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

National Council of HUD Locals 222, AFGE, AFL-CIO Union,	)	
v.	)	Case No.: O-AR-4586
U.S. Department of Housing and Urban Development, Agency.	)	March 26, 2018

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National Council of HUD Locals 222, AFGE, AFL-CIO, Union,	)	Case No.: O-AR-4586
	)	Issue: Fair & Equitable Compliance
v.	)	
U.S. Department of Housing & Urban Development, Agency.	)	Date: March 26, 2018

AGENCY'S MOTION FOR LEAVE TO FILE A SUPPLEMENT TO AGENCY'S JULY 29, 2016, EXCEPTIONS TO SUMMARY ORDER 10

INTRODUCTION

The U.S. Department of Housing and Urban Development (HUD or Agency) respectfully moves the Federal Labor Relations Authority's (FLRA or Authority), pursuant to § 2429.26 of the Authority's Regulations for leave to file a supplement to its July 29, 2016 Exceptions to the January 10, 2012 Award on Remand and Implementation Meeting Summary 10 dated June 30, 2016 issued by Arbitrator Andree McKissick, which are currently pending before the FLRA. The proposed Supplement will show how Arbitrator McKissick's order to retroactively promote 3,777 employees at a cost of more than $720 million[1] excessively interferes with § 7106 management rights, and is thus contrary to law, and should be vacated under the new standard established by the FLRA's recent ruling in *U.S. Federal Bureau of*

[1] *See* Ex. 1, Summary Order 6, pp. 12 and 15; *see also* Ex. 2, Union's Estimate of Damages.

Prisons v. AFGE, Local 817, 70 FLRA 398 (February 22, 2018) (hereinafter *Bureau of Prisons*). As will be established below, allowing the Agency to supplement its July 29, 2016 Exceptions is consistent with FLRA precedent and regulations, § 7122, Federal Rule of Civil Procedure 15, and the Supreme Court's ruling in *Bradley v. Richmond Sch. Bd.,* 416 U.S. 696, 715 (1974) (noting that "even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect.") In the event that a supplement is allowed, the Union will not be prejudiced because it can file an opposition. Accordingly, the Agency seeks the Authority's leave to file a supplement to its July 29, 2016 Exceptions, which should be granted for the reasons set forth below.

BACKGROUND

A full procedural history of the case is provided in the attached Exceptions to Summary Order 10, pages 3-19. *See* attached Ex. 3. Of importance, the Agency's currently pending Exceptions set forth several arguments as to why Arbitrator McKissick's January 2012 Remedial Order and subsequent Implementation Meeting Summary Order 10, which collectively order the Agency to retroactively promote 3,777 employees at a cost of more than $700 million dollars based on an adverse inference drawn during an arbitration hearing in 2008, when the Agency's human resources department could not produce vacancy announcement data from the early 2000s is contrary to law. *See* Ex. 3, Exceptions to Summary Order 10, pages 3-19. The original hearing consisted of six employees[2] testifying that they were treated unfairly in applying for GS-13 positions, and the original grievance filed by the Union on November 13, 2002, only listed six job

[2] *See* Ex.3, Agency's July 29, 2016 Exceptions, p. 28.

series and 18 vacancy announcements.[3] The current order to promote 3,777 employees includes virtually all GS-12 positions in 42 job series across the Department. *See* Ex. 1, Summary Order 6.

ARGUMENT

A. The Agency has met the standard to obtain leave to file a supplement to its July 29, 2016 Exceptions under 5 C.F.R. § 2429.26.

Pursuant to 5 C.F.R. § 2429.26(a) the Authority may in its discretion grant leave to file other documents as they deem appropriate. The filing party must demonstrate why its submission should be considered. *NTEU, Chapter 98,* 60 FLRA 448, 448 n.2 (2004). Here, stated simply, the Agency's reason for filing a supplement to its current Exceptions is that it believes that under the FLRA's new precedent set out in *Bureau of Prisons,* which overruled the "abrogation" standard that was in effect when the Agency filed its July 29, 2016 Exceptions, and replaced it with a new framework that asks whether the remedy ordered by the arbitrator is reasonably related to the contract violation, and, if so, whether the arbitrator's interpretation of the provision excessively interferes with a § 7106 management right,[4] the Authority should find that Arbitrator McKissick's award and subsequent 'Implementation" Orders are contrary to law.

There is unanimous agreement among Federal Courts that under Fed. Rule Civ. Pro. 15, "Amended and Supplemental Pleadings," that justice and fairness allows a party to a lawsuit to amend their filings when changes in law give rise to new claims and defenses that did not exist at the time of filing. *See Pittston Co. v. United States*, 199 F3d 694 (4th Cir. Va. Dec. 27, 1999) (district court should have allowed amendment of complaint to add claim which was based on recent decision of Supreme Court and thus could not have been brought earlier); *Teamsters Pension Trust Fund v. CBS Records, Div. of CBS, Inc.*, 103 FRD 83 (E.D. Pa. Aug. 24, 1984); (Leave to

[3] *See* Ex. 4, Arbitrator McKissick's 2008 Merits Award.
[4] *Bureau of Prisons* at 405-406.

amend pleadings should be granted liberally when law governing point that is subject matter of proposed amendment is revised during pendency of litigation); *Lakeside v. Freightliner Corp.*, 612 F. Supp. 10 (1984) (It is reasonable to allow plaintiff to amend her complaint to conform with most recent Oregon Supreme Court ruling); *Clarke v. UFI, Inc.* 98 F. Supp. 2d 320 (E.D.N.Y. May 16, 2000) ("Defendants' motion to amend and supplement their answer is granted in workplace harassment action, where arbitral and judicial opinions of direct relevance to allegations advanced in complaint have issued since they answered in first instance, because amendment is in interests of justice, does not operate in any way unduly to prejudice plaintiffs, is not sought in bad faith, and falls directly within scope of FRCP 15(d)"); *see also Nordyke v. King*, 644 F3d 776 (9th Cir. Nov. 28, 2011).

Here, the Authority announced a new legal standard in *Bureau of Prisons* after the Agency filed its currently pending Exceptions to Summary Order 10. The Authority overruled the "abrogation" standard set out in previous FLRA decisions and will use this new standard to review whether an arbitrator's remedy is reasonably related to the contract violation and whether it excessively interferes with a § 7106 management right. That the new standard set out in *Bureau of Prisons* has relevance to the Agency's defense is clear based on the Arbitrator's absurd orders, and like the parties in the aforementioned Federal court cases, the interests of justice and fairness dictate that the Agency should be allowed leave to supplement its current Exceptions. Because the Union can be allowed to file an opposition, it is in no way prejudiced. Consequently, the Agency moves that pursuant to 5 C.F.R. § 2429.26(a), the Authority grants its motion for leave to file a supplement to its Exceptions to Summary Order 10.

In *Bradley v. Richmond Sch. Bd.,* the Supreme Court held that "an appellate court must apply the law in effect at the time it renders its decision." 416 U.S. 696, 714 (1974) *citing* to

Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 281 (1969). As applied to the current motion for leave, the holding in these Supreme Court cases strongly weighs in favor of allowing the Agency to supplement its Exceptions so that the FLRA can consider whether Arbitrator McKissick's orders are contrary to law. If the FLRA denied the Agency's motion for leave to file a supplement to its current Exceptions, the probable result would be that the FLRA may not be able to consider its new holding in *Bureau of Prisons*, when deciding the Agency's current Exceptions.

An examination of Arbitrator McKissick's orders shows the injustice that would result by implementing her orders. As explained in the Agency's current Exceptions and its ULP Position Statement[5], Arbitrator McKissick ordered over $700 million dollars in damages and the retroactive promotion of 3,777 employees from GS-12 to GS-13 positions (the Agency currently has less than 9,000 total employees and for Fiscal Year 2016 its entire Salary and Expense Appropriation was $1.1 billion[6]) based on an adverse inference drawn during an arbitration hearing in 2008. This interpretation of the parties' collective bargaining agreement requires the Department to retroactively place 73% of its current GS-12 employees into GS-13 positions at a cost of over $700 million. Aside from the obvious fact that the remedy ordered by Arbitrator McKissick is not reasonably and proportionally related to the contract violation she found, these promotions excessively interfere with numerous § 7106(a) management rights including, but not limited to, the Department's ability to assign work and make selections, determine its organization, and to select and hire employees and assign them work. Furthermore, given its $1.1 billion salary and expense appropriation and inability to access the Judgement Fund[7], paying the $700 million in backpay

[5] *See* attached Exhibit 5, ULP Position Statement.
[6] *See* Ex. 6, HUD's FTE and S&E Budget for FY16.
[7] DOJ has advised Agency counsel numerous times the Judgment Fund is not available to pay awards of backpay. *See* https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/questions.htm ("the Judgment Fund may not be used to pay an award if another source of funds is legally available to make that payment.")

would require the Agency to furlough employees and shutdown operations, which clearly excessively interferes with its ability to determine mission and budget- if this outcome is not excessive interference with § 7106 management rights, it is hard to imagine what would be.

