**The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award**, during the relevant time frame of 2002 until 2012, and ongoing until the Agency ceases and desists from posting positions that are violative of my Award.

***Id.*, p. 3. (Emphasis added).**

To the extent any clarification was necessary, the Arbitrator plainly provided it in Summary 1, which became final and binding after thirty days passed without the Agency filing Exceptions. The Arbitrator reiterated that her ruling was based, in part, on the adverse inference that she had previously drawn against the Agency for failing to provide necessary documentation during the course of the Grievance filing. She also noted that the class of employees entitled to relief encompassed all bargaining unit employees who encumbered any positions in any of the job series referenced in the relevant hearing exhibits.

IV. Summary 2.

On May 17, 2014, the Arbitrator issued Summary 2. **Agency Exhibit 1(2)**. The Agency did not file Exceptions to the Summary 2, so it became final and binding thirty-days after service. **5 U.S.C. § 7122(b)**. In Summary 2, the Arbitrator reiterated her prior orders, stating:

> It became apparent through discussion that the witnesses who testified at the hearing were **in two job series, GS-1101 and GS-236. Employees encumbering those job series are clearly within the scope of the Award**, **although they comprise a small portion** of the job series covered by the Award, and therefore will serve as the basis for the next round of Grievants to be promoted with back pay and interest. A subset of the GS-1101 series is the PHRS (Public Housing Revitalization Specialist) job title. **Although the Award covers all GS-1101 employees who were not promoted to the GS-13 level (among others),** the PHRS group is discrete and therefore the Parties were directed to work through the GS-1101 series to identify all

reminded the Agency of the adverse inference ruling, and that the adverse inference rulings would not be affected by the Agency's alleged ability to now locate information that it had previously represented was destroyed. The Arbitrator stated that the Agency could use the documents to expand the class, but not limit it.

> eligible class members in the PHRS position, and to work to have them retroactively promoted with back pay and interest, among other relief. The Parties were directed to then move on to the CIRS (Contract Industrial Relation Specialist) employees in the GS-246 series, **the other GS-1101 employees, and then others in other applicable job series, until implementation is complete.**

Agency Exhibit 1(2), Summary 2, p. 3 (Emphasis added).

The Arbitrator further reiterated her position that:

> Coming up with a satisfactory methodology should not be difficult. Impasse in implementation should be unnecessary because the Award is clear in its definition of the class. The Class definition is data driven, not vacancy announcement driven, as is clear from the Award and the Adverse Inference drawn due to the Agency's failure to produce evidence, as previously mentioned last spring and summer and in the prior Summary. The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing until the Agency ceases and desists from posting positions that are violative of this Arbitrator's Award.

***Id.*, p. 4.**

It is clear from Summary 2 that the class of affected BUEs was easily identifiable based on the Remedial Award.

V. Summary 3.

On August 2, 2014, the Arbitrator issued Summary 3. **Agency Exhibit 1(3)**. Summary 3 contained no new requirements or modifications to the Remedial Award or prior Summaries. In Summary 3, the Arbitrator again reiterated her prior orders, stating:

> As stated in prior Summaries, this Arbitrator has instructed the Parties to make substantial progress on identifying class members. The Parties were instructed that based upon this Arbitrator's award, as an example, all GS-1101 employees at the GS-12 level from 2002 to present were to be promoted, per the Back Pay Act and CBA, with backpay and interest, as of their earliest date of eligibility…
>
> …Initially, the basics of a new Agency proposal were discussed, mostly by Mr. Fruge by phone. This Arbitrator noted that the Agency's new proposal, as described by Mr. Fruge, does not comport with the Award, prior Summaries or with this Arbitrator's prior instructions to the Parties. This

> Arbitrator further reminded the Agency that any use of location, vacancies or any other limiting factor would not comport with the Award…

Agency Exhibit 1(3), Summary 3, pp. 1-2.

The Agency filed Exceptions to Summary 3 because it alleged that the cited text contained impermissible modifications to the Remedial Award. The Authority dismissed those Exceptions on May 22, 2015. ***AFGE 222 v. U.S. Department of HUD*, 68 FLRA 631 (2015)**. As such, it is clear that all GS-1101 employees are amongst the eligible class members subject to the other noted requirements.

VI. Summary 4.

On January 10, 2015, the Arbitrator issued Summary 4. **Agency Exhibit 1(4).** The Agency did not file Exceptions to Summary 4 so it became final and binding thirty-days after service. **5 U.S.C. § 7122(b)**. Because the Agency's Exceptions to Summary 3 were then pending, Summary 4 did not relate to that Summary. **Agency Exhibit 1(4)**. In Summary 4, the Arbitrator ordered the Parties to work together to come up with language to stem the chilling effect that Management's actions had on impacted BUEs. ***Id.*, at p. 2**. The Arbitrator also ruled that the start date of the damages period was January 18, 2002, stating:

> The Award is hereby clarified that the damages period begins on January 18, 2002, which was the first date in 2002 that a violation was shown to have existed. This ruling is based upon data provided by the Agency to the Union and shared with this Arbitrator at the hearing by the Parties.

Id.

The Arbitrator further clarified that the language "until the present" as set forth in the Remedial Award means that: "Bargaining Unit Employees (BUEs) shall continue to be considered class members until the award is fully implemented." ***Id.***

VII. Summary 5.

On February 27, 2015, the Arbitrator issued Summary 5. **Agency Exhibit 1(5).** The Agency did not file Exceptions to Summary 5 so it became final and binding thirty-days after service. **5 U.S.C. § 7122(b)**.

At the fifth Summary of Implementation Meeting, the Union raised concerns that the Agency was **still not** in compliance with the Arbitrator's award and had not yet completed the process of promoting and paying the 17 identified claimants. **Agency Exhibit 1(5), Summary 5, p. 2**. In Summary 5, the Arbitrator noted: "The Agency has repeatedly failed to comply with this Arbitrator's prior Order(s) to submit its final approach. In spite of these failures, HUD stated that it was not prepared to present any list of class members at this IM." ***Id.*** The Union again explained its methodology in light of the Arbitrator's prior rulings and the Arbitrator found:

> The Union's presentation continued by restating its approach to the class composition based upon this Arbitrator's Award and subsequent Summaries. As noted by this Arbitrator in Summary 1, "[T]he eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award." The Union's presentation revealed that the Job Series identified in the Exhibits as listed in the Award include 42 applicable Job Series, and at a minimum, the Union stated that the applicable class consists of at least all GS-12 employees who encumbered a position in any of those 42 Job Series at any time during the relevant damages period, so long as the requirements concerning performance and time-in-grade were met. **This presentation and interpretation comports with previous statements by this Arbitrator reiterating that the class is easily identifiable and includes any employee who encumbered any position in any of the Job Series identified in the Exhibits as noted in the Award and presented by the Union, at any time during the relevant damages period so long as that employee met the required time-in-grade and performance requirements.**

***Id,* p. 3 (emphasis added)**.

The Arbitrator's summary further noted the testimony of Mr. Brad Huther, CFO for the Agency stating:

> At the conclusion of the Union's presentation, the Parties and this Arbitrator informally questioned Mr. Brad Huther, Chief Financial Officer (CFO) for the

> Agency. Mr. Huther remarked that to date HUD has not recorded this matter as either a Contingent Liability or as an Obligation. He stated that this omission was in part due to the fact that the entire value of the case was not known. He also stated that to his knowledge no specific request to fund the judgment in this matter had been made. However, CFO Huther also stated that he was relatively new to the Agency at this juncture

***Id.*, p. 4**.

As such, Summary 5 confirmed the Union's methodology for identifying affected BUEs and noted that the Agency had still failed to identify its class list or methodology, and had not properly designated funding for the damages owed in this case.

