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 14th day of October, 2016.

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

ONE ORIGINAL & FOUR COPIES SENT VIA CERTIFIED MAIL

Agency
David M. Ganz, Esq
U.S. Dept. of Housing and Urban Development
451 7th Street, SW, Room 2124
Washington, D.C. 20410

SENT VIA CERTIFIED MAIL

Arbitrator
Dr. Andree McKissick
Arbitrator
2808 Navarre Drive
Chevy Chase, MD 20815-3802

SENT VIA FIRST CLASS MAIL

Jacob Y. Statman, Esq.

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.

UNION'S RESPONSE IN OPPOSITION TO AGENCY'S RESPONSE TO ORDER TO SHOW CAUSE

AFGE Council of Locals 222 (the "Union"), by and through its undersigned counsel, and pursuant to the Authority's Order to Show Cause dated September 15, 2016, hereby timely files its Response in Opposition to the Agency's Response to the Order to Show Cause (the "Agency's Response"). The Agency's Response fails to explain why the Authority should disturb any of the Arbitrator's or Authority's prior rulings, and as such, the Agency's Exceptions filed on July 29, 2016, must be dismissed or denied. In support thereof, the Union states as follows:

Argument & Analysis

The Agency's Response fails to provide any valid reason for the Authority to disturb the Remedial Award or any of the subsequent Summaries. The Agency argues that the facts in *Scobey* are distinct from the facts herein; however, such an argument is not relevant as the underlying legal analysis is directly on point. Moreover, the Agency's argument that a sovereign immunity defense can be raised at any time continues to ignore that fact that the underlying

Exception must still be timely, a fact not present herein. Furthermore, Summary 10 is not a modification of Summary 9, and the Agency's failure to raise issues concerning the Arbitrator's retention of jurisdiction in its Exceptions renders its arguments in that regard untimely. Finally, the Agency fails to explain why the Authority should disregard its prior findings that Arbitrator McKissick is not biased in this matter and fails to present any evidence to the contrary. In sum, the Agency's Response contains no valid reason to disturb any of the Arbitrator's or the Authority's prior findings and conclusions. The Exceptions must be dismissed or denied.

I. *Scobey* and subsequent Authority rulings are applicable to the instant matter.

The Agency argues that the D.C. Circuit's holding in *U.S. Department of Homeland Security v. FLRA,* 784 F.3d 821 (D.C. Cir. 2015) (*"Scobey")* is not applicable to the instant matter because that case was "routine," while the instant matter is not. **Agency's Response, p. 3.** The fact remains, however, that the underlying analysis of the Court's decision, as well as subsequent decisions from the Authority interpreting *Scobey,* plainly demonstrate that the Agency's argument concerning sovereign immunity is nothing more than a disagreement with the Arbitrator and Authority's analysis on the Back Pay Act, camouflaged as a challenge to alleged sovereign immunity violations, and as such, is untimely.

While *Scobey* deals with a jurisdictional challenge to judicial review of an arbitration decision; an issue not relevant herein, the holding is still clear. *Scobey,* 784 F.3d 821. That is, a simple disagreement with a Back Pay Act analysis does not create a constitutional, or sovereign immunity issue. *Id.*

The *Scobey* court made clear that the exceptions to the judicial review limitation present in Section 7123 of the FSLMR are narrow. *Id.* The court noted that the judicial review limitation contained in Section 7123 might not apply to constitutional challenges, but also made clear that a

constitutional challenge does not exist when it is clear that the statute at issue (in both *Scobey* and the instant matter the statute at issue is 5 U.S.C § 5596, the Back Pay Act), is within the Authority's purview. The Back Pay Act "undisputedly was designed to deal directly with employee working conditions and the case presents no constitutional question, as that statute waives sovereign immunity, *see* 5 U.S.C. § 5596." *Scobey,* 784 F.3d 823 (internal citations omitted). The Court ruled that routine statutory and regulatory questions are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity noting:

> Otherwise, Congress's creation of a mostly unreviewable system of arbitration would be eviscerated, as every Authority decision involving an arbitral award arguably in excess of what the Back Pay Act authorizes would be reviewable. To make matters worse, as Customs concedes, Oral Arg. Rec. at 1:09-2:05, this evisceration would be distinctly asymmetrical: when the Authority awards back pay, the government could seek judicial review, but when the Authority denies back pay, the employee would have no recourse because only decisions adverse to the government could implicate sovereign immunity. As we said of a similar argument in *Treasury,* "[t]hat seems to us to be a labored, even silly, construction of the statute." *Treasury,* 43 F.3d at 688.