Denying the Agency the ability to advance arguments based on the new legal standard set out in *Bureau of Prisons* would be a manifest injustice and violate the Supreme Court's holding that:

> "where the change was constitutional, statutory, or judicial... it must apply 'with equal force where the change is made by an administrative agency acting pursuant to legislative authorization' even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." *See Bradley v. Richmond Sch. Bd.,* 416 U.S. 696, 712-716 (1974).

As the D.C. Circuit Court of Appeals stated "[t]he judgment of a trial court that is appealed from cannot establish the law of the case. That must be established by this court in the decision upon the appeal. A lawful change in a judicial rule not amounting to a rule of property or its equivalent by a court of last resort becomes effective at once, and thereafter, upon subsequent appeals, operates alike upon acts coming within it whether occurring before or after its announcement." *Ruppert v. Ruppert,* 134 F.2d 497, 500 (1942).

Given the above Federal court precedent regarding amending filings when a change of law occurs and the Supreme Court's holding in *Bradley,* supra., which found that even a change of administrative agency's rule must apply to pending cases, it is clear that the Agency should be allowed to supplement its currently pending exceptions to include a claim that Arbitrator McKissick's Summary Order 10 and the previous orders and awards that it modified, are contrary to law because they are not a reasonable and proportional remedy for the contract provisions found to be violated. Even if her remedy is reasonable and proportional, it clearly excessively interferes with § 7106 management rights as set out in *Federal Bureau of Prisons.* Thus, the Agency should be

allowed to supplement its current Exceptions and raise a defense of excessive interference with § 7106 management rights under the new legal standard set out in *Bureau of Prisons.*

As noted in *Bureau of Prisons*, "It is quite telling that, since *FDIC* and *EPA*, no agency has been able to successfully navigate the procedural and substantive roadblocks that *FDIC/EPA* and their unfortunate progeny have imposed on the ability to successfully challenge and establish that an arbitrator's award impermissibly interferes with a § 7106(a) management right." *Id.* at 404. The Agency did not bring an interference with a § 7106(a) management right claim in its July 29, 2016 Exceptions because such a claim had never been successful and therefore any argument would likewise have been fruitless under the previous legal precedent set out in *FDIC* and *EPA.*

Finally, in *AFGE Local 1667*, 70 F.L.R.A. 155, 156 (2016), the Authority found that where a party "seeks to submit untimely documents that it could have submitted in a previous submission, the Authority ordinarily denies requests to consider those supplemental submissions. Here the Union -- filing outside the time limit for submitting its exceptions -- requests leave to file a supplemental submission that was available when the Union filed its exceptions. Because the Union could have filed this second supplemental submission with its exceptions, but did not, we will not consider it." (Emphasis added).

This case clearly shows that the Authority considers whether a party could have made an argument when deciding whether to allow that party to supplement its exception. As discussed above, the Agency could not have made an interference with management rights argument in its current Exceptions because under the FLRA's old "abrogation" standard, no such claim had ever been granted,[8] and, as discussed below, absent the change of law announced in *Bureau of Prisons*,

[8] *Bureau of Prisons* at 404.

the doctrine of collateral estoppel may have precluded an interference with § 7106 management rights argument as the Authority dismissed the Agency's previous such arguments in *United States HUD*, 68 F.L.R.A. 631 (2015) (Agency's Exceptions to Summary Order 3).

Thus, given *Bureau of Prison's* new legal precedent and the above Federal and FLRA legal precedent, and fact the Agency could not have made a § 7106 management rights argument at the time of its current Exceptions, the Agency should be granted leave to supplement its Exceptions.

B. Common law collateral estoppel, 5 U.S.C. § 7122, and 5 C.F.R §§ 2425.4(c) and 2429.5 do not bar the Agency from supplementing its current Exceptions.

1. Collateral estoppel/issue preclusion

The Supreme Court in *Montana v. United States* found that "the Court declined to give collateral estoppel effect to the prior judgment because there had been a significant 'change in the legal climate.'" 440 U.S. 147, 161 (1979) *citing* to *Commissioner v. Sunnen,* 333 U.S. 591, 606 (1948). "Issue preclusion will apply to prevent relitigation of previously determined issues 'unless there have been major changes in the law.'" *Roche Palo Alto LLC v. Apotex, Inc.,* 526 F. Supp. 2d 985, 996 (2007) *citing* to *Montana v. United States*, 440 U.S. 147, 161 (1979). "Legal conclusions may be reexamined only if there has been 'a significant change in the legal climate.'" *Roche Palo Alto LLC*, 526 F. Supp. 2d at 996 *citing* to *Kamilche Co. v. United States,* 53 F.3d 1059, 1063 (1995). Here, in its Exceptions to the September 2009 Merits Award, the Agency argued that the order for an "organizational upgrade" interferes with management's rights under the Statute. *See United States HUD*, 65 F.L.R.A. 433, 434 (2011). The Authority did not rule on the Agency's management rights argument and instead remanded the case back to Arbitrator McKissick to formulate a new remedy after finding her "organizational upgrade" improper. Following the issuance of the January 2012 Remedial Award, the Agency filed Exceptions and again alleged that

the award was contrary to management's rights. *United States HUD*, 66 F.L.R.A. 867, 868 (2012). This time, the Authority did take notice of the Agency's argument, but dismissed it because it was not raised with the Arbitrator. *Id.* at 869. This absurd ruling was despite the fact that the Agency already raised the argument with the Arbitrator in its previous Exceptions to the September 2009 Merits Award. *See* Member Pizzella's Dissent, which summarizes the Authority's rulings. *United States HUD,* 68 F.L.R.A. 631, 638 (2015) ("The Authority (now with only two members) incorrectly found that HUD had never made these arguments to the Arbitrator and dismissed the exceptions.")

Likewise, in the exceptions to Summary Order 6 the Agency argued Summary Order 6 improperly impacted management's rights, but rather than addressing these arguments, the Authority found that they were barred by the Authority's previous dismissal of them and did not consider them. *See United States Dep't of HUD*, 69 F.L.R.A. 213, 218-219 (2016).

In addressing the Agency's exceptions based on whether the remedy interfered with § 7106 management rights, it is clear that the Authority never ruled on the merits of them. Critically, regardless of whether the Authority ever ruled on the merits of the § 7106 management rights, the Supreme Court's holding *Montana*, supra, prevents issue preclusion when there is a change in law, such as the Authority announced in *Bureau of Prisons.* Although issue preclusion prevents relitigation between the same parties when there is a judgment on the merits, the doctrine set out in *Montana*, supra., is an exception to this general rule. *See Roche Palo Alto LLC*, supra. Given the foregoing, issue preclusion clearly does not prevent the Authority from considering a §7106 management rights defense now.

2. 5 U.S.C. § 7122(b)

Should the Union contend that 5 U.S.C. § 7122(b) bars the Agency's current attempt to supplement its July 29, 2016 Exceptions because it allows the Agency to file exceptions to the Arbitrator's June 30, 2016, Summary Order 10 more than 30 days after it was issued, this argument must fail. § 7122(b) states that if no exception to an arbitrator's award is filed during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. The Agency points out that it did file exceptions within 30 days of the June 30, 2016 Summary Order 10 and therefore the Order never became final. 5 CFR § 2425.2 states that the time limit for filing an exception to an arbitration award is 30 days after the date of service of the award. In *AFGE Local 1667*, 70 F.L.R.A. 155, 156 (2016), the Authority found that where a party "seeks to submit untimely documents that it could have submitted in a previous submission, the Authority ordinarily denies requests to consider those supplemental submissions. Here, the Union -- filing outside the time limit for submitting its exceptions -- requests leave to file a supplemental submission that was available when the Union filed its exceptions. Because the Union could have filed this second supplemental submission with its exceptions, but did not, we will not consider it." (Emphasis added).

This case clearly shows that the Authority considers whether a party could have made an argument when deciding whether the supplement to an exception is timely for purposes of § 7122(b). As discussed above, it is clear that the Agency could not have made an excessive interference with management rights argument in its current Exceptions both because of the doctrine of collateral estoppel (absent the change of law announced in *Federal Bureau of Prisons*) and because under the FLRA's old abrogation precedent, no claim had ever been granted. *Federal*

Bureau of Prisons, p. 404. Thus, based on the foregoing, § 7122 should not bar the Agency's motion for leave to file a supplement.

Additionally, to require the Agency to have file a § 7106 management rights claim within 30 days of Arbitrator McKissick's June 30, 2016 Summary Order 10 (prior to the change in law announced in *Federal Bureau of Prisons*), will result in the freezing of the "law of the case" to that at the time of Summary Order 10 rather than whatever the law may be at the time the Authority deicides the Agency's Exception's to Summary Order 10, which is clear violation of the Supreme Court's holding in *Ruppert,* 134 F.2d at 500.

3. 5 C.F.R. §§ 2425.4(c) and 2429.5

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. *See also United States Dep't of HUD*, 69 F.L.R.A. at 218.