VIII. Summary 6.

On May 16, 2015, the Arbitrator issued Summary 6. **Agency Exhibit 1(6).** The Agency filed Exceptions to Summary which were wholly dismissed or denied. **69 FLRA 213.** In Summary 6, the Arbitrator provided some of the background to this matter and reiterated some of her prior rulings in certain Summaries. **Agency Exhibit 1(6), Summary 6, pp. 4-7**. The Arbitrator further reiterated her prior adverse inference ruling:

> This Arbitrator has noted on a number of occasions that due to the Agency's historical failure to produce information and data to the Union- even after being ordered to do so and being provided ample opportunity to comply- the Agency's data systems may be used to expand the Class of employees subject to the Award and Remedy, but not to limit the Class. This is the result of the adverse inference that has been drawn in this case and was noted by, and upheld by, the FLRA.

***Id.*, p. 7**.

Summary 6 continues with the Agency's presentation of its methodology, the Union's comments thereto, and the Arbitrator's analysis and findings regarding the Agency methodology. ***Id.*, pp. 8-12**. The Arbitrator found that the Agency failed to provide a methodology that complied with her prior Award and Summaries:

> This Arbitrator finds that the Agency's methodology is not in compliance with the Award, prior Summaries, and this Arbitrator's instructions for a number of reasons including: its deliberately limited scope, use of invalid distinctions, utilization of information that contradicts the adverse inference previously found, and upheld by

the FLRA and demonstrated noncompliance with the Award and Summaries based upon the end result of application of the Agency's methodology in practice.

The Agency limited the Class by artificially distinguishing between Field and Headquarters positions, explaining that they have a different reporting structure and that even positions within the same Job Series and Job Title "are classified differently" and, in the Agency's view, were not "similar" as that term was used in the Award and FLRA Decisions upholding the Award. The Agency's use of alleged reporting or classification differences to distinguish between positions does not comport with the Award and prior Summaries. The Headquarters/Field distinction is not in compliance with this Arbitrator's Award and Summaries. This Arbitrator noted that the Headquarters/ Field distinction appeared very troubling as it was made clear during the IM that Field employees could apply and qualify for Headquarters positions, and vice versa. No credible evidence was presented by the Agency in support of its Headquarters/Field distinction. Just like employees in the same Job Series are fungible- i.e. they may be qualified for, may apply for and be selected for positions in the same Job Series regardless of reporting structure or location- employees in many Job Series are qualified for, may apply for and be selected for positions in other Job Series. This possibility was ignored by the Agency in its methodology as well.

Moreover, no explanation was provided by the Agency as to why it was using the Agency's data systems to limit, as opposed to expand, the Class of employees subject to the Remedy. As this Arbitrator has noted throughout the litigation of this matter, the Agency had ample opportunity to provide data that might supplement its position, yet repeatedly failed to produce that data, which resulted in the finding of an adverse inference against the Agency. The Agency is now attempting to use new data to limit the class. The adverse inference precludes the usage of data to limit the class, as explained to the Parties repeatedly. New data may be used to expand the class, but not to limit it.

***Id.*, pp. 13-14**.

With regards to the adverse inference, the Arbitrator noted:

The Agency's methodology is similarly flawed in that it relies heavily on its identification of "previously classified positions with FPL [Full Performance Level] of GS-13." As noted on many prior occasions, the Agency was previously ordered to provide data on this and many other areas of information, but failed to do so and, therefore, an adverse inference was drawn. The Agency cannot now use information it failed to provide, in order to limit the Class. These new distinctions and limitations show that the Agency's methodology is not in compliance with the Award and prior summaries.

The Agency's use of accession lists, as noted above, is not in compliance with the Award and prior summaries and may not be used to either limit the class membership or to reduce the damages period for class members. The Adverse

> Inference that has been drawn and upheld precludes the use of the accession lists for these purposes. The eligibility for a class member is driven by their being at the GS-12 grade for 12 months in any position in an eligible Job Series, so long as their performance was fully satisfactory.

***Id.*, p. 14.**

The Arbitrator's Summary also includes her concerns that the Agency (by its own admission) does not have adequate funding to pay the damages owed bargaining unit employees (based upon even its own methodology) yet, did not set aside any funding to pay the damages in this case, and never recorded this matter as a contingent liability or obligation. ***Id.*, p.16**.

IX. Summary 7.

On June 27, 2015, the Arbitrator issued Summary 7. **Agency Exhibit 1(7).** The Agency did not file exceptions to Summary 7, so it became final and binding thirty-days after service. **5 U.S.C. § 7122(b), 5 CFR § 2425.2(b)**.

In Summary 7, the Arbitrator reiterated what transpired at the Implementation Meeting and noted that pursuant to Summary 3, the Union had presented its list of PHRS and CIRS employees eligible for promotion pursuant to the Award to the Arbitrator and Agency, and that the Agency had been given an opportunity to respond to that list, but that it failed to do so. **Agency Exhibit 1(7)**.

The Arbitrator further noted that the Agency refused to discuss the status of remaining class members as it had indicated its intention to file Exceptions to Summary 6. ***Id.*** Other items concerning the: (1) chilling effect email; (2) status of certain payments for the 17 class members; (3) contact with OPM re: progress on annuity recalculations; and (4) the status of the Union's request for contact information for certain class members were also briefly discussed. ***Id.***

X. Summary 8.

On February 27, 2016, the Arbitrator issued Summary 8. **Agency Exhibit 1(8).** The Agency did not file exceptions to Summary 8, so it became final and binding thirty-days after service. **5 U.S.C. § 7122(b), 5 CFR § 2425.2(b)**. In Summary 8, the Arbitrator reiterated what transpired at the Implementation Meeting and noted that the Agency was present at the IM simply to preserve any appeal rights, but did not intend to participate in the IM. ***Id.*** At the IM, the Agency explained that it would not engage in piecemeal implementation and that it believed that the then pending exceptions (to Summary 6) divested the Arbitrator of her jurisdiction in this matter; an assertion with which the Arbitrator disagreed. ***Id.***

At the eighth IM, the Union also presented an update on its efforts to calculate and ascertain damages for impacted class members. *Id.* Those efforts were necessary due to the Agency's refusal to provide information which had been properly requested pursuant to 5 U.S.C. §7114(b). ***Id.*** The Arbitrator urged the Agency to provide the requested information so that the Union would not have to conduct the resource consuming job of gathering all of the information itself. ***Id.***

Many of the outstanding items discussed at IM 7, *supra,* were discussed at IM 8 as well (chilling effect email, OPM contact, class member contact information, TSP information, current bargaining unit list). ***Id.***

XI. Summary 9.

On March 26, 2016, the Arbitrator issued Summary 9. **Agency Exhibit 1(9).** The Agency did not file exceptions to Summary 9, so it became final and binding thirty-days after service. **5 U.S.C. § 7122(b), 5 CFR § 2425.2(b)**. In Summary 9, the Arbitrator reiterated what transpired at

IM 9. The Agency again indicated that it was attending only to preserve appeal rights (though they did not appeal the Summary). ***Id.***

The Union raised its concern that the Agency had failed to report this matter to Congress or the IG as a contingent liability or obligation in violation of applicable law, rule, and regulation; the Agency refused to discuss whether it had or had not done so. ***Id.*** The Agency further stated that it would not engage in discussing promotions due to the pendency of its Motion for Stay and for Reconsideration of the Authority's decision in **69 FLRA 213**. The Arbitrator noted that the Authority's regulations concerning reconsideration are clear and that the Authority's award is final even if a party requests reconsideration. *Id.* The Arbitrator further instructed the Agency that it was required to comply with Orders which were then final. ***Id.***

Finally, the Arbitrator noted that jurisdiction had been retained over all outstanding matters concerning implementation and nothing precluded her from conducting a more formal hearing with testimony as opposed to an implementation meeting. *Id.* She ruled that in the future she could conduct a formal hearing with testimony. ***Id.***

XII. Summary 10.

On June 30, 2016, the Arbitrator issued Summary 10. **Agency Exhibit 1(10).** The instant Exceptions are over Summary 10, which is the only Award or Summary which could be subject to a **timely** appeal; Exceptions to **all** other Awards or Summaries are untimely. **5 U.S.C. § 7122(b), 5 CFR § 2425.2(b)**.