Scobey, 784 F.3d 823-24.

The FLRA has applied *Scobey* to bar arguments concerning sovereign immunity when it is clear that a backpay award relies upon the Back Pay Act and the arguments were not otherwise raised before an arbitrator. *U.S. DHS,* 68 FLRA 829. In *DHS*, 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, Sections 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 *Scobey, U.S. DHS*, and the Authority's decision in the underlying case *U.S. DHS v. NTEU*, 68 FLRA 253 (2015), where the Court and Authority ruled that Sections 2425.4(c) and 2429.5 barred the Agency's arguments concerning a waiver of sovereign immunity; so too here, because the Agency failed to raise these arguments before the Arbitrator and because Arbitrator McKissick's rulings plainly rely upon the Back Pay Act, the arguments are barred and the Exception must be denied.

II. Exceptions to an Arbitrator's decision must still be timely filed even if those Exceptions raise a sovereign immunity argument.

In its Response, the Agency reiterates its argument that an Exception which raises a defense of sovereign immunity can be raised "at any time," but fails to present any support for its assertion such an argument need not otherwise be made in a timely filed pleading. **Agency's Response, p. 5.** Indeed, such an argument is without merit as the facts in each of the cases cited plainly demonstrate that while the issue of sovereign immunity need not be raised before an arbitrator (or trial court), the Exception (or appeal) must still be timely filed.

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 Sections 2425.4(c) and 2429.5; the Exception containing such an argument **must still be timely filed** pursuant to Section 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)**. The Agency argues that its Exceptions were filed within 30 days of Summary 10, but fails to explain how Summary 10 implicates the doctrine of sovereign immunity. **Agency's Response, p. 7.** Indeed, Summary 10 cannot possibly be construed as implicating the doctrine of sovereign immunity because it does not mandate any payments whatsoever.

The Agency's Response reiterates the same arguments contained in its Exceptions and also contains the same rhetoric in an attempt to bolster its argument by presenting information about the scope of the class and the amount of damages the Agency owes to impacted class members. Regardless, however, of whether the damages in this case are $1 or $1 trillion, the law remains clear. The Exceptions are untimely and must be dismissed.

III. The Administrative Procedures Act is not applicable to the instant matter.

The Agency's Response alleges that a finding by the Authority that the Agency's sovereign immunity and other arguments are not timely is arbitrary and capricious and a violation of the Administrative Procedures Act, 5 U.S.C. § 706. **Agency's Response, p. 10.** The argument fails because Section 706 relates to judicial review and is not relevant to the instant matter before the FLRA. Indeed, Chapter 7 of Title 5 of the United States Code is titled "Judicial Review;" and 5 U.S.C. § 701(a)(1) states unequivocally, "[T]his chapter applies, according to the provisions thereof, except to the extent that - (1) statutes preclude judicial review." 5 U.S.C. §701(a)(1). It is undisputed that there is no judicial review of an Arbitrator's opinion that does not deal with a ULP, 5 U.S.C. § 7123(a)(1), and it is further undisputed that the instant forum is not one of judicial review. The Agency's arguments alleging a violation of the APA must, therefore, be rejected. [1]

IV. Summary 10 does not require the Agency to provide any Back Pay, nor does it increase Back Pay already awarded to include overtime payments.

The Agency alleges that Summary 10 contains an order which requires the Agency to make overtime payments to class members and, therefore, improperly modified prior Award and/or Summaries. **Agency's Response, p. 11**. Such a claim must be denied. The entirety of Summary 10 as it relates to overtime payments is as follows:

> On March 7, 2016, the Union properly filed a Request for Information pursuant to 5 U.S.C. §7114(b) requesting information about payments made for overtime to class members pursuant to the FLSA. This information request was made so that the Union could properly ascertain damages in this case and this Arbitrator finds that it was a proper request. The Agency acknowledged receipt of the Request and

[1] It is clear that the APA is not applicable herein. Notwithstanding the foregoing, the Authority's decisions have not been arbitrary or capricious. Rather, it is the Agency that failed to timely and properly raise issues that could have been raised in prior Exceptions, and is now trying for the proverbial second, third, and fourth bites at the apple.

stated that they would look into a formal response. This Arbitrator ordered the Agency to provide an update to the Union no later than June 1, 2016.