The above regulations should not apply to bar the Agency from being granted leave to supplement its current Exceptions. First, the Agency presented §7106 management rights arguments in its Exceptions to Summary Orders 3 and 6, and in its exceptions to the January 2012 Remedial Award. As Member Pizzella pointed out "Prior to HUD III, the Authority had not required parties to repeatedly raise the same arguments that were raised in earlier stages of an ongoing arbitral process, so long as "the record indicates that [a party] did raise [those specific issues]."*United States HUD*, 68 F.L.R.A. at 638. Requiring HUD to make the same arguments at each juncture of the ongoing implementation process serves no purpose except to catch the Agency in regulatory "trapfalls."[9]

[9] Member Pizzella Dissent, *United States Dep't of HUD*, 69 F.L.R.A. at 223.

Second, as discussed above, the Supreme Court and FLRA precedent allow agencies to supplement their filings based on a change of law. Here, to apply the foregoing regulations to prevent the Authority from hearing the Agency's § 7106 management rights arguments would effectively freeze the law to the time prior to the Authority's ruling in *Federal Bureau of Prisons* as the Agency could not have made a § 7106 management right's argument before Arbitrator McKissick at the time of her Exceptions to Summary 10 as the Authority had never found a violation of such rights under the previous § 7106 abrogation standard. Third, applying §§ 2425.4(c) and 2429.5 to preclude a supplement to the Agency's Exceptions would also freeze the law and is a clear violation of the Supreme Court's holding in *Ruppert*, supra, *Bradley*, supra, and the FLRA's holding in *AFGE Local 1667*, supra, that allow parties to amend their filings when there is a change in law during the pendency of their case. This would be especially unfair given that the Authority has continually avoided ruling on the Agency's § 7106 management right's argument and instead has dismissed them on technicalities.

For the foregoing reasons, the Authority is not precluded by the FLRA's regulatory requirements or the doctrine of collateral estoppel from allowing the Agency leave to supplement its current Exceptions. *See United States Dep't of HUD*, 69 F.L.R.A. at 223, Member Pizzella Dissenting ("It is worth repeating that the Authority ought not to go out of its way to catch parties in "trapfalls" just to avoid addressing difficult, and outcome-determinative, issues particularly here, where the Union's grievance, and the Arbitrator's award, should have been declared contrary to § 7121(c)(5) in 2004, again in 2011, and again in 2015.")

CONCLUSION

In light of the clear Federal court and FLRA precedent and based on the Authority's change of law with regards what constitutes excessive inference with § 7106 management rights announced in *Bureau of Prisons*, the Agency requests that pursuant to 5 C.F.R. § 2429.26, the Authority grant the Agency leave to file a supplement to its pending July 29, 2016 Exceptions. If granted, the Agency requests that the Authority consider its soon to be filed Supplement its July 29, 2016 Exceptions to Summary Order 10.

Respectfully submitted,

/s/ David M. Ganz

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Agency's Motion for Leave to File a Supplement to its July 29, 2016 Exceptions has been served on all parties on this 26th day of March, 2018, via the method indicated below:

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March 26, 2018
(Date)

/s/ David M. Ganz
DAVID M. GANZ
Agency Representative

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IN THE MATTER OF ARBITRATION BETWEEN:

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

SUMMARY OF IMPLEMENTATION MEETING

This Arbitrator met with the Parties on March 26, 2014 to discuss the progress of the Parties with the implementation of the January 10, 2012, Opinion and Award (the "Award") in the above captioned matter. Present for the Agency were: Michael J. Snider, Esq. and Jacob Y. Statman, Esq., from Snider & Associates, LLC, and Holly Salamido, Union Council President Present for the Agency were: Tresa A. Rice, Esq., Javes Myung, Esq., Peter Constantine, Esq., Mercedeh Momeni, Esq., Michael Moran and Mary Beth Pavlik. This is the sixth Summary of Implementation Meeting ("Summary 6"), the first five having been issued on March 14, 2014 ("Summary 1"), May 17, 2014 ("Summary 2"), August 2, 2014 ("Summary 3"), January 10, 2015 ("Summary 4") and February 27, 2015 ("Summary 5"), respectively. The Agency filed Exceptions before the FLRA to the August 2, 2014, Summary of Implementation Meeting, and those Exceptions are currently pending. This Summary only relates to the Award and Summaries 1, 2, 4 and 5. This Summary does not relate to the August 2, 2014 Summary (Summary 3).

I. Status of Outstanding Compliance Issues

In Summary 5, this Arbitrator noted that at the February 4, 2015 Implementation Meeting ("IM"), the Union provided a presentation concerning non-compliance and implementation for the remaining class of BUEs subject to the Award. Specifically, the Union noted that: **(1)** none of the

seventeen (17) class members had received their performance bonus differential; **(2)** only one out of the seven (7) employees from the seventeen (17) class members who are retired received her revised annuity; and **(3)** the Union had not received sufficient information as to the TSP contributions for the ten (10) employees from the seventeen (17) class members who were or are enrolled in FERS. This Arbitrator ordered the Agency to provide a detailed update as to the status of the recalculated annuities and the TSP contributions no later than February 16, 2015. This Arbitrator further ordered the Agency to provide a detailed update as to the status of the performance bonus differential at the next IM.

At the March 26, 2015 IM, the Agency provided the Union with the proposed payments for the performance bonus differential for the seventeen (17) class members. The Union is ordered to provide its response to the Agency concerning the sufficiency of those payments within two (2) weeks of the date of receipt of this Summary.

The Agency's response as to the status of the recalculated annuities is insufficient. Many of the retired class members have still not received their revised annuity payments from OPM. The Agency is ordered to schedule a call with this Arbitrator, the Union and the Agency with the Agency's OPM contact no later than one week from the date of receipt of this IM Summary. The Agency is further ordered to have the Deputy Secretary and/or CHCO contact OPM directly to ascertain a more detailed status on the payment of the revised annuities and to urge OPM to expedite the processing thereof.

The Union has requested certain data concerning TSP contributions from class members and potential class members. The Agency has informed the Union that TSP will not provide such data to the Union due to legal restrictions in doing so. Within fourteen (14) days of receipt of this Summary, the Agency shall provide written proof from TSP which sets forth TSP's position in this regard. The Parties are then directed to work together to determine a reasonable and

appropriate manner and method of obtaining the Union's requested information. This will be further discussed at the June 2, 2015 IM.

II. Orders on Outstanding Motions

The Union has filed a Motion to Compel the production of MSCS Announcement Listings from 1999 to 2002. The Agency has opposed the Union's Motion, and the Union has filed a Reply. The Union's Motion is granted. Moreover, as explained in Summary 4, due to new evidence being submitted, the Award was 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 was based upon data from the MSCS system provided by the Agency to the Union and shared with this Arbitrator at the hearing by the Parties. This Arbitrator stated that "if the Union or Agency presents additional new evidence or data, this ruling may be further clarified." The Union seeks the identical MSCS data relied upon in Summary 4 in an effort to discover and present new evidence in support of showing that violations existed prior to 2002; without this evidence, which is in the sole control of the Agency, the Union effort will be stymied. The Back Pay Act has a six (6) year look back period, or statute of limitations. The July 1999 date proffered by the Agency as the beginning of entries to the MSCS system falls well within that six (6) year period prior to the filing of the Grievance of this case, in November 2002. Despite the Agency's claim that this Arbitrator lacks jurisdiction prior to 2002, the Back Pay Act says otherwise. Since there is jurisdiction, and the evidence is germane to this case, therefore, the Union's Motion is granted. The Agency shall produce the MSCS Announcement Listings in the same format as in its May 2014 production, for the period from the inception of the MSCS system entries (circa July 1999) until 2002, to the Union, within thirty (30) days. This ruling shall not yet be construed as a finding that the damages period extends back to July 1999, rather it is a directive that the Agency produce the requested data.

A ruling on all other outstanding Motions, including the Union's Motion to order the Agency to produce the names of Responsible Management Officials, are held in abeyance until the next IM and presentation of the materials this Arbitrator requested at the IM.

III. Identification of Class Members

a. Background

As noted above, this Arbitrator has previously provided the Parties with five (5) Summaries of Implementation Meetings. In **Summary 1**, this Arbitrator stated in relevant part:

> 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.
> ...
>
> Moreover, the Parties are at an impasse regarding the appropriate methodology for identifying the class of employees eligible for back pay and promotion. **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. 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.**
>
> Per the Union's December 13, 2012 data request, the Agency provided data to the Union on January 18, 2013 which listed all of the Bargaining Unit Employees that

encumbered, per the definition of the Class set forth in the Award, the Job Series referenced in Joint Exhibits 2, 3, 4, & 7G and Union Exhibits 1 and 9.

Summary 1 (emphasis added).

In **Summary 2**, this Arbitrator stated in relevant part:

During our prior meeting, I noted that the Agency's methodology of identifying class members entitled to relief under my Award was flawed, and I directed the Parties to meet and agree on a methodology, or to present alternative methodologies at our March 26, 2014 meeting. The reason we are meeting is to ensure that implementation is moving forward and does not stretch out.