Summary 10 does not contain any specific orders or requirements which could possibly implicate the government's waiver of sovereign immunity as it does not order any specific or general payments or promotions. **Agency Exhibit 1(10); *infra.*** The Arbitrator did note that in accordance with her continuing jurisdiction of this case, she would be conducting a formal

hearing with testimony for the purpose of overseeing implementation of the Award and Summaries. ***Id.*** She also alleviated Agency concerns, noting that in the event the Union would attempt to elicit improper testimony at the future hearing, the Agency would have a full opportunity to object at that time. ***Id.*** In this regard, nothing new was added or changed from the Arbitrator's rulings in Summary 9. *Supra.* In Summary 9, the Arbitrator held that a formal hearing would take place if necessary and in Summary 10 she simply reiterated that same ruling. ***Id.***

Summary 10 also contains an order for the Agency to respond to timely and proper requests for information submitted by the Union, and further ordered the Agency to send out the chilling effect email previously mentioned. **Agency Exhibit 1(10).** Those orders were not raised in, and are not subject to, the instant Exceptions.

Argument & Analysis

While difficult to discern the exact arguments set forth by the Agency, the Exceptions contain three preliminary matters which challenge prior rulings and Awards, and an argument section which expands on one of the three preliminary matters. It is important to dissect which arguments are attached to which of the Arbitrator's awards as **only Exceptions related to Summary 10 are timely**. *Infra.*

The Agency argues that Summary 10 should be set aside because: (1) the Arbitrator lacks continued jurisdiction over this matter; and (2) it impermissibly modifies the "award." **Exceptions, pp. 17-18**. It then argues that all of the awards, including Summaries 1-10 are contrary to law because sovereign immunity bars the remedy ordered by Arbitrator McKissick. **Exceptions, p. 17**. As discussed *infra,* the Exceptions contain no valid reason to disturb any of

the Arbitrator's or the Authority's findings and conclusions, and must be dismissed or denied in its entirety.

I. The Agency's arguments concerning sovereign immunity are untimely.

The Agency, while admitting that it failed to raise the issue of sovereign immunity before the Arbitrator, argues that it may now set forth such a defense because "claims relating to sovereign immunity can be raised at any time." **Exceptions, p. 16.** The Agency relies upon holdings from the Authority in numerous cases in support of this argument. ***Id.*** The Agency misinterprets the holdings in those cases in an attempt to now bring an untimely Exception.

Indeed, every single case relied upon by the Agency in support of its argument deals with the issue of *whether a sovereign immunity argument should be* ***barred*** due to the failure of the Agency to raise the issue before the Arbitrator. **Exceptions, pp.16-17;** *SSA ODAR v. AFGE Local 1164,* 65 FLRA 334 (2010); *Settles v. US. 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)*; DHS v. NTEU,* 68 FLRA 253 *citing* to U.S. *Dep't of the Interior, US. Park Police,* 67 FLRA at 347. The Authority has ruled:

> As set forth above, generally, under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator. 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. Therefore, even 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.

***DHS v. NTEU,* 68 FLRA 253 (internal citations omitted).**

Pursuant to Authority regulations, "[T]he time limit for filing an exception to an arbitration award is thirty (30) days after the date of service of the award. **This thirty (30)-day time limit may not be extended or waived**." **5 C.F.R. § 2425.2(b) (emphasis added).** While it

is true that the failure to raise the issue of sovereign immunity before an arbitrator will not bar such an argument before the Authority pursuant to §2425.4(c) and §2429.5; the Exception containing such an argument **must still be timely filed** pursuant to §2425.2(b). In this case, the only ruling from the Arbitrator for which a timely Exception could be filed is Summary 10. Summary 10 only deals with the possibility of an evidentiary hearing, a request for information filed by the Union pursuant to 5 U.S.C. §7114(b), and the transmission of an email to bargaining unit employees. **Agency Exhibit 1(10)**. Summary 10 **does not contain** any ruling or order requiring the Agency to make any monetary payments, such that it could implicate sovereign immunity. Other than Summary 10, all prior Summaries and Awards were issued more than thirty-days prior to the filing of the Agency's Exceptions; therefore, the Exception is untimely. **5 U.S.C. § 7122(b), 5 C.F.R. § 2425.2(b)**. Indeed, the Agency has previously filed Exceptions to the Remedial Award (January 10, 2012), Summary 3 (August 2, 2014), and Summary 6 (May 16, 2015) and did not raise the sovereign immunity defense in any of those prior Exceptions; note, the FLRA dismissed or denied, in their entirety, all of those prior Exceptions. **66 FLRA 867; 68 FLRA 631; 69 FLRA 213**.

The Authority's language in other cases not cited by the Agency interpreting this point further confirms the Union's argument. Addressing this exact issue, rather than use the "at any time" language identified by the Agency, the Authority stated: "a sovereign immunity objection may be raised without regard **to whether it was raised below**. *See Dep't of the Treasury, IRS v. FLRA,* 521 F.3d 1148, 1152 (9th Cir. 2008)." *U.S. DOJ v. AFGE Local 1741*, 63 FLRA 188 (emphasis added).

Interpreting the Authority's decisions in accordance with what is now argued by the Agency would serve to render §2425.2(b) as completely toothless. Indeed, such an argument

would permit a party to file Exceptions to an award years, or even decades, after it was issued – and even after the Authority has issued its decision on Exceptions filed over the same ruling – ostensibly because such an argument can be raised "at any time." Obviously such an argument is without merit.

The Agency's failure to raise the issue of sovereign immunity in a timely filed Exception to an Award or Summary which implicates sovereign immunity is fatal to all of the arguments in the instant Exceptions. The Authority need not address any of the other arguments as they are all premised on the argument that sovereign immunity has not been waived. The Exceptions, therefore, must be denied.

II. Assuming arguments concerning the waiver of sovereign immunity were timely, the Back Pay Act provides the necessary waiver of sovereign immunity.

Assuming *arguendo* that the Authority is inclined to address the Agency's untimely arguments concerning sovereign immunity, the Exceptions must still be denied because the Back Pay Act serves as a waiver of sovereign immunity in this matter.

The United States is immune from liability for money damages under the doctrine of sovereign immunity. *Lane v. Pena*, 518 U.S. 187, 192 (1996). A waiver of sovereign immunity will be found only if "unequivocally expressed in statutory text . . . and will not be implied[.]" *Id.*; *see also U.S. DHHS-FDA v. NTEU*, 60 FLRA 250 (2004). It is undisputed that the Back Pay Act serves as an unequivocal waiver of sovereign immunity. *U.S. DHHS v. NTEU*, 68 FLRA 239 (2015); *U.S. DOJ v. AFGE Local 1741*, 63 FLRA 188 (2009). To support an award of backpay under the BPA, an arbitrator must find that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *AFGE Local 1242 v. U.S. DOJ,* 66 FLRA 737 (2012). It is further undisputed that a violation of a collective

bargaining agreement constitutes an unjustified or unwarranted personnel action under the Back Pay Act. *AFGE Local 342 v. Department of Veterans Affairs,* 69 FLRA 278 (2016) (internal citations omitted).

In this case, Arbitrator McKissick has repeatedly issued multiple rulings which satisfy both prongs of the BPA – a finding that the Agency violated the Parties' collective bargaining agreement, and that those violations resulted in the withdrawal or reduction of the employees' pay – mainly the failure to promote to the GS-13 level:

> Accordingly, the Arbitrator finds that the Agency violated Article 4, Sections 4.01 and 4.06 as these Grievants were unfairly treated and were unjustly discriminated against, as delineated above. In addition, this Arbitrator finds that the Agency violated Article 9, Section 9.01. . . Lastly, the Arbitrator finds that the Agency also violated Article 13, Section 13.01, as it sought to hire external applicants, instead of promoting and facilitating the career development of internal employees.

Agency Exhibit 2.

The Arbitrator similarly ruled in the Remedial Award:

> [i]n light of this Arbitrator's prior findings and rulings, including that the Agency violated Article 4, Sections 4.01 and 4.06. These Grievants were unfairly treated and were unjustly discriminated against, that the Agency violated Article 9, Section 9.01. . . The Agency also violated Article 13, Section 13.01, as it sought to hire external applicants, instead of promoting and facilitating the career development of internal employees, and that but for these violations The Grievants would have been selected for currently existing career ladder positions. . .

Agency Exhibit 3.