Agency Exceptions, Exhibit 1(10).

The Arbitrator did not order overtime payments, increase Back Pay, or even issue any order relating to payments in Summary 10. ***Id.*** In fact, the Arbitrator did not even order the Agency to produce the Union's requested data in Summary 10. ***Id.*** Rather, Summary 10 simply states that the Union's request for information was proper pursuant to 5 U.S.C. §7114(b) and orders the Agency to provide an update as to the status of the data request no later than June 1, 2016.

It is outlandish for the Agency to allege that Summary 10 contains modifications which permit timely review of its sovereign immunity claims when there is zero evidence to support such an argument. The Exception must be denied.

V. The Arbitrator properly retained jurisdiction over implementation in this matter.

In its Response, the Agency, for the first time, alleges that the Arbitrator did not retain jurisdiction over implementation of the 2012 Remedial Award, and as such, all subsequent Awards and Summaries were improper. **Agency's Response, p. 15.** As an initial matter, this argument fails because it was not raised in the Agency's Exceptions, or in any of its prior filings with either the Arbitrator or Authority, and is barred. **5 U.S.C. § 7122(b), 5 CFR § 2425.2(b), 5 CFR § 2429.5.** Indeed, it was not until Implementation Meeting No. 8 that the Agency stated it was only participating to preserve its "appeal rights." **Agency Exhibit 1(8), p. 1.**

In support of its argument that the Arbitrator lacked jurisdiction to convene Implementation Meetings, the Agency references a January 4, 2014 email exchange in which it purportedly objected to such meetings. **Agency Exhibit 8.** But the Agency mischaracterizes the

January 4, 2014 email because the email contains no such objection or refusal to participate. *Id.* Rather, it is a request for clarification on the definition of the class of grievants. ***Id.*** In response to that request, the Arbitrator noted that in her opinion there is no need for any additional clarification, and that the Award had already been upheld by the FLRA. ***Id.*** The Agency's Exhibit failed to include its response to Arbitrator McKissick's email which simply stated: "I have received your message below, and am forwarding your response to HUD's senior management." **Exhibit A.** No additional communication was had on the issue and the Agency subsequently participated in the first Implementation Meeting without objection. **Agency Exhibit 1(1).** The Agency's argument is without merit.

Moreover, in Summary 1 the Arbitrator specifically noted that: "[T]his Arbitrator ***continues*** to retain jurisdiction over this matter for all matters relating to implementation as well as an award of attorney fees, costs and expenses." ***Id.*, p. 4 (emphasis added).** The Arbitrator retained jurisdiction over implementation from the very start of the case. In fact, in the underlying merits award the Arbitrator specifically noted her continued jurisdiction over implementation as well – "In addition, this Arbitrator shall maintain jurisdiction of this matter for implementation of this Award." **Agency Exceptions, Exhibit 2, p. 16**. The Agency did not object to Arbitrator McKissick's continued jurisdiction for implementation purposes as is demonstrated by the June 5, 2013 letter from the Union as well as the Agency's detailed letter dated July 8, 2013, in which it updated the Union and Arbitrator on its implementation efforts. **Exhibit B, C.**

Because the Agency did not raise the argument concerning the Arbitrator's continued jurisdiction in its Exceptions, or prior filings, it is barred. Moreover, the Arbitrator retained

jurisdiction for implementation purposes and the Agency actively participated in the implementation process. The Agency's argument, therefore, must be rejected.

VI. The Agency fails to establish why Summary 10 demonstrates Arbitrator Bias.

The Agency's Response reiterates the allegation that Arbitrator McKissick somehow demonstrated bias in this matter. **Agency's Response, p. 17.** However, other than a conclusory statement that she did, the Agency failed to establish how Arbitrator McKissick demonstrated any bias with the issuance of Summary 10. ***Id.*** The Agency's conclusion is most telling; and essentially alleges that if an Arbitrator's decision is contrary to law then that decision must demonstrate bias. The Agency fails to provide any legal support for the conclusion. ***Id.*** Indeed, Authority precedent is clear that 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.**

The Agency's failure to present any actual evidence of bias is fatal to its alleged claim of Arbitrator bias and must be rejected.