In the prior meeting and Summary, I made it clear that the Agency was to meet with the Union to identify additional class members as set forth in the Award and **jointly to submit methodologies for doing so as the March 26, 2014 Implementation Meeting.** The Parties informed me that they met on March 13, 2014, and that the Union asked the Agency if it agreed with the Union's list of class members; if not, the Union asked the Agency for suggestions of alternative methodologies to identify class members.

The Agency confirmed at the March 26, 2014, Implementation Meeting that it does not agree with the Union's list of class members, arguing that the scope of the data exceeds the claims period. The Agency agreed, however, that it is at fault for failing to provide the Union with data confined to the claims period. The Agency also confirmed that it has not yet developed or presented for the Union's consideration an alternative methodology for identifying class members.

In my prior Summary I noted that the Agency had unilaterally determined, based upon its own methodology, that there are a minimal number of class members which it was able to identify, including only two (2) of the six (6) witnesses. As set forth in my prior Summary, any methodology that failed to identify each of the six (6) witnesses as class members is by definition flawed. **The Agency insists that it disputes my understanding of my Award and that it prefers to interpret my Award narrowly. I informed the Agency that, while it may dispute my understanding of my Award, it must nevertheless implement the Award as I interpret it – not as the Agency unilaterally interprets it. I explained again as well to the Parties that I intend for my Award to be interpreted broadly, so as to apply to the largest class of Grievants possible.**

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 drive, as is clear from my Award and the Adverse Inference drawn due to the Agency's

> failure to produce evidence, as I told the Agency previously last spring and summer and in my 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 my Award.**
>
> The Parties and I discussed at the March 26, 2014 meeting which portion of the eligible class of Grievants would be the easiest to identify, so as to begin implementation of the Award with undisputed class members. It became apparent through discussion that **the witnesses who testified at the hearing were in two Job Series, GS-1101 and GS-236. These 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 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 Relations Specialist) employees in the GS-246 series, the other GS-1101 employees, and then others in other applicable Job Series, until implementation is complete.

Summary 2 (emphasis added).

In Summary 5, this Arbitrator noted that the Union's presentation restated its methodology 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 forty-two (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 forty-two (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 Arbitrator found, in Summary 5, that the Union's "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."

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. Further, this Arbitrator has stated on numerous occasions that the Award was to be interpreted broadly, so as to apply to the largest class of Grievants possible. For example, in Summary 2 this Arbitrator stated:

> I informed the Agency that, while it may dispute its understanding of my Award, it must nevertheless implement the Award as I interpret it – not as the Agency unilaterally interprets it. I explained again as well to the Parties that **I intend for my Award to be interpreted broadly, so as to apply to the largest class of Grievants possible.**

(Summary 2, emphasis added).

b. The Agency's Methodology

i. Agency Presentation

On March 26, 2015, the Agency presented its "HUD Compliance Methodology" for the first time, along with a list of "HUD's Proposed Claimant List" of approximately four hundred, thirty-nine (439) employees. After the Agency meticulously presented and explained its methodology, the Parties and this Arbitrator discussed the matter thoroughly. The Agency methodology utilized "accession lists" along with the Agency's identification of previously

classified positions (drawn from an unknown source), "affected bargaining unit employees" – at the time of new hires into positions with FPL of GS-13, and stated that those employees "are the claimants." HUD also applied filters and utilized the "HR System of Records" to find self-identified "newly created, previously classified positions" and other limitations in order to arrive at the class of four hundred, thirty-nine (439) claimants. HUD specifically stated that it only included "GS-12 employees with FPL of only GS-12 occupying the same positions at the same time as the violations." HUD stated that headquarters and field employees are "different position[s] altogether, based on the reporting structure of the organization and the scope and effect of the work of the relevant employee." The Agency stated that its methodology complied with the Award and Summaries, because it includes all six (6) witnesses, PHRS employees, and CIRS employees. The Agency further explained that its methodology was designed to result in "practical implementation," was a "data driven exercise" and was guided by the "rate of promotions internally."

ii. Union's Comments on Agency Methodology

The Union took issue with many aspects of the Agency's methodology, and pointed out many ways in which it did not comport with the Award and prior Summaries of this Arbitrator. The Union argued that the Headquarters / Field distinction created by the Agency had no valid basis – that it was essentially the same distinction as the Agency drew previously, but this time with a new alleged, and flawed, justification. The Union alleged that the Agency methodology did not construe the Award and Summaries "broadly" (as required by the Award and Summaries) but rather created an approach that did not even include all PHRS and CIRS employees. The Union claimed that, beyond the PHRS and CIRS groupings, the Agency methodology included few additional class members – essentially customizing an approach that created the smallest class possible while presenting the false image of compliance with the Award and Summaries.

The Union noted that the Grievance included allegations of violations on behalf of these six (6) categories:

1. GS-343 Program Analysts,
2. GS-246 Contractor Industrial Relations Specialists,
3. GS-801 Engineers,
4. GS-1160 Financial Analysts,
5. GS-828 Construction Analysts, and
6. GS-1101 Public Housing Revitalization Specialists.

The Union previously submitted a list to both the Agency and this Arbitrator identifying the class of employees entitled to relief under the Award and Summaries, using "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" whom the Union believes, at a minimum, are eligible class members. The Union stated that the class consists of under one thousand, five hundred (1,500) current employees due promotions to the GS-13 level. The Union estimates the total class to be at least three thousand, seven hundred, seventy-seven (3,777) former and current Bargaining Unit employees – many of whom are already retired, many of whom are already GS-13s and many of whom have deceased during the pendency of this matter.

The Union's review of that list, compared to the Agency's eligible class member list for these six (6) positions, further demonstrates that the Agency's methodology does not comport with this Arbitrator's Award. The Union stated that the class definition in the Award explicitly included additional Job Series beyond those listed in the Grievance, due to the adverse inference ruling. The Union stated that a simple review of these positions alone, identified in the Award itself (**Award** at page 4) demonstrates that the Agency's methodology does not comport with the Award and Summaries.

The Arbitrator now finds that the Agency's methodology should be far more inclusive as explained at the last Implementation Meeting. Specifically, the grievance itself and supporting exhibits clearly identified six (6) Job Series and positions which amounts to six hundred, ninety-

seven (697) eligible and current employees. This is in contradistinction to two hundred, eighty-nine (289) class members identified by the Agency. That is, there seems to be one hundred and one (101) GS-343 Program Analysts, based upon categories defined in the grievance and corresponding submissions. However, the Agency's methodology in contrast identifies only fifteen (15) Analysts. Moreover, it would further seem that there are thirty-three (33) GS-246 CIRS employees who are eligible class members. Nonetheless, the Agency's methodology only identifies twenty-eight (28). Still further, there seems to be ten (10) GS-801 Engineers who are eligible class members. However, only one (1) Engineer was identified by the Agency's methodology. Moreover, another category comprises one hundred, seventy (170) GS-1160 Financial Analysts who are eligible class members. This is in contrast with thirty-six (36) identified Financial Analysts based on the Agency's methodology. Still another category of eligible employees include one hundred, forty seven (147) GS-828 Construction Analysts, but only six (6) were identified by the Agency's methodology. Lastly, the final category of eligible employees seem to be two hundred, thirty-six (236) GS-1101 PHRS eligible employees, yet only two-hundred, three (203) were identified by the Agency's methodology. As noted in the Award, these six (6) categories of eligible members should be computed from 2002 to present in coverage. Based on all of the foregoing, these categories should be reviewed and expanded to include more eligible members.

The Union further argues, based upon <u>just</u> the six (6) positions explicitly listed and contained in the initial Grievance, the Union's methodology utilizing 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 would include approximately six-hundred, ninety-seven (697) eligible class members while the Agency's methodology produces two-hundred, eighty-nine (289), or only forty-one percent (41%). The Union noted that the dichotomy is even greater when reviewing the class as a whole; the Agency's entire list of class members is

comprised of four-hundred, thirty-nine (439) current and former employees while the Union claims the class numbers in excess of three-thousand, seven-hundred, seventy-seven (3,777). The Union claims that the Agency's methodology cannot be in compliance with the Arbitrator's directive that "my Award to be interpreted broadly, so as to apply to the largest class of Grievants possible." Summary 2.

Furthermore, the Union stated that the Agency utilized information – not previously provided by the Agency – to limit the class, as opposed to expanding it, contrary to the clear and explicit directions of the Arbitrator. The Union claims that the effect of the utilization of the new information was to limit the class is clear, and therefore the Agency's integration of that information is contrary to the Award and prior Summaries.

The Union asked the Agency questions at the March 26, 2015 IM about which Job Series were included in the Proposed Claimant List, as that information was not revealed in the Agency's exhibits. The Union also questioned the Agency's apparent integration of a portion of the Remedy ("that the Agency process retroactive permanent selections of all affected BUEs into currently existing career ladder positions") into the Class Definition (BUEs in career ladder positions where that ladder lead to a lower journeyman grade than the target grade of "a career ladder of a position with the same job series").