The Arbitrator's remedy for the violations herein have previously been upheld by Authority decisions in this case and others. *Supra.* The Agency requests yet another proverbial bite at the apple, arguing that the promotions at issue were discretionary. **Exceptions, p. 24.** But there is nothing in the record which supports such an assertion. The Arbitrator found that, "but for" the Agency's violations, class member employees would have been selected for the positions, and

that those positions would have been promotions. ***Supra.*** Moreover, the Authority has ruled that arbitrators have the authority to compel non-competitive promotions pursuant to 5 CFR §335.103, when as here, the candidates were not given proper consideration in a competitive promotion action. *NTEU Chapter 3 v. Internal Revenue Service*, 60 FLRA 742 (2005).

The Agency also argues that specific findings of violative selections were not made for each of the class members, but that was because the Agency's own failure to provide requested information made such a finding impossible. As such, the adverse inference was issued; and upheld. **65 FLRA 433.** Moreover, it is the Agency that has itself to blame for many of the adverse rulings in this matter:

> As for the Agency's complaints about the Arbitrator's decisions against it, we note initially that the Agency's refusal to cooperate or attempt to comply with the Arbitrator's remedial award has prompted many of these adverse decisions. In that regard, the Arbitrator did not begin implementation meetings until a year and a half passed without the Agency fulfilling its remedial obligations to any relief-eligible employees.

65 FLRA 213.

The Agency now attempts to play Monday morning quarterback with data that it previously represented was destroyed or did not exist, and argue that some of the promotions ordered were improper. But the Agency had the opportunity to present that data, failed to do so, and cannot now attempt to re-litigate and collaterally attack Authority upheld Awards and Summaries.

The Agency's argument that the Award and Summaries are violative of the principal of sovereign immunity are really nothing more than a disagreement with the Arbitrator's Back Pay Act analysis. Indeed, the Exceptions explicitly state that the Agency "advances arguments **related to the scope** of the Agency's waiver of sovereign immunity," **Exceptions, p. 17;** Exceptions which needed to be raised within thirty days of receipt of the Remedial Award. The

Authority has ruled than when an Exception that an award fails to satisfy the Back Pay Act is not raised before the Arbitrator (as here), the claim is barred by § 2429.5.

> Here, the Agency's claim that the award is inconsistent with the principle of sovereign immunity is expressly an extension of, and depends on, its exception that the Arbitrator failed to satisfy the requirements of the Back Pay Act. See Exceptions at 6. That is, the Agency does not claim that the Back Pay Act does not apply to it. In fact, the Agency's argument that the award fails to satisfy the causal-connection requirement of the Back Pay Act assumes that the Act applies. *See id.*
>
> Consistent with the foregoing, the Agency's claim that the award fails to satisfy the causal-connection requirement of the Back Pay Act is barred by § 2429.5 of the Authority's Regulations. **Accordingly, as the Agency's sovereign immunity claim depends on its claim that the award fails to satisfy one of the requirements of the Back Pay Act,** the sovereign immunity claim is denied.

AFGE Local 1741, 63 FLRA 188.

As the Agency could have raised these challenges to the Back Pay Act analysis, but did not, they are barred by § 2429.5 of the Authority's Regulations. *See FEA v. U.S. DODEA,* 60 FLRA 254, 256 (2004) (section 2429.5 barred Authority consideration of agency's claim that portion of award was inconsistent with Back Pay Act); *NFFE Local 2142 v. U.S. Department of Army,* 58 FLRA 87, 91 (2002) (section 2429.5 barred consideration of agency exception that award of attorney fees was inconsistent with Back Pay Act).

III. The orders plainly and unambiguously rely upon the Back Pay Act.

The Agency argues that even if the BPA does serve as a proper waiver of sovereign immunity (a fact proven *supra)*, the Arbitrator did not mention the "Back Pay Act or 5 U.S.C. 5596" in either the Merits Award, the Remedial Award, or Summaries 1 and 2, and, therefore, the BPA cannot be relied upon. **Exceptions, p. 35.** This argument fails because: (A) the Summaries at issue plainly rely upon the Back Pay Act and (B) the Remedial Award and Summaries 1 and 2 implicitly rely upon the Back Pay Act.

A. The Summaries at issue specifically reference the Back Pay Act.

The Agency's argument that the BPA does not serve as a proper waiver of sovereign immunity because the Remedial Award does not mention the Act is without merit. Summary 3 explicitly states:

> As stated in prior Summaries, this Arbitrator has instructed the Parties to make substantial progress on identifying class members. The Parties were instructed that based upon this Arbitrator's award, as an example, all GS-1101 employees at the GS-12 level from 2002 to present were to be promoted, **per the Back Pay Act** and CBA, with backpay and interest, as of their earliest date of eligibility…

Agency Exhibit 1(3) (emphasis added).

Summary 3 explicitly includes the Arbitrator's reliance on the Back Pay Act, and Summary 3 is final by virtue of the Authority's ruling. **68 FLRA 631**; reconsideration denied **69 FLRA 60**.

Similarly, Summary 6 also explicitly includes the arbitrator's reliance on the Back Pay Act.

> The Agency and Union are furthermore directed to work together to continue to review the Agency's employee data to identify additional and those remaining Class members as defined above, to calculate all damages and emoluments **due under the Back Pay Act**, and to present the results to the Arbitrator within sixty (60) days. An extension may be granted if there is a joint request for one.

Agency Exhibit 1(6) (emphasis added).

Summary 6 has also been upheld by the Authority and is final. **69 FLRA 213**.

To the extent the Agency believes that Summary 3 and/or Summary 6 impermissibly modified the Remedial Award or Summary 1 or 2, those arguments would have had to have been raised within thirty days of receipt of the Summaries 3 and 6. Because those arguments were not raised, or were rejected by the Authority, the Agency's argument herein must fail. As such, this Exception must be denied.

B. The Remedial Award and Summaries 1 and 2 implicitly rely upon the Back Pay Act.

Even assuming that the Agency timely raised this argument, it still fails because the Remedial Award and Summary 1 and 2 all implicitly rely upon the Back Pay Act. The Remedial Award plainly states in part: "[T]he Agency shall process such promotions within (30) thirty days, and calculate and pay affected employees all back pay and interest due since 2002." **Agency Exhibit 3.** Summary 1 and 2 both contain similar language requiring affected employees to be retroactively promoted and paid back pay and interest. **Agency Exhibit 1(1) and (2).**

The Agency fails to cite to any case law, law, rule, or regulation which requires a BPA violation to specifically reference the statute at issue. Rather, the Agency cites to two cases which are wholly inapplicable to the facts herein. In the first case cited, the Authority ruled that the BPA does not permit recovery for personal commuting expenses, *AFGE Local 1164 v. Social Security Administration,* 65 FLRA 334 (2010), but contrary to the Agency's argument, there was no ruling requiring an Arbitrator to specifically cite to the BPA.

In the second case, the Authority set aside a ruling issuing straight time pay to bargaining unit employees who were stranded due to inclement weather. *AFGE Local 4046 v. Department of Air Force, 61 FLRA 366 (2005).* That ruling; however, is also inapplicable because both parties and the Arbitrator agreed that there was not a specific statutory authority to award pay. *Id.* In that regard the arbitrator noted:

> [g]uidance for determining the pay issue in this proceeding does not emanate from general Code of Federal Regulations "hours of work" provisions or from a Comptroller General decision dealing with a specific question of "standby time" defined in the regulations. Those regulations might have been relevant under a set of facts not requiring application of Article 20, Section B(1)(c) of the collective bargaining agreement where employees who were ready to travel home were "forced" to remain on site in violation of that contract provision prohibiting such force. Had Grievants not been "forced" to remain on base, the Regulations raised

> by the parties would have become more relevant to the overtime question in this case.

Id.

Indeed, the Authority further noted that "the Union does not assert that the award is supported by requisite statutory authorization." *Id.* Such is not the case herein, where the Union asserts that the BPA has been invoked and the BPA serves as the necessary waiver of sovereign immunity. As such, this Exception must be denied.