Conclusion

The Agency's Response to the Authority's Order to Show Cause does not contain any legally sufficient reason to disturb any of the Arbitrator or Authority's prior Decisions, Awards, and Summaries. The Agency's Exceptions must be dismissed and/or denied.

Respectfully Submitted,

Michael J. Snider, Esq.
Jacob Y. Statman, Esq.
Snider & Associates, LLC
600 Reisterstown Rd., 7th Floor
Baltimore, Maryland 21208
Phone: (410) 653-9060
Fax: (410) 653-9061

Counsel for the Union

Exhibits:

Exhibit A – January 2014 email traffic between the Parties and Arbitrator

Exhibit B – June 5, 2013 letter from Union Counsel

Exhibit C – July 8, 2014 letter from Agency Counsel

EXHIBIT

A

Jacob Statman

From: Rice, Tresa A <Tresa.A.Rice@hud.gov>
Sent: Monday, January 13, 2014 1:14 PM
To: 'mckiss3343@aol.com'
Cc: M Snider; Myung, Javes; Mercer-Hollie, Jacqueline; Fruge, James E; Jason Weisbrot; Federoff, Carolyn; Biggs, William L; Jacob Statman
Subject: RE: Fair and Equitable: Phase III Results & Documentation

Dear Arbitrator McKissick,

I have received your message below, and am forwarding your response to HUD's senior management.

Sincerely,
Tresa A. Rice
Senior Attorney Advisor, Personnel Law Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, Room 3170
Washington, DC 20410
Office: (202) 402-2222
Fax: (202) 401-7400

From: mckiss3343@aol.com [mailto:mckiss3343@aol.com]
Sent: Saturday, January 04, 2014 9:32 AM
To: Rice, Tresa A; 'Jacob Statman'
Cc: 'M Snider'; Myung, Javes; Mercer-Hollie, Jacqueline; Fruge, James E; 'Jason Weisbrot'; Federoff, Carolyn; Biggs, William L
Subject: Re: Fair and Equitable: Phase III Results & Documentation

Hello Counselors:

Notwithstanding my repeated refusals to issue a written clarification, the Agency persists in requesting one. As explained on multiple occasions, the Final Award , which was affirmed by FLRA, shall be the sole written determination of this grievance.

The purpose of an Implementation Meeting is to clarify any ambiguities and aid the resolution of this remedy. This is the appropriate conduit for resolution of your concerns. Thus, the Agency's refusal to participate with this option shall function as a direct refusal to comply with all prior Orders for a remedy to this grievance.

Not only shall a written clarification not be submitted, but it shall not function as a condition precedent to the option of an Implementation Meeting. In light of the foregoing, the Agency is compelled to attend.

Dr. McKissick

Sent from my Verizon Wireless BlackBerry

From: "Rice, Tresa A" <Tresa.A.Rice@hud.gov>
Date: Thu, 2 Jan 2014 13:08:44 -0500
To: 'mckiss3343@aol.com'<mckiss3343@aol.com>; 'Jacob Statman'<jstatman@sniderlaw.com>
Cc: 'M Snider'<m@sniderlaw.com>; Myung, Javes<javes.myung@hud.gov>; Mercer-Hollie, Jacqueline<Jacqueline.Mercer-Hollie@hud.gov>; Fruge, James E<James.E.Fruge@hud.gov>; 'Jason Weisbrot'<Jason@sniderlaw.com>; Federoff, Carolyn<Carolyn.Federoff@hud.gov>; Biggs, William L<William.L.Biggs@hud.gov>
Subject: RE: Fair and Equitable: Phase III Results & Documentation

Dear Arbitrator McKissick,

Good afternoon. The request for the Agency's participation in an Implementation Meeting was forwarded to senior management. In response, I am sending this email to request that, prior to participation in a meeting on implementation, that the Agency receive a response to the November 13, 2013, letter transmitted by Associate General Counsel Peter Constantine to you, asking that you reconsider the Agency's request for a written clarification on the definition of the class of grievants outlined in your Opinion and Award.

A copy of the November 13, 2013, letter is also attached to this email.