The Union stated that the Agency limited application of the Class Definition by incorporating into it the Remedy and its description of "currently existing career ladder positions." The Union also claimed that the Agency limited the Class by utilizing an Agency systems data point called "accession lists" whose use the Union claimed was apparently designed to pare down the size, membership and damages period for Class members, in contradistinction to this Arbitrator's Award and prior Summaries. The Union pointed out that the Agency's list of four-hundred, thirty-nine (439) employees does <u>not</u> include all employees in, for example, the entire GS1101 series (as were included explicitly in Summary 2 at pages 5 and 6) but rather singles out

a very few individual positions within very few Job Series (i.e. the Agency methodology misinterprets the Award as reading "a career ladder **of the same position with the same Job Series**") as opposed to following the actual language of the Award ("a career ladder of **a position with the same Job Series**"). The Union pointed out that in Summary 2, the Arbitrator has found that employees in the same Job Series were to be treated similarly due to the adverse inference drawn in the Awards issued by the Arbitrator. The Union pointed out that its methodology identifies the applicable class as consisting of at least all GS-12 employees who encumbered a position in any of the forty-two (42) Job Series listed in the Joint and Union Exhibits described in the Award (Award at page 4, Summary 5 at page 3) and that the Arbitrator found, in Summary 5, that:

> ...the **Union's "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."

Summary 5, page 3. The Union urged this Arbitrator to reject the Agency's approach and to adopt the Union's approach as being in compliance with her Award and prior Summaries.

iii. Arbitrator's Analysis and Findings Regarding Agency Methodology

This Arbitrator finds that the Agency has been provided ample opportunity to create a methodology which complies with the Award and Summaries. See, e.g., Summary Nos. 1, 2 and 5. The Parties were given clear guidance as to who should belong in the Class, by way of the Class Definition and repeated statements in Summaries that "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..." *Id.* This Arbitrator also repeatedly "explained again as well to the Parties that I intend for my Award to be interpreted broadly, so as to apply to the largest class of Grievants possible." Summary 2. Despite being given multiple

opportunities to come up with a methodology that complies with the Award and Summaries, the Agency has failed to do so.

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 non-compliance 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 support 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.

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.

Finally, this Arbitrator inquired a number of times with the Agency during the March 26, 2015 IM as to whether it was interested and able to modify its Methodology to come closer towards compliance with the Award and summaries, since it clearly is not in compliance. The Agency stated it was not able or willing to do so.

iv. Ruling on Remaining Class Members

This Arbitrator has carefully reviewed the Award, prior Summaries and both the Union's and Agency's proposed methodologies. As in Summary 2, the Agency has again failed "to come up with any [valid] alternative methodology to that of the Union for identifying class members." Therefore, as this Arbitrator cited with approval in Summary 5, the Union's methodology for identifying class members is hereby adopted. To the extent any clarification is necessary, the Award is clarified that the class of employees eligible for the relief stated include: any employee who encumbered any position in any of the Job Series identified in the Hearing Exhibits as noted in the Award and presented by the Union at the February 4, 2015 IM (Union Exhibit 12, "List of Series Pulled from Hearing Exhibits"), at any time during the relevant damages period so long as that employee met the required time-in-grade and performance requirements. As set forth in Summary 4, the relevant damages period in this case, is from January 18, 2002 until the present.[1]

Applying the Union's methodology to the "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" the Union has identified a class of, at a minimum, three-thousand, seven-hundred, seventy-seven (3,777) Bargaining Unit Employees. This list was provided by the Union to the Agency in September 2014 and the Agency has had ample time to review and comment upon it. The Agency has not disputed this list. Therefore, the Agency is directed to, within forty-five (45) days, retroactively promote and make whole these three-thousand, seven-hundred, seventy-seven (3,777) employees that have so far been identified, back to January 18, 2002 or the earliest date of eligibility, in accordance with the findings and Analysis set forth above (i.e. after meeting minimum time in grade and fully satisfactory performance).

[1] As stated in Summary 4, the start date for the relevant damages period may be revisited in the event new evidence is presented by either the Union or Agency. Such a revision to the award would constitute a permissible modification under Authority precedent. **U.S. Department of the Navy, Naval Surface Warfare Center, Indian Head Division, Indian Head, Maryland and AFGE, Local 1923**. 56 FLRA 848 (September 29, 2000).

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. This Arbitrator would like regular status updates on the implementation of the Award and Summaries on a monthly basis, and a full briefing at the next IM. The goal is to have all Class members promoted and the remedy implemented this Fiscal Year. The Parties are directed to continue their weekly discussions on information exchange and implementation status.

v. Additional Issues and Conclusion

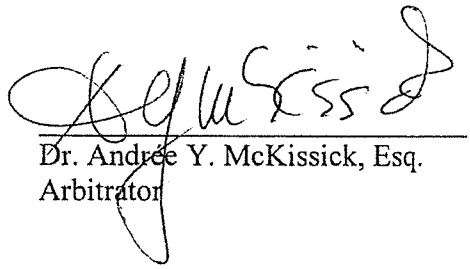
This Arbitrator has expressed concern about HUD's stated inability to pay for the damages pursuant to the Award and Summaries. Mr. Brad Huther, Chief Financial Officer for the Agency remarked in February 2015 that, to date, HUD has not recorded this matter as either a Contingent Liability or as an Obligation. He stated that this omission was in part due to the fact that the entire value of the case was not known. As Union counsel pointed out, the HUD Inspector General's March 6, 2015 Audit of HUD's Budgets from FY 2013 and FY 2014 revealed that HUD not only has not set aside funding for satisfaction of the claims in this case, its "management and general counsel" have opined that "the ultimate resolution of pending litigation will not have a material effect on the Department's financial statements."[2] This is especially concerning because by the Agency's own admission, it does not have adequate funding to pay even the damages it believes are owed as a result of its own, improper, methodology.

[2] The entire statement is as follows: "HUD is party to a number of claims and tort actions related to lawsuits brought against it concerning the implementation or operation of its various programs. The potential loss related to an ongoing case related to HUD"s assisted housing programs is probable at this time and as a result, the Department has recorded a contingent liability of $117 thousand in its financial statements. Other ongoing suits cannot be reasonably determined at this time and in the opinion of management and general counsel, the ultimate resolution of pending litigation will not have a material effect on the Department's financial statements." Fiscal Years 2014 and 2013 Consolidated Financial Statements. https://www.hudoig.gov/reports-publications/audit-reports/independent-auditor%E2%80%99s-report-hud%E2%80%99s-consolidated-financial

The purpose of the March 26, 2015, IM was to monitor and oversee implementation and compliance of the Award. Nothing discussed or stated at the meeting or in this Summary should be construed as a new requirement or modification of the existing Award. This Arbitrator continues to maintain jurisdiction over the Award and Summaries 1, 2, 4 and 5. This Arbitrator has and will continue to maintain jurisdiction over any Union request for attorney fees, costs and expenses. A final decision on attorney fees, costs and expenses does not appear to be ripe at this time since the matter is ongoing and, therefore, this Arbitrator shall continue to retain jurisdiction over any Union request for attorney fees, costs and expenses until the matter is completed.

In response to the Agency's assessment of these composite summaries, this Arbitrator finds that some repetition is helpful for clarification and continuity of our continuing issues. In response to the Agency's conclusion that the Union's description of events and statements are inaccurate, this Arbitrator disagrees. All the categories of eligible members were specified in the grievance and corresponding exhibits submitted. Thus, such information is pertinent and relevant to current controversy regarding the best methodology to achieve the outstanding remedies awarded and validated by FLRA.

The next IM will take place on June 2, 2015 at 10:00 am at HUD's headquarters.



Dr. Andrée Y. McKissick, Esq.
Arbitrator

May 16, 2015

AFGE 222 v. U.S. DEPARTMENT OF HUD
FAIR EQUITABLE DAMAGES

Backpay and Interest			
Class Members		3777	
Potential Addl. Members		350 +	
Est. Class Members 2014		150	
Additional Class members to be added for period 1995-2001		950	(new evidence)
Total estimated class members		5227	
Average Claim Backpay/Interest	$	97,000.00	
Total BP&I	**$**	**507,019,000.00**	
Annual Leave Payouts			
Average Payout	$	929.00	
25% Class Retirement		1306.75	
Total Annual Leave	**$**	**1,213,970.75**	
Performance Awards			
Average Claim	$	1,015.00	
100% Class Participation		4077	
Total Class - Perf. Awards	**$**	**4,138,155.00**	
TSP Contribution			
40% FERS Participation		2090.8	
Average TSP Growth (7% @ 5% - 3% Contrib)	$	12,500.00	
Total TSP	**$**	**26,135,000.00**	
CSRS Catch-Up			
Average Payout	$	28,000.00	
25% Class Retirement		1306.75	
Total CSRS Catch-Up	**$**	**36,589,000.00**	
Implementation / Taxes (10%)	**$**	**64,211,415.09**	
Attorney Fees / Oversight	**$**	**40,000,000.00**	
Total	**$**	**679,306,540.84**	
Gross-up on BPA portion	$	40,989,690.06	
Total including Gross-up on BPA	**$**	**720,296,230.90**	

80000 SERIES

RECYCLED ♻ *30% P.C.W.*

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

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

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

AGENCY'S EXCEPTIONS TO ARBITRATOR AWARD

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

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

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

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

Factual and Procedural Background of Grievance, Arbitration, and Award

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

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

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

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

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

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

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

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

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

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

Implementation before Arbitrator McKissick

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

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

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

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

Implementation Meeting Summaries

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Preliminary Matters

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

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

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

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

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

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

II. Arbitrator McKissick's Assertion of Continued Jurisdiction

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

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

III. Modification

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

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

Argument

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

Introduction

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

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

Sovereign Immunity

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

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

Back Pay Act

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

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

The Back Pay Act provides, in relevant part:

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

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

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

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

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

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

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

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

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

Turning to the Back Pay Act, the Court reiterated,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[6] *Citing* to *U.S. Department of Health and Human Services and National Treasury Employees Union*, 54 FLRA 1210, 1219 (1998).
[7] *Citing* to *U.S. Department of the Air Force, Warner Robins Air Logistics Center*, 52 FLRA 938, 942 (1997).