IV. The Award and Summaries are consistent with what is permitted under the Back Pay Act.

The Agency further argues that the aspects of the Award ordering the Agency to pay TSP and other annuity and retirement benefits pursuant to the Back Pay Act is prohibited by OPM regulation and thus are contrary to law. **Exceptions, p. 37.** The Agency relies upon 5 C.F.R. §550.803 in support of this argument. *Id.* This argument fails for several reasons including: (A) the Agency's argument is untimely; (B) the Agency misinterprets the regulation; and (C) the Agency's past payments include all categories of relief set forth by the Arbitrator.

A. The Agency's argument is untimely and barred by Section 2429.5.

As discussed *supra*, the Agency's argument that the Award and Summaries are violative of the principal of sovereign immunity are really nothing more than a disagreement with the Arbitrator's Back Pay Act analysis – such Exceptions needed to be raised within thirty days of receipt of the Awards. This fact remains true as it pertains to both the liability aspect of the Back Pay Act, as well as the remedy. The Agency's argument that portions of the remedy are violative of what is a permitted recovery pursuant to the Back Pay Act are untimely and were not raised before the Arbitrator. As the Agency could have raised, but did not raise, these objections to the Arbitrator, they are barred by § 2429.5 of the Authority's Regulations. *See FEA v. U.S. DODEA,* 60 FLRA 254, 256 (2004) (section 2429.5 barred Authority consideration of agency's

claim that portion of award was inconsistent with Back Pay Act); *NFFE Local 2142 v. U.S. Department of Army,* 58 FLRA 87, 91 (2002) (section 2429.5 barred consideration of agency exception that award of attorney fees was inconsistent with Back Pay Act).

B. The Agency misinterprets the regulation at issue.

The Agency relies on 5 C.F.R §550.803 in support of its argument that TSP payments and annuity retirement benefits are not included within the scope of relief provided for in the BPA, and that the Award is contrary to law. **Exceptions, p. 37.**

Section 550.803 defines pay, allowances, and 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. 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.

5 C.F.R. §550.803 (emphasis added).

An employee's entitlement to back pay under the Act must be directly linked to a loss in pay, allowances, or differentials that are covered by the definition in the Act. Once the employee is covered and is entitled to an award under the Act, the amounts or categories are to be determined by the fact finder. The definition is simply asserting that when the underlying cause of action pertains to a monetary benefit payable to a separated or retired employee based upon a separation from service, that benefit does not trigger the Back Pay Act. An example of this would be a former employee who alleges she did not receive all of the years of service for which she worked in her CSRS annuity payment. A review of the other Back Pay Act computation regulation proves this argument.

Section 550.805, provide the details on back pay computations and states in part:

§ 550.805 Back pay computations.

> **(a)** When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee -
>
> **(1)** The employee shall be deemed to have performed service for the agency during the period covered by the corrective action; and…
>
> **(2)** The agency shall compute for the period covered by the corrective action the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred….
>
> **(3)** Authorized deductions of the type that would have been made from the employee's pay (if paid when properly due) in accordance with the normal order of precedence for deductions from pay established by the agency, subject to any applicable law or regulation, including, but not limited to, the following types of deductions, as applicable…
> **(i)** Mandatory employee retirement contributions toward a defined benefit plan, such as the Civil Service Retirement System or the defined benefit component of the Federal Employees Retirement System…
>
> **(h)** Agencies must correct errors that affect an employee's Thrift Savings Plan account consistent with regulations prescribed by the Federal Retirement Thrift Investment Board. (See parts 1605 and 1606 of this title.)

5 C.F.R. §550.805.

The regulation referenced by the Agency does not establish that the Award and Summaries are contrary to law because it does not order retroactive payments to current and former employees of monies that are prohibited under the BPA. While the Agency references the definitional language in Section 550.803, the computation language in Section 550.805 explicitly includes TSP adjustments in the back pay awards to which employees are entitled. Subparagraph (h) requires the Agency to correct errors affecting an employee's TSP account in accordance with the FRTIB. ***Id.***

A brief review of 5 C.F.R §1605.13 plainly demonstrates that Thrift Savings Plan contributions do apply to Back Pay awards. Section 1605.13 states in part:

> **(a)** ***Participant not employed.*** The following rules apply to participants who receive a back pay award or other retroactive pay adjustment for a period during

> which the participant was separated from Government service or was not appointed to a position that is covered by FERS, CSRS, or an equivalent system under which TSP participation is authorized. . .
>
> **(b)** ***Participant employed.*** The following rules apply to participants who receive a back pay award or other retroactive pay adjustment for a period during which the participant was employed in a position that is covered by FERS, CSRS, or an equivalent system under which TSP participation is authorized…

5 C.F.R. §1605.13.

The regulation continues with specificity, explaining how to calculate TSP contributions and growth for employees who receive an award of Back Pay or other retroactive pay adjustment. *Id.*

Interestingly, the regulation which the Agency alleges demonstrates a lack of entitlement to TSP contribution and retirement benefits, also includes a reference to lump sum annual leave payments. 5 C.F.R. §550.803. Yet, despite the clarity of the Arbitrator's order requiring the payment of such, and the fact that Agency has in fact made those payments to class members, *infra,* the Agency ignores that part of the regulation and does not allege that such an order is violative of the BPA. Indeed, it is clear that such an order is not contrary to law. The U.S. Court of Federal Claims has similarly ordered the differential for the lump sum annual leave payouts, with interest. *Agee v. United States*, No. 04-1575C (May 23, 2007).

Just as the Order to pay the lump sum annual leave payout is not contrary to law, the Orders pertaining to TSP contributions and retirement benefits are similarly not contrary to law. Moreover, the Arbitrator has not ordered the Agency to make a payment to class members for retirement benefits pursuant to the Back Pay Act; she has simply ordered the Agency to calculate the contributions (of both employee and agency) to FERS Employees' TSP accounts, and has ordered the Agency to contact OPM to work with them to provide recalculated annuity information to retired employees. As the Order and Summaries do not contain any requirement to make an unlawful payment, this Exception must be denied.

C. The Agency's past practice demonstrates that the ordered categories of relief are legally proper and available.

The Agency's argument further fails because its past practice has been to pay all of the ordered relief. A past practice is a legally recognized concept in labor and employment law that is binding on the parties if it involves a working condition, has been exercised consistently over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *AFGE Local 3627 v. Social Security Administration*, 60 FLRA 549, 554 (2005). "Essential factors in finding that a past practice exists are that the practice must be known to management, responsible management must knowingly acquiesce in the practice, and the practice must continue for a significant period of time." *Id*. Although courts and the Authority have not defined "working conditions," the term has been given a broad interpretation that encapsulates a wide range of subjects that is effectively synonymous with "conditions of employment." *See, e.g., Fort Stewart*, 495 U.S. at 646.

In this case, the Agency has a past practice of providing all of the ordered remedy. Specifically, the Agency, pursuant to repeated orders from the Arbitrator, provided the ordered relief to an initial 17 class members. That relief included: (1) a retroactive promotion to the GS-13 level; (2) back pay and interest calculated in accordance with the Back Pay Act for the difference between the GS-12 salary and GS-13 salary; (3) Thrift Savings Plan contributions and growth for those of the 17 whom were under the FERS system; (4) the difference between the value of the GS-12 and GS-13 performance award with interest calculated pursuant to the Back Pay Act; (5) for those employees who retired, the difference between the value of the annual leave payout for a GS-12 and GS-13 with interest calculated pursuant to the Back Pay Act; (6) and for those employees who retired, a recalculated annuity with a lump sum payment for the past differential. *See* e.g., **Exhibit C.**

The Agency cannot now claim that such relief is contrary to law when it has already provided the relief to others and has established a past practice that such relief is proper. As such, this Exception must be denied.

V. The Agency failed to raise its argument that the Award violates the Appropriations Clause of the Constitution before the Arbitrator.

The Agency argues that because the Back Pay Act cannot be used to pay the monetary relief at issue in this case (an argument disproven *supra)*, the payment of the damages in this case amounts to a violation of the Appropriation Clause of the Constitution, Art. I, § 9, Cl. 7. **Exceptions, p. 40.**

It is undisputed that the Agency did not raise this argument before the Arbitrator. The Agency, however, argues that the principal of sovereign immunity is implicated with the Appropriations Clause argument, and can therefore be raised before the Authority at this juncture. This argument is identical to an argument which was rejected by the Authority in *U.S. DHS v. NTEU*, 68 FLRA 829 (2015).