Sincerely,
Tresa A. Rice
Senior Attorney Advisor, Personnel Law Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, Room 3170
Washington, DC 20410
Office: (202) 402-2222
Fax: (202) 401-7400

From: mckiss3343@aol.com [mailto:mckiss3343@aol.com]
Sent: Tuesday, December 10, 2013 4:52 PM
To: Jacob Statman
Cc: M Snider; Myung, Javes; Mercer-Hollie, Jacqueline; Fruge, James E; Jason Weisbrot; Federoff, Carolyn; Biggs, William L; Rice, Tresa A
Subject: Re: Fair and Equitable: Phase III Results & Documentation

Hello Counselors:

Has the Agency concurred with the Union on February 4th for the Implementation Meeting?

Please advise me as soon as possible. Thank you.

Dr. McKissick
Sent from my Verizon Wireless BlackBerry

From: Jacob Statman <jstatman@sniderlaw.com>
Date: Tue, 10 Dec 2013 20:21:42 +0000

To: <mckiss3343@aol.com><mckiss3343@aol.com>
Cc: M Snider<m@sniderlaw.com>; Myung, Javes<javes.myung@hud.gov>; Mercer-Hollie, Jacqueline<Jacqueline.Mercer-Hollie@hud.gov>; Fruge, James E<James.E.Fruge@hud.gov>; Jason Weisbrot<Jason@sniderlaw.com>; Federoff, Carolyn<Carolyn.Federoff@hud.gov>; Biggs, William L<William.L.Biggs@hud.gov>; Rice, Tresa A<tresa.a.rice@hud.gov>
Subject: Re: Fair and Equitable: Phase III Results & Documentation

Thank you. The Union would like to reserve February 4 for the meeting.

Jacob Y. Statman, Esq.
Snider & Associates, LLC
600 Reisterstown Road; 7th Floor
Baltimore, Maryland 21208
Phone: (410) 653-9060
Fax: (410) 653-9061
Email: jstatman@sniderlaw.com

On Dec 9, 2013, at 1:03 PM, "mckiss3343@aol.com" <mckiss3343@aol.com> wrote:

> Hello All:
>
> I am available January 31st, not January 4th.
> Please correct this error. Thanks.
>
> Dr. McKissick
> Sent from my Verizon Wireless BlackBerry
>
> ---
>
> **From:** M Snider <m@sniderlaw.com>
> **Date:** Mon, 9 Dec 2013 17:14:23 +0000
> **To:** Dr. Andree McKissick<McKiss3343@aol.com>
> **Cc:** Myung, Javes<javes.myung@hud.gov>; Mercer-Hollie, Jacqueline<Jacqueline.Mercer-Hollie@hud.gov>; Fruge, James E<James.E.Fruge@hud.gov>; Jason Weisbrot<Jason@sniderlaw.com>; Federoff, Carolyn<Carolyn.Federoff@hud.gov>; Biggs, William L<William.L.Biggs@hud.gov>; Rice, Tresa A<tresa.a.rice@hud.gov>; Jacob Statman<jstatman@sniderlaw.com>
> **Subject:** Re: Fair and Equitable: Phase III Results & Documentation
>
> Arbitrator McKissick:
>
> This just reinforces our point, and we repeat our request for an in-person meeting as soon as practical.
>
> M Snider, Esq.
> Snider and Associates, LLC
> 600 Reisterstown Road
> 7th Floor
> Baltimore, MD 21208
> 410-653-9060 phone
> 410-653-9061 fax
> M@sniderlaw.com email
> Sniderlaw.com website

From: Rice, Tresa A
Sent: Monday, December 9, 2013 11:01 AM
To: Jacob Statman
Cc: Myung, Javes; Mercer-Hollie, Jacqueline; Fruge, James E; M Snider; Jason Weisbrot; Federoff, Carolyn; Biggs, William L; 'mckiss3343@aol.com'
Subject: Fair and Equitable: Phase III Results & Documentation

Mr. Statman,

Attached for you review are the results and corresponding documentation from the Phase III review. Based upon the review, no eligible claimants have been identified for Remedy No. 1 of the Opinion and Award.

Hard copies are also being sent to the parties.