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

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

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

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

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

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

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

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

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

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

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

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

In *Lane* the Supreme Court stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OPM regulations state:

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

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

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

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

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

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

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

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

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

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

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

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

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

The Arbitrator's disregard for the law shows bias.

The Agency further challenges the Arbitrator's partiality and continued jurisdiction over the Fair and Equitable implementation proceedings, and requests that the Award be remanded to another arbitrator for further processing if the Remedial Award is not reversed entirely. To establish that an arbitrator is biased, the moving party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party. *See U.S. Dep't of the Navy, Naval Surface Warfare Ctr.*, 57 FLRA 417 (2001).

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

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

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

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

CONCLUSION

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

Respectfully submitted,

/s/ David Ganz

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CERTIFICATE OF SERVICE

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

Federal Labor Relations Authority

Office of Case Intake and Publication

Docket Room, Suite 200

1400 K Street, NW

Washington, DC 20424-0001

Phone: (202) 218-7740

VIA: courier service

Arbitrator Andree McKissick

2808 Navarre Drive

Chevy Chase, MD 20815-3802

Phone: (301) 587-3343

VIA: UPS (tracking number:1Z2760802599871446)

Jacob Statman, Esq.

Snider & Associates, LLC
600 Reisterstown Road, 7th Floor
Baltimore, Maryland 21208
Phone: (410) 653-9060
VIA: UPS (tracking number: 1Z2760802596610054)

July 29, 2016
(Date)

/s/ David Ganz
DAVID GANZ
Agency Representative

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration:	]	
	]	
	]	
U.S. DEPARTMENT of HOUSING and URBAN DEVELOPMENT	]	
	]	
	]	
	]	**FMCS No: 03-07743**
and	]	
	]	
	]	
AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, AFL-CIO	]	
	]	

OPINION AND AWARD: Dr. Andrée Y. McKissick, **ARBITRATOR**

APPEARANCES:

For Management:

Walter C. Vick Jr., Labor Relations Specialist
Joann T. Robinson, Esquire
U.S. Dept. of Housing & Urban Development
451 7th Street, SW, Room 2150
Washington, D.C. 20410

For Union:

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Ari Taragin, Esquire
Snider & Associates
104 Church Lane, Suite 100
Baltimore, MD 21208

Carolyn Federoff, Esquire, Former President
AFGE Council 222
108 Ashlaud Street
Melrose, MA 02176

DATES AND PLACE OF HEARING: **July 15, 2008 and August 28, 2008**
U.S. Dept. of Housing and Urban Development
451 7th Street, SW, Room 2150
Washington, D.C. 20410

POST-HEARING BRIEFS: **December 1, 2008**

PROCEDURAL POSTURE

The Union filed this grievance on November 13, 2002. The Agency denied this grievance based upon its position that it was not arbitrable pursuant to § 7121 (c) (5) of the Federal Service Labor Management Statute. Subsequently, this grievance was submitted to arbitration on the sole issue of arbitrability. At that juncture, this Arbitrator found that the subject matter of this grievance, based upon the failure to treat employees fairly and equitably, to be arbitrable on June 23, 2003.

The Agency filed exceptions to this Award the same day. The Federal Labor Relations Authority (FLRA) remanded the Award to the parties and ordered that it be resubmitted to this Arbitrator for clarification of the jurisdictional issue on February 11, 2004. The Union's request for a hearing was granted. It was held on June 23, 2006, where additional evidence and arguments were made. On June 24, 2007, this Arbitrator clarified the Award on remand. This Arbitrator found that this grievance was arbitrable, as the grievance was based upon the right to be placed in previously classified positions. In addition, this Arbitrator ruled that there were several possible remedies pursuant to Section 22.11 of the Agreement, consistent with the FLRA's decision.

The record further reflects that on March 1, 2007, the Agency filed exception to the January 24, 2007 Award. On March 22, 2007, the Union filed an Opposition to the Agency's Exceptions. Subsequently, the FLRA issued a Show Cause Order as to why the Agency's Exceptions should not be dismissed as untimely. Thereupon, the FLRA ruled that the Exceptions were untimely and dismissed them on August 3, 2007.

The Union then filed a Motion to Compel the Production of Documents on March 14, 2007, explaining the history of its request for documents commencing from October 2002. This

information request was based on 5 USC 7114, drafted by Carolyn Federoff, Esquire and then President of Council 222. The record reflects that the documents requested for the purpose of amending the grievance were not forthcoming. Instead, the Agency denied the grievance, as stated earlier, based on its position that this grievance was not arbitrable. Based upon the Motion to Compel, this Arbitrator ruled that the Agency must comply with the request for information immediately, but no later than "June 30, 2008". Since the information requested was still not forthcoming, this Arbitrator ruled that an adverse inference can be made based upon the unreleased information. The record further reflects that some documents were later released, but the information was largely insufficient. Based upon the foregoing, this current arbitration hearing was held on July 15, 2008 and continued on August 28, 2008.

STIPULATED ISSUES:

1. **Whether the Agency violated the Collective Bargaining Agreement, Law Rule, or other regulation when it failed to treat bargaining unit employees fairly and equitably in posting vacancy announcement from May 2002 until the present?**

2. **If so, what are the appropriate remedies?**

RELEVANT PROVISIONS

The central controversy of this grievance lies within the applicability of the contractual provisions of the Agreement between the U.S. Department of Housing and Urban Development and the American Federation of Government Employees (AFL-CIO) (CBA - Joint Exhibit I), effective 1998 thru present.

COLLECTIVE BARGAINING AGREEMENT
(CBA - Joint Exhibit I)

ARTICLE 4-EMPLOYEE RIGHTS/STANDARDS OF CONDUCT

Section 4.01- General. Employees have the right to direct and to pursue their private lives consistent with the standards of conduct, as clarified by this Article, without interference, coercion or discrimination by Management. Employees shall be treated fairly and equitably in the administration of this Agreement and in policies and practices concerning conditions of employment, and may grieve any matter relating to employment.

Section 4.06- Morale. Recognizing that productivity is enhanced when their morale is high, managers, supervisors, and employees shall endeavor to treat one another with the utmost respect and dignity, notwithstanding the type of work or grade of jobs held.

ARTICLE 9-POSITION CLASSIFICATION

Section 9.01- General. Classification standards shall be applied fairly and equitably to all positions. Each position covered by this Agreement that is established or changed must be accurately described, in writing, and classified as to the proper title, series, and grade and so certified by an appropriate Management official. A positions description does not list every duty an employee may be assigned but reflects those duties which are series and grade controlling. The phrase "other duties as assigned" shall not be used as the basis for the assignment to employees of duties unrelated to the principal duties of their position, except on an infrequent basis and only under circumstances in which such assignments can be justified as reasonable.

Section 9.05- Resolution of Discrepancies. Employees shall be encouraged to discuss any position description change or inaccuracy with the supervisor, who shall also maintain a continuing view of duties. Disputes involving the qualitative or quantitative value of tasks performed by the employees which affect the grading of a job may be appealed to the Department and /or other appropriate authorities. This does not preclude the filing of a grievance where the loss of a grade is involved. The following issues may be appealed through the Grievance Procedure, Article 22:

1. **Accuracy of the Official Position Description including the inclusion or exclusion of a major duty.**

2. **An assignment or detail out of the scope of normally performed duties outlined in the Official Position Description.**

3. **The accuracy, consistency, or use of agency supplemental classification guides.**

4. **The title of the position unless a specific title is authorized in a published Office or Personnel Management classification standard or guide, or title reflects a qualification requirement or authorized area of specialization.**

ARTICLE 13- MERIT PROMOTION AND INTERNAL PLACEMENT

Section 13.01- General. This Article sets forth the merit promotion and internal placement policy and procedures to be followed in staffing positions within the bargaining unit. The parties agree that the provisions of this Article shall be administered by the parties to ensure that employees are with valid job-related criteria. Management agrees that it is desirable to develop or utilize programs that facilitate the career development of the Department's employees. To that end, Management shall consider filling positions from within the Department and developing bridge and/ or upward mobility positions, where feasible, to help promote the internal advancement of employees.