In that case, the Agency argued that compliance with the Customs Officer Pay Reform Act ("COPRA") implicates the doctrine that the federal government is immune from money damages unless a federal statute waives that immunity, so even though the argument was not raised before the Arbitrator, §§ 2425.4(c) and 2429.5 could not bar COPRA-compliance arguments. *Id.* The Authority rejected that claim and stated:

> But, as the Authority stated in *DHS*, sovereign immunity is waived in this case because the Second Remedial Award is consistent with the BPA. And as the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently explained, in cases where the sovereign-immunity waiver in the BPA applies, other "[r]outine statutory and regulatory questions" – such as the second remedial award's compliance with COPRA in this case – "are not transformed into constitutional or jurisdictional issues merely because" a backpay award relies upon a sovereign-immunity waiver. Although the Agency's sovereign-immunity

> argument here invokes the Appropriations Clause of the U.S. Constitution, the D.C. Circuit indicated that its holding regarding the non-jurisdictional nature of "[r]outine statutory and regulatory questions" applies even when a sovereign-immunity argument rests on the Appropriations Clause. Therefore, the Agency's reliance on the doctrine of sovereign immunity does not demonstrate that the Authority erred when finding that §§ 2425.4(c) and 2429.5 barred the Agency's COPRA arguments.

U.S. DHS, 68 FLRA 829.

Just as in *U.S. DHS*, and the Authority's decision in the underlying case *U.S. DHS v. NTEU*, 68 FLRA 253 (2015), the Authority ruled that §§ 2425.4(c) and 2429.5 barred the Agency's COPRA (and therefore, Appropriations Clause) arguments; so too here, because the Agency failed to raise this argument before the Arbitrator, it is barred. As such, this Exception must be denied.

VI. The Authority has already ruled that Arbitrator McKissick has not demonstrated bias and the Agency fails to present any new evidence in support of this argument.

The Agency argues that the Arbitrator's alleged disregard of the law shows bias. **Exceptions, p. 41**. This Exception must be denied because: (1) the Agency failed to raise any claims of bias in the proceedings surrounding Summary 10; and (2) the Agency failed to establish that Arbitrator McKissick was at all biased in this matter. Indeed, for the most part, the Agency simply rehashes the same arguments set forth in prior bias arguments – arguments which the Authority has already rejected. **69 FLRA 213**. Rather, the record plainly reflects that the Arbitrator has been fair and partial throughout the 13-year history of this case and if anything, has bent over backwards to accommodate an Agency that has done nothing but delay these proceedings.

A. Applicable Legal Standard.

To establish that an award is deficient because of an arbitrator's bias, a party must show the award was procured through improper means, there was partiality or corruption on the part of

the arbitrator, or the arbitrator engaged in misconduct that prejudiced the rights of the party. Though not alleged, a party's claim that all of the arbitrator's findings were against the party does not, standing alone, satisfy this standard. *DVA Medical Center, Detroit*, 61 FLRA 371 (2005); *VA Connecticut Healthcare System*, 58 FLRA 501 (2003). Further, to the extent the Agency even allege it, an arbitrator's intemperate language directed toward one party does not alone establish bias. *Army Air Force Exchange Service*, 51 FLRA 1709 (FLRA 1996).

An arbitrator is not biased simply because the arbitrator made findings favoring one party over another or interpreting the agreement in a manner that differs from a party's interpretation. *DVA Medical Center,* 61 FLRA 88. Finally, it is well established that an arbitrator has considerable latitude in conducting a hearing, and the fact that an arbitrator conducts a hearing in a manner that a party finds objectionable does not, by itself, provide a basis for finding an award deficient. *See AFGE, Local 22,* 51 FLRA 1496, 1497-98 (1996).

B. The Agency failed to raise any allegations of bias in the proceedings surrounding Summary 10.

As discussed *supra,* the only award or summary which could be timely appealed at this juncture is Summary 10. The Agency has not alleged that it raised concerns of bias during the proceedings surrounding Summary 10, and as such, any claims concerning bias must fail.

It is well established that absent extraordinary circumstances, the Authority will not entertain a claim of bias if such claim could have been, but was not, raised before the arbitrator. *Puget Sound Naval Shipyard*, 59 FLRA 583 (2004). While the Agency has previously raised questions about the Arbitrator's partiality, those questions resolved when the Authority denied the Agency's claims of bias in its Decision, dated February 25, 2016. **69 FLRA 213**. Specifically, the Authority stated: "we note initially that the Agency's refusal to cooperate or attempt to comply with the Arbitrator's remedial award has prompted many of these adverse

decisions. In that regard, the Arbitrator did not begin implementation meetings until a year and a half passed without the Agency fulfilling its remedial obligations to any relief-eligible employees." ***Id.*** Because claims of bias have already been resolved, and the Agency has not alleged that it re-raised claims of bias in the proceedings surrounding Summary 10, the Agency's claims are untimely now and must fail. The Agency failed to demonstrate that any extraordinary circumstances exist such that its bias argument should be considered by the Authority. As such, this Exception must be denied.

C. The Agency has not established that Arbitrator McKissick's actions are biased.

The Authority has already determined that none of Arbitrator McKissick's awards demonstrate bias. *Supra.* The Agency, however, for the most part, rehashes the same arguments already rejected by the Authority and adds that Arbitrator McKissick must be biased because portions of her awards allegedly violate the Back Pay Act and compliance with the awards essentially orders Agency officials to take a course of action that is in direct violation of the Anti-Deficiency Act. **Exceptions, pp. 41-42**.

The Agency does not present any case law in support of its argument that if the Authority were to grant its Exceptions and reverse any portion of an Award or Summary that such a finding would be a catalyst to determine that Arbitrator McKissick was biased in this matter. *Id.* Indeed, if issuing an award that was contrary to law was all that was necessary to find bias, then almost every Authority reversal of an arbitrator decision would also include a bias finding. Such a conclusion does not comport with the law. ***DVA Medical Center,* 61 FLRA 88**.

Moreover, the Agency's Exception that the Arbitrator is biased because compliance of the award would require Agency officials to violate the Anti-Deficient Act is similarly flawed. As noted in the Union's prior opposition to Agency Exceptions, the Agency's complaint that it does not have sufficient funding to pay the damages in this case is akin to the child who murders

his parents and then asks for mercy from the court because he is an orphan. **Kozinski, Alex; Eugene Volokh. "Lawsuit Shmawsuit." 103 Yale Law Journal 463 (1993)**. The Agency has no one to blame but itself for its alleged inability to pay the damages in this case, and yet has the chutzpa to file an Exception concerning its own irresponsible behavior.

Regarding the Agency's request that the case be remanded to another Arbitrator, the Authority has held that this extraordinary move will only be taken when a party demonstrates that the current Arbitrator can no longer effectuate compliance with her Award. The Agency has not demonstrated that in this case, and indeed cannot. The Authority has previously rejected this argument, **69 FLRA 213**, and should do so once again.

VII. The Agency has not established that Arbitrator McKissick's continued jurisdiction is improper.

Under the heading of "Preliminary Matters," the Agency argues that the Arbitrator lacks continuing jurisdiction to implement or effectuate her unlawful award and orders. **Exceptions, p. 17**. The Agency does not cite to any case law in support of this argument, rather, it argues that its Exceptions demonstrate that there are no remaining outstanding matters. *Id.* Such an argument is without merit. As discussed throughout the Union's opposition, the Arbitrator's Awards and Summaries are lawful and proper, and the Agency's Exceptions are untimely or without merit. As such, even assuming *arguendo* that portions of prior rulings are set-aside or re-visited, there are still many other issues that require resolution, e.g., attorney fees, costs, and expenses and back pay and interest calculations. Therefore, the Arbitrator's continued jurisdiction is proper and this Exception must be denied.