Sincerely,
Tresa Rice
Senior Attorney-Advisor
Personnel Law Division, Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, SW, Room 3142
Washington, DC 20410
Office: (202) 402-2222
Fax: (202) 401-7400

EXHIBIT

B

Michael J. Snider, Esq.
Keith Kauffman, Esq. ⊥ ⁎
James L. Fuchs, Esq. ⊥ ×◎ ⊛

LAW OFFICES OF SNIDER & ASSOCIATES, LLC
JUSTICE IN THE WORKPLACE®

Jason I. Weisbrot, Esq. ⊥
Allan E. Feldman, Esq. × ⊥
Jacob Y. Statman, Esq. ⊥

⊥ admitted in the District of Columbia
× admitted in Florida
× admitted in New York
⊛ admitted in Massachusetts
◎ admitted in Illinois
⁎ admitted in West Virginia

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

EXHIBIT

C

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

OFFICE OF GENERAL COUNSEL

July 8, 2013

Transmitted via E-Mail

Dr. Andree McKissick
2808 Navarre Drive
Chevy Chase, MD 20815-3802
Email: mckiss3343@aol.com

Re: June 2013 Summary on Fair and Equitable Arbitration Remedy No. 1 Implementation

Dear Dr. McKissick,

Pursuant to the May 30, 2013, Order, the Agency hereby submits its June 2013 monthly summary on progress with implementation of Remedy No. 1 from the January 10, 2012, Opinion and Award.

On June 19, 2013, the Agency and Union counsel held a teleconference to discuss the Agency's implementation efforts. During the teleconference, Union counsel requested to know the status of the Agency's application of Remedy No. 1 to the following employees who previously testified at the Fair and Equitable Arbitration Hearings:

- Marcia Randolph Brown,
- Victoria Reese Brown,
- Melanie Hertel,
- Bonnie Lovorn,
- Julie McGuire, and
- Lynna Schonert.

Status of employee-witnesses

During the June 19, 2013, teleconference, the Agency advised Union counsel that it appears that the following employee-witnesses may be eligible for Remedy No. 1:

- Victoria Reese Brown, Office of Public and Indian Housing (PIH),
- Bonnie Lovorn (PIH),
- Julie McGuire (PIH), and
- Lynna Schonert (PIH).

The Agency further advised Union counsel that it has begun the process of applying Remedy No. 1 to the employees identified above.

In regards to the remaining employee-witnesses:

- Melanie Hertel, Office of Departmental Operations and Coordination (ODOC) – The Agency advised that the official duty station for Ms. Hertel is Seattle, WA; further, a review of announcements posted revealed that no vacancy announcements were advertised in Seattle, WA. Based upon the Agency's methodology, the Agency advised that Ms. Hertel did not appear to be eligible for Remedy No. 1.

- Marcia Randolph Brown (ODOC) – The Agency further advised that a vacancy announcement was not posted for a position at a grade higher than the career ladder of the position encumbered by Ms. Brown. The Agency further advised that because it did not appear that a vacancy announcement was posted pursuant to the Opinion and Award, that Ms. Brown did not appear to be eligible for Remedy No. 1.

Class of Grievants

During the June 19, 2013, teleconference, the Union objected to the class of grievants identified by the Agency. Instead, the Union contends that employees entitled to Remedy No. 1 are bargaining unit employees occupying classified positions in the AFGE bargaining unit. The Union asserts that their justification is based upon the adverse inference on the Agency's failure to provide documents during the arbitration hearings.

While the Agency countered, and advised the Union of its position that employees entitled to Remedy No. 1 have already been defined by the Arbitrator, per the identification of the class of grievants in the January 10, 2012, Opinion and Award. Specifically, on page 4 of the Order, Arbitrator McKissick states the following, in relevant part:

> The Class of Grievants subject to the Remedy addressed herein is defined as follows:
>
> All Bargaining unit employees in a position in a career ladder (including at the journeyman level), where that career ladder lead to a lower journeyman 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.

Request for Clarification

At this juncture, the parties have not able to agree on the group of employees entitled to Remedy No. 1. The parties have submitted a joint request to Dr. McKissick for clarification on the class of grievants. A teleconference is scheduled with Dr. McKissick on July 8, 2013, to discuss clarification on the class of grievants entitled to Remedy No. 1 of the January 10, 2012, Opinion and Award.

Sincerely,

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cc: Union Counsel