ARTICLE 22- GRIEVANCE PROCEDURES

Section 22.01- Definition and Scope. This Article constitutes the sole and exclusive procedure for the resolution of grievances by employees of the bargaining unit and between the parties. This grievance procedure replaces Management's administrative procedure for employees in the bargaining unit only to the extent of those matters which are grievable and arbitrable under this negotiated Agreement. A grievance means any complaint by:

1. **Any employee concerning any matter relation to his/her employment; or**
2. **The Union concerning any matter relating to the employment of any employee; or**
3. **Any employee, the Union, or Management concerning:**
    a. **The effects or interpretation, or claim of breach, of this collective bargaining agreement; or**
    b. **Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.**

Section 22.02- Statutory Appeals. Adverse actions consist of:

1. **Reduction in grade or removal for unacceptable performance;**
2. **Removals for misconduct;**
3. **Suspensions for more than fourteen (14) days; and**
4. **Furloughs for thirty (30) days or less.**

Adverse actions may, in the discretion of the aggrieved employee, be raised under either:

1. **The appropriate statutory procedures; or**

2. **Under the negotiated grievance procedure, but not both.**

ARTICLE 3- RIGHTS AND OBLIGATIONS OF THE PARTIES

Section 3.06- Managements Rights. Nothing in this Agreement shall affect the authority of Management:

1. **To determine the mission, budget, organization, number of employees, and internal security practices of the agency; and**

2. **In accordance with applicable laws and its duty to bargain on such matters, to the extent provided by law:**

    a. **To hire, assign, direct, lay off, and retain employees in the agency; or to suspend, remove, reduce, in grade or pay; or take other disciplinary action against such employees;**

    b. **To assign work, to make determinations with respect to contracting out and to determine the personnel by which agency operations shall be conducted;**

    c. **With respect to the filling of positions, to make selections for appointments from:**

        i. **Among properly ranked and certified candidates for promotion; or**

        ii. **Any other appropriate source.**

    d. **To take whatever actions may be necessary to carry out the agency mission during emergencies.**

POSITIONS OF THE PARTIES

It is the position of the Agency that the grievance is in contravention of federal regulations as well as the collective bargaining agreement because it pertains to classification issues which did not result in the reduction in grade or pay of any employees.

Specifically, the Agency maintains that only the Office of Personnel Management (OPM) has the authority to classify or reclassify positions, after consultation with the Agency. The

Agency asserts that Article 13.03 (9) sets forth three modes for non-competitive promotions. Although the Union would argue that (b) of Article 13.03 (9) is applicable, the Agency retorts that the Union did not show that the Grievants performed work at a higher grade or that such higher graded work even existed at that time.

The Agency asserts that the grievance, dated November 13, 2002, lists six (6) job series and eighteen (18) vacancy announcements. However since that time, the Agency asserts that the grievance has exponentially expanded to include many more Grievants. The Agency also contends that the grievance was never amended to include these alleged additional violations, as it promised to do. Most importantly, the Agency points out that the Union never requested the sixteen (16) announcements. Thus, the Agency argues these announcements are not subject to negative inferences, as the Union urges. The Agency admits that four (4) of the announcements requested by the Union, that had a series of six (6) sequential even numbers, were among the documents that the Agency could not locate. However, the Agency notes that these announcements were for intern positions only, based on the numerical sequence.

The Agency stringently argues that the positions of the grieving parties were not the same as those positions listed in the 2002 vacancy announcements on the date of the grievance. That is, the Agency argues that the Union failed to show that the positions were identical in every way to the current duties, responsibilities, job descriptions, experience requirements, general qualifications, education, and level of responsibilities. Thus, the Agency reasons that the Union failed to establish its prima facie case. In addition, the Agency further asserts no substantive evidence was presented such as: classification studies, desk audits, or copies of the job announcement listed in the grievance.

Moreover , the Agency further points out that there are but four (4) areas, outlined in Article 9.05, which are classification-related issues that are grievable. However, the Agency notes that the grievance does not fall within the ambit of these delineated categories of Article 9.05 of the Agreement.

The Agency contends that promoting Grievants or increasing their non-competitive promotion potential would constitute a violation of 5 USC § 7106 (c) (5) as well as Article 3.06 of the Agreement, as both interfere with Management's right to determine the numbers, types, and grades of employees or positions within its organizational subdivisions.

In response to the remedy of retroactive promotion with back pay and interest suggested by the Union, the Agency counters that if the Arbitrator decides to sustain this grievance that a desk audit is the appropriate remedy. That is, the Agency argues that any more relief would be windfall for the Union, and would be punitive. The Agency further argues that no unwarranted personnel action has occurred here, a prerequisite for both back pay as well as attorney's fees, as the Union urges.

Lastly, the Agency points out that the Union's proposed remedy would award Grade 13 promotions without a showing that (1) the individual performed, or would perform, Grade 13 work; (2) the individual could perform Grade 13 work; or (3) there was any Grade 13 work at the individuals location. Based on all of the above, the Agency requests that the Arbitrator deny this grievance in its entirety, as the Union failed to meet its burden of proof.

On the other hand, it is the Union's position that the Agency had advertised a number of positions with a maximum grade potential of GS-13. However, in contrast, current employees who occupied these exact same positions had, and have, only a maximum potential to the GS-12 level. Specifically, the Union asserts that the Agency would hire someone at the entry level (GS-

7, 9, or 11). Subsequently, these new employees were trained and mentored by other existing employees in the same position. Nonetheless, the Union maintains that these employees who trained and mentored only had career ladder potential to the GS-12 level. However, the Union asserts that the new trainees would eventually become GS-13 employees.

In addition, the Union contends that although there were postings both internally and externally for vacancies, the internal announcements were subsequently cancelled. Thus, the Union argues that the current employees were discouraged from applying. The Union also alleges that current employees were told that their applications would be thrown out. Other current employees, the Union alleges, were told they were ineligible to apply for vacancies, but were told to train and mentor new trainees who "leapfrogged" them to become GS-13 journeyman level employees.

Another example the Union points out as being exemplary of inequitable and unfair treatment was when a vacancy announcement required that a current employee take a constructive demotion to GS-7 level with maximum career ladder potential to GS-13 level.

Still another example, the Union contends was demonstrative of unfair treatment was when a current employee was told that she was not selected for a position because she was retirement-eligible, yet she trained the actual selectees. Based upon the foregoing, the Union asserts that Articles 4.01, 4.06, 9.01, and 13.01 of the Agreement were violated.

In response to the Agency's argument regarding the Union's omission to amend this grievance, the Union counters that the Agency never presented the necessary documents that it needed to amend the grievance.

In response to the Agency's argument that the missing announcements dealt exclusively with the intern positions, the Union rebuts that is an untruthful assessment of the situation.

In addition, the Union reminds the Arbitrator of her prior adverse inference regarding the missing documents as it relates to the Union's Motion to Compel the Production of Documents on March 14, 2007. Based on the foregoing, the Union requests that this Arbitrator sustain this grievance.

In regards to the appropriate remedy, the Union offers the Arbitrator multiple creative options. However, the Union strongly asserts its right to be compensated by retroactive promotions with back pay and interest. The Union also concurrently requests that the Arbitrator retains jurisdiction in this matter.

FINDINGS AND DISCUSSION

After careful review of the record in its entirety and having had the opportunity to weigh and evaluate the testimony of witnesses, this Arbitrator finds that this grievance should be sustained for the following reasons.

First, in response to the Union's request for a specific adverse inference regarding the numbered series vacancy announcements that were not provided to the Union, case law is replete with poignant instances of spoliation. That is, the failure to preserve property for the other party's use "as evidence in pending or reasonable foreseeable litigation." (See Zubulake ag. UBS Warburg, LLC, 229 FRD 422, July 20, 2004) 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. (See "Adverse Inference Spreadsheet", U-1)

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. 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." (See U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 37 FLRA 515 (1990); also see National Park Service, National Capital Region, U.S. Park Service and Police Association of the District of Columbia, 38 FLRA 1037, December 18, 1990).

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. (See Internal Revenue Service, Philadelphia Center and National Treasury Employees Union, 54 FLRA 674, July 31, 1998; Bureau of Engraving and Printing and Lodge 2135, International Association of Machinists and Aerospace, Workers, 28 FLRA 796, August 31, 1987).

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.

Fourth, this Arbitrator was persuaded by the testimonies of the following witnesses: Bonnie Lovorn, Public Housing Revitalization Specialist, GS-12, Lynn Schonert, Public Housing Revitalization Specialist, GS-12, Monica Randolph-Brown, Public Housing Revitalization Specialist in the Public and Indian Housing Office, Victoria Reese Brown, Public Housing Revitalization Specialist, and Melanie Hertel, Contractor Industrial Relations Specialist in the Office of Labor Relations.