VIII. Summary 10 does not modify any of the prior awards or summaries and should not be set-aside.

The Agency argues that Summary 10 contains an impermissible modification because "the original Merit and Remedial Award made no mention of a formal hearing on the record with testimony from Agency officials…[T]hus, 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 a formal evidentiary hearing will be conducted with testimony from Agency officials." **Exceptions, p. 18.** The Agency's argument is without merit because Summary 10 contains no modification to the Remedial Award and even if it did, this Exception would have had to have been raised within thirty-days of receipt of Summary 9, in which the Arbitrator first raised the matter of holding more formal implementation hearings.

A. Applicable Legal Standard.

Without specifically citing to it, the Agency relies on the doctrine of *functus officio* in support of its argument that Summary 10 contains an impermissible modification. Under the doctrine of *functus officio*, once an arbitrator resolves the matter submitted to arbitration, the arbitrator is generally without further authority. *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 64 FLRA 823, 825 (2010). The doctrine of *functus officio* prevents arbitrators from reconsidering a final award. *See AFGE, Local 2172*, 57 FLRA 625, 627 (2001) (citing *Devine v. White*, 697 F.2d 421, 433 (D.C. Cir. 1983)). Consistent with this principle, the Authority has found that, unless an arbitrator has retained jurisdiction or received permission from the parties, the arbitrator exceeds his or her authority when reopening and reconsidering an original award that has become final and binding. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 302 (2011) (citing *Overseas Fed'n of Teachers AFT, AFL-CIO*, 32 FLRA 410, 415 (1988)). In this case, it is undisputed that the

Arbitrator has retained jurisdiction over implementation and that the Parties agreed to participate and attend implementation meetings without objection. Note, the retained jurisdiction is limited to implementation of the Remedial Award, and the Arbitrator has not reopened and reconsidered any aspects of the original award.

Furthermore, even if the Arbitrator had not specifically retained jurisdiction, or if the Parties had not agreed to participate in implementation meetings, the exception to the doctrine of *functus officio*, such as when an arbitrator merely clarifies an award, would be applicable. *AFGE, Local 400*, 50 FLRA 525, 526 (1995). The Authority has held that an arbitrator may clarify an ambiguous award even without a joint request from the parties, but the clarification must conform to the arbitrator's original award. *United States Dep't of the Army Corps of Eng 'rs, Northwestern Div. and Portland Dist.,* 60 FLRA 595, 596 (2005). Indeed, a supplemental award providing any necessary clarifications would still be permitted. Moreover, where an arbitrator expressly retains jurisdiction in the original award for purposes of resolving any dispute regarding interpretation or implementation, the arbitrator does not act improperly by issuing an award resolving any dispute over implementation of the original award. *See United States Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.,* 56 FLRA 249, 253 (2000). That is precisely what the Arbitrator did here.

B. The Agency failed to timely raise this Exception.

The Agency's Exception that Summary 10 impermissibly modifies the Remedial Award is untimely. In Summary 9, the Arbitrator stated that she would "conduct a formal hearing on the record, with testimony." **Exceptions, p. 18; Agency Exhibit 1(9)**. The Agency's failure to file Exceptions on this basis after receipt of Summary 9 is fatal to their claimed argument herein. **5 U.S.C. § 7122(b), 5 C.F.R. § 2425.2(b)**. Contrary to the assertion set forth by the Agency,

nothing contained in Summary 10 as it pertains to an intent to conduct a formal hearing with testimony is a new requirement which differs from Summary 9. The only difference is that Summary 9 contained an "if necessary" qualifier which was removed from Summary 10 when the Agency continued its failure to comply. The Agency does not even present an argument as to why the "if necessary" qualifier is relevant to its argument – it simply concludes that it is. But the fact remains that the Arbitrator ordered a formal hearing with testimony in Summary 9 and the Agency did not timely file Exceptions to that Summary. As such, this Exception must be denied.

C. Conducting a hearing over issues concerning implementation does not constitute a modification to a prior Award.

Assuming *arguendo* that the failure to timely file Exceptions after its receipt of Summary 9 does not serve to bar the instant Exceptions, the Exception should also be denied because an intention to conduct a formal hearing with testimony over implementation issues is not a modification of the Remedial Award or any of the other Summaries, and is within the purview of what is permitted under the Arbitrator's continued jurisdiction. The Arbitrator has plainly and unambiguously retained jurisdiction over this matter, and has not placed any self-imposed limits on that continued jurisdiction. *Cf. U.S. DOJ v. AFGE Local 506*, 66 FLRA 300 (2011). The retention of jurisdiction by arbitrators for the purposes of clarification and interpretation of an award and for overseeing the implementation of remedies is not unusual and has routinely been approved by the Authority. *Department of Defense v. Overseas Education Association*, 31 FLRA 80 (1988) (finding that the arbitrator properly retained jurisdiction to assist parties if they could not agree on procedures for implementing the award).

Moreover, it is well established that arbitrators have considerable latitude in the conduct of the hearing, and the fact that an arbitrator conducts a hearing in a manner that a party finds

objectionable does not, in and of itself, provide a basis for finding an award deficient. *AFGE Local 3911 v. Environmental Protection Agency,* 68 FLRA 564 (2015). The Agency fails to establish how the Arbitrator's ***intent*** to conduct a formal hearing with testimony over issues which are wholly within the purview of her continued jurisdiction would be improper. Indeed, such a hearing has not even taken place. As such, this Exception must be denied.

Conclusion

The Agency's Exceptions must be dismissed and/or denied. Each of the Agency's Exceptions fail to establish that any of the Arbitrator's Awards or Summaries were deficient in any way. Rather, the Agency simply disagrees with the Arbitrator's findings and attempts to collaterally and untimely attack the Remedial Award and prior Summaries. The Agency's Exceptions, therefore, must be dismissed and/or denied.

Respectfully Submitted,

_____

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Counsel for the Union

EXHIBITS:

Exhibit A – Order on Union's Motion to Compel

Exhibit B – June 5, 2013 letter from Union

Exhibit C – Documentation pertaining to Agency's Past Practice of providing TSP contributions and retirement recalculations as part of the remedy.

EXHIBIT

A

IN THE MATTER OF ARBITRATION BETWEEN:

U.S. Department of HUD,	
Agency,	**Fair and Equitable Grievance**
and	
	FMCS No: 03-07743
Council of HUD, Local 222,	
Union.	**Arbitrator: Dr. Andrée Y. McKissick**

ARBITRATOR'S RESPONSE TO THE UNION'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND COMPLIANCE WITH THE ORDER OF THE ARBITRATOR AND FOR SANCTIONS

BACKGROUND

Based upon the Union's request, dated October 19, 2002, and pursuant to 5 U.S.C.§7112, the Agency is required to provide data in the regular course of business. This request for information was also congruent with Articles 3, 4, 20 and 22 of the Agreement. Still further, this Arbitrator ordered the Agency to provide the data requested to allow the complete identification of all potential Grievants on June 23, 2002. Notwithstanding that order, the record reflects that the Agency refused to fully comply with the breadth of that request.

It is significant to note that, in the interim, the Agency has not contested the Union's rights to the requested information, nor has the Agency established a countervailing anti-disclosure interest in this matter. In addition, the Agency also has not claimed FOIA/Privacy Act protection for these documents.

The specifics of that request for information are as follows:

REQUEST FOR INFORMATION
(Dated: October 9, 2002)

The Union requested information in a Request for Information dated October 9, 2002, as follows:

Information Requested:

A. Please furnish the personnel action of each person selected to fill the attached vacancy announcements. Listed by announcement number on the attached spreadsheet. You may delete those items, which may be subject to the Privacy Act, such as social security numbers, date of birth etc.

B. Please furnish the previous personnel action prior to selection, prior to the current position.

C. Please furnish the successful applications' resume. SF 171 or OF-612 application.

D. Please identify and furnish any vacancy announcements in which a waiver of qualifications was given for the other person selected for the vacancy.

E. Please furnish the vacancy announcements that were withdrawn or canceled prior to the selecting of any applicant, from the spreadsheet attached.

This list was fleshed out *reiterated and cited and incorporated into the Grievance,* as follows:

1) **On or about August 5, 2002 Program Analyst, GS-0343-09 (vacancy number GS-MSH-2002-0101z and GR-DEU-2002-0043z) with maximum grade potential to GS-13.**
   a. **similarly situated persons (GS-0343 Program Analysts) working for HUD whose grade potential is limited to GS-12.**

2) **On or about August 7, 2002 – 22 Contract Industrial Relations Specialists, GS-0246-09/11/12 (vacancy number PO-MSH-2002-0153z and PO-DEU-2002-0098z) with maximum grade potential to GS-13.**
   a. **similarly situated persons (GS-0246 Contract Industrial Relations Specialists) working for HUD whose grade potential is limited to GS-12.**

3) **On or about August 6, 8, 12, 2002, the agency advertised Engineers, GS-0801-09/13 (vacancy numbers 06-MSR-2002-0106Z, 06-MSR-2002-0107, 06-MSR-2002-0112Z, 06-MSR-2002-0113Z, 06-DEU-2002-00832Z, 06-DEU-2002-0084, 06-DEU-2002-0089Z, and 06-DEU-2002-0090Z) with maximum grade potential to GS-13.**
   a. **similarly situated persons (GS-0801 Engineers) working for HUD whose grade potential is limited to GS-12.**

4) **On or about August 8, 2002, the agency advertised Financial Analysts, GS-1160-09/13 (vacancy number 04-MSA-2002-0048Z and 04-DEU-2002-0036Z) with maximum grade potential to GS-13.**
   a. **similarly situated persons (GS-1160 Financial Analysts) working for HUD whose grade potential is limited to GS-12.**

5) On or about August 9, 2002, the agency advertised Construction Analysts, GS-0828-11/13 (vacancy number RE-MSH-2002-0247Z and RE-DEU-2002-0124Z) with maximum grade potential to GS-13.
   a. similarly situated persons (GS-0828 Construction Analysts) working for HUD whose grade potential is limited to GS-12.

6) On or about August 16, 2002, the agency advertised Public Housing Revitalization Specialists, GS-1101-09/13 (vacancy number 04-MSA-2002-0051Z and 04-DEU-2002-0039Z) with maximum grade potential to GS-13.
   a. similarly situated persons (GS-1101 Public Housing Revitalization Specialists) working for HUD whose grade potential is limited to GS-12.

REQUEST FOR INFORMATION CONTAINED IN THE GRIEVANCE
(Dated: November 13, 2002)

The Union requested information in the Grievance, dated November 13, 2002, as follows (numbering continued for ease of reference):

7) Additional instances like those listed above. Union is requesting copies of certain vacancy announcements in order to make an assessment. These announcements include, but are not limited to:

   a. 02-MSD-2002-0066Z and 02-DEU-2002-0013Z
   b. 152700
   c. 152698
   d. 152696
   e. PHJT-2-152800S0
   f. PHJT-2-152806S0
   g. 152702
   h. 03-MSA-2002-0032Z

8) Additionally, to fully assess the matter, we are requesting a list of employees as follows:

   a. For all Program Analysts GS-0343: name, duty station, maximum promotion potential;
   b. For all Contract Industrial Relations Specialists GS-0246: name, duty station, maximum promotion potential;
   c. For all Engineers GS-0801: name, duty station, maximum promotion potential;
   d. For all Financial Analysts GS 1160: name, duty station, maximum promotion potential;
   e. For all Construction Analysts GS-0828: name, duty station, maximum promotion potential;
   f. For all Public Housing Revitalization Specialists GS-1101: name, duty station, maximum promotion potential;

9) Finally, we need to know if persons were hired under each of the vacancy announcements listed in the fact section above. For each person hired, please advise of his/her name, duty station, grade at which s/he was hired, and the vacancy announcement under which s/he was hired.

FINDINGS AND SANCTIONS

In light of the foregoing, the Agency is again **ordered** to fully comply with this information request immediately, but no later than **June 30, 2008**. If this order is not fully complied with by the above date, this Arbitrator is compelled to draw an adverse inference that the unreleased information must be adverse to the Agency.

It is well settled that adverse inferences can be made upon a party's failure to comply with discovery orders thus sanctions can rightfully ensue. Moreover, such an omission to produce documents is also viewed as a presumption and functions as an admission that those requested documents lack merit. (See Insurance Corporation of Ireland, LTD, et al., Bauxites de Guinee, 456 US 694, 102 S.Ct. 2099, December 1, 1982; Also See Hammond Packing Co. v. Arkansas, 212 US 322, 351, 29 S.Ct. 370, 380, 53, L.Ed. 530 (1909). Still further, the Court has held that such sanctions are not against due process of the recalcitrant party.

Moreover, this Arbitrator views this requested information to be relevant and necessary for the Union to assert its case (See Internal Revenue Service, Austin District Office, Austin, TX, Federal Labor Relations Authority, DA-CA 30106; 51 FLRA No. 95, 51 FLRA 1166, April 19, 1996). Accordingly, if this Order is not timely complied with, this Arbitrator shall bar any evidence on the part of the Agency on these issues in the forthcoming hearing on the merits of this grievance.

Date: May 29, 2008

ARBITRATOR

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EXHIBIT

B

Michael J. Snider, Esq.
Keith Kauffman, Esq. ⊥ *
James L. Fuchs, Esq. ⊥ ✕ ◎ ●

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● admitted in Massachusetts
◎ admitted in Illinois
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June 5, 2013

SENT VIA E-MAIL
Dr. Andree McKissick
Labor Arbitrator
2808 Navarre Drive
Chevy Chase, Maryland 20815
Email: mckiss3343@aol.com

Re: ***AFGE Council 222 v. U.S. Department of Housing & Urban Development***
Fair & Equitable Grievance

Dear Arbitrator McKissick:

The purpose of this letter is to memorialize the conference call that took place on Thursday, May 30, 2013 regarding the above referenced matter and update you on the Parties' progress since then.

On May 30, 2013, a conference call was held to discuss implementation of Remedy No. 1 of your Decision and Award dated January 10, 2012. In addition to the Arbitrator, present for the conference were: Mr. Jacob Y. Statman and Mr. Michael J. Snider for the Union and Ms. Tresa A. Rice and Mr. James E. Fruge for the Agency.

Prior to and during the call, the Union took issue with the manner in which the Agency is implementing Remedy No. 1. First, the Union noted that the Arbitrator's order required the Agency to implement the ordered remedy within 30 days. The Union further took issue with the fact that, after representing to the Arbitrator and after testifying on the record that it could not locate many of the vacancy announcements at issue, the Agency now claims that it is planning on hand-searching through an old database to attempt to locate old, possibly relevant vacancy announcements. The Union brought up the Arbitrator's Order drawing an Adverse Inference and establishing a broad class of employees entitled to Relief under Remedy No. 1, and argued that any search for vacancy announcements and employees who applied for, or were eligible to apply for those vacancies, should be added to the class identifiable through the Adverse Inference.

During the call, the Arbitrator affirmed her Order finding an Adverse Inference against the Agency and that the class, as can be established through that Order and Adverse Inference would not be affected by the Agency's alleged ability to now locate vacancy announcements. The Arbitrator further stated that, while the Agency could use the records to find additional class members or to identify class members, it could not use the search results to limit the class.

The Arbitrator also inquired of the Agency why it had not yet processed promotions and backpay awards for employees not in dispute, and ordered that those employees be promoted and

paid immediately. The Arbitrator further instructed the Parties to meet and discuss the implementation process and, if a joint process and timeframe cannot be reached, to submit competing proposals for the Arbitrator to review.

Subsequent to the conference call the Agency submitted its findings from Phase I. The Agency found that there are no eligible class members from its Phase I review. In other words, a year has passed since the Award and over four months since the Agency began its "review," and not one employee has been promoted and/or paid backpay.

The Parties have since agreed to discuss the results via telephone on June 13, 2013, and meet in-person on June 19, 2013. The Union will continue to keep the Arbitrator apprised of the Parties' progress.

Thank you.

Respectfully Submitted,

SNIDER & ASSOCIATES, LLC

Jacob Y. Statman, Esq

Cc: Ms. Tresa Rice
Ms. Carolyn Federoff
Mr. William Biggs