Specialist Lovorn, GS-12, testified that she applied for both the internal and external announcement for a GS-13 but was not selected. Nonetheless, she testified that she performed the same identical work as the GS-13, selectee, Gloria Smith. [TR-72-74]

Specialist Schonert, GS-12, testified that she applied for two internal vacancy positions in 2002, as a Facilities Management Specialist as well as a Financial Analyst. Although these vacancy announcements were posted internally and externally, she was not selected for either position. Specialist Schonert was told by her supervisor that it was in the best interest of the Agency to make external selections to promote growth in the Agency. [TR-177-181]

Specialist Randolph-Brown, GS-12, now retired, testified that she applied for a GS-13 level position in 2002, but was not selected because she was retirement-eligible. However, she trained the actual selectees. Interestingly, Randolph-Brown testified that at the time of her retirement there were other employees who were GS-13 except for her. However, she also added that she was fully qualified for the positions and had already performed the higher graded work as well as received fully successful performance appraisals. [TR-199-204]

Specialist Reese Brown, GS-12, also President of Local 3980, testified that the Agency posted a vacancy announcement for a GS-7 Financial Analyst position, yet the same announcement had a promotion to GS-13 level for three (3) or four (4) other offices, but with identical duties. (See U-7(G) and TR-213-14) Specifically, on the handwritten notation on the vacancy announcement indicated that a constructive demotion was necessary, from a GS-7 level with the maximum career ladder potential to GS-13 level. This assessment was confirmed by Administrative Officer Whitehouse.

Specialist Hertel, GS-13, testified that the Agency posted her same position with a promotion potential to GS-13 level, but she was maxed out at GS-12 at that juncture. However, she further testified that she was discouraged from applying, as her Supervisor Herald stated that new external recruits were needed. Thus, Specialist Hertel did not apply because she believed

that her application would not be considered. [TR-227-232] This Arbitrator credits this testimony of the above witnesses on these issues.

Fifth, the Agency's sole witness, Specialist Lyman, a Supervisor in Human Resources, but who was a Position Classification Specialist for approximately thirty (30) years, made several admissions of irregularities by the Agency.

Specifically , when asked on cross-examination about dual postings of internal and external vacancy announcements and an internal cancellation, he responded as follows:

> "It would seem to go against [this] simultaneous consideration clause."
>
> [TR-99]

Still further, he explains what he means regarding the "simultaneous consideration" in direct examination as follows:

> "If you're advertising externally to HUD, you also do an ad internal to HUD to permit you know, HUD staff...to apply."
>
> [TR-19]

Moreover, he testified that such contravention, the cancellation of an internal advertisement, was "bizarre". [TR-99]

Another example of Specialist Lyman's admission is when posed with still another hypothetical question regarding a vacancy with two different growth potentials. He responded on cross-examination that he would not do such a thing. [TR-104-105]

When questioned about the process of constructive demotion, where a position which is only available at GS-7 level but later expands to a GS-13 level, Specialist Lyman responded that this arrangement was "odd". [TR-109] He further added the following:

"Because many HUD employees who are
GS-12's would obviously not be interested
in applying even though the job...grew to 13."

[TR-109] also see [TR-115]

Based on the foregoing, Specialist Lyman admitted that such irregularities would be violative of the Agreement.

Accordingly, this Arbitrator finds that the Agency violated Article 4, Sections 4.01and 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, as classification standards were not fairly and equitably applied. Lastly, this 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.

Sixth, in response to the Agency's argument that this grievance is precluded from coverage because there is no reduction in the grade or pay of any employee, this Arbitrator disagrees. The evidence supports the Union's case that the Grievants were: (1) not considered for selections; (2) dissuaded from applying; (3) external applicants were given priority over internal employees; (4) GS-12 journeyman employees must train, tutor, and perform the same work as GS-13 journeyman employees in the same position. Thus, but for these inequitable and unfair situations delineated above, these affected positions should have been promoted to the journeyman level to GS-13 retroactively to 2002. The basis for this organizational upgrade is because the Agency failed to follow the procedures set forth the Agreement which

correspondingly resulted in the loss of pay, had these Grievants been promoted to the GS-13 level at the time of this occurrence.

Seventh, in response to what is an appropriate remedy, it would seem to this Arbitrator that an organizational upgrade of affected positions by upgrading the journeyman level for all the subject positions to GS-13 level retroactively to 2002 is the fair and equitable solution. Pursuant to the Agreement, an Agency supervisor would have the final determination as to whether the affected employee has performed the duties of one's position satisfactorily.

AWARD

Accordingly, this Arbitrator finds that the Agency violated Article 4, Section 4.01 and 4.06, Article 9, Section 9.01, and Article 13, Section 13.01 for the aforementioned reasons. The appropriate remedy is an organizational upgrade of affected positions by upgrading the journeyman level for all the subject positions to GS-13 level retroactively from 2002. Pursuant to the Agreement, a supervisor would have the final determination as to whether the affected employees have performed the duties of one's position satisfactorily. In addition, this Arbitrator shall maintain jurisdiction of this matter for implementation of this Award

_____

ARBITRATOR

DATE OF AWARD: September 29, 2009

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

OFFICE OF GENERAL COUNSEL

MEMORANDUM FOR: Jessica Bartlett, Acting Regional Director, FLRA, Washington Field Office

THROUGH: Keisha Hurst, Branch Chief - Employee & Labor Relations Division

FROM: David Ganz, Attorney-Advisor, and Javes Myung, Deputy Assistant General Counsel, Personnel Law Division

SUBJECT: Agency's Statement of Position for U.S. HUD and AFGE, Council of Locals 222, Case No. WA-CA-16-0472, Fair and Equitable Grievance

This constitutes the Agency's Statement of Position in response to the July 20, 2016, unfair labor practice (ULP) charge filed against the U.S. Department of Housing and Urban Development (HUD or Agency) by AFGE Local 222 (the Union) related to the Fair and Equitable Grievance. The charge alleges that the Agency violated 5 U.S.C. § 7116(a)(1)(2)(5)(7)(8) by failing to fully implement the awards set forth in Summary Order 6, the GS-1101 Order, and the PHRS/CIRS Order.

As will be discussed below, the Arbitrator failed to retain jurisdiction to implement the January 2012 Remedial Award (Remedial Award). Because the Arbitrator failed to retain jurisdiction to implement the Remedial Award she lacked jurisdiction to issue any subsequent Implementation Meeting (IM) Summary Orders (Orders), including Summary Order 6, the GS-1101 Order, and the PHRS/CIRS Order,[1] all of which are part of the Union's ULP charge. The Federal Labor Relations Authority (FLRA or Authority) also lacks jurisdiction to hear this case because the Union failed to file a timely ULP regarding the Remedial Award. Consequently, these alleged orders are not final or binding as a matter of law and the Agency could not have committed a ULP by failing to implement them.

Furthermore, even if the Arbitrator could exercise jurisdiction that she did not retain, the awards in this case, including the Remedial Award and IM Orders 1-10 are not binding because

[1] In Summary Order 3, dated August 2, 2014, the Agency was directed to promote all GS-1101 employees. *See* Ex 1 "GS-1101 List of 1,908 Employees to be Promoted." The GS-1101 Order, dated June 18, 2015, directs the Agency to promote the same employees directed to be promoted in Summary 3, following the Authority's May 22, 2015 Decision upholding Summary 3. Similarly, the PHRS/CIRS Order dated June 19, 2015, also orders to the Agency to promote the same employees directed to be promoted in Summary 3. *See* Ex. 2, PHRS/CIRS Order, including Ex.s A and B. Summary Order 6 orders the Agency to promote the employees included in Summary Order 3, the GS-1101 Order, and the PHRS/CIRS Order. *See* Ex. 3, GS-1101 Order, and Ex. 4, "Summary Order 6 List of 3,777 Employees to be Promoted."

they exceed the limited scope of the government's waiver of sovereign immunity in the Back Pay Act, do not comport with the requirements of the Back Pay Act, and violate the Appropriations Clause of the Constitution. The awards also direct the Agency to unlawfully violate the Anti-Deficiency Act. *See U.S. Dept. of VA, Asheville, N.C.*, 57 FLRA 681, 683 (2002) (parties can raise arguments concerning the Authority's jurisdiction at any stage of the Authority's proceedings). Consequently, the FLRA cannot find that the Agency's failure to implement these awards violate 5 U.S.C. 7116 or otherwise constitutes a ULP because such a finding would by definition be arbitrary and capricious under the Administrative Procedures Act. *See AFGE, Local 2924 v. FLRA*, 470 F.3d 375, 380 (D.C. Cir. 2006) (noting that the Court will set aside an order of the Authority if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if it is unsupported by substantial evidence.)

Background

On November 13, 2002, the Union filed a grievance alleging the Agency posted new positions with promotion potential to GS-13 with identical job responsibilities of current bargaining unit employees who encumbered similar positions with promotion potential to grade 12. *See* Ex. 5, Grievance. The parties participated in an arbitration hearing, and on September 29, 2009, the Arbitrator issued an award sustaining the Union's grievance (Merits Award). *See* Ex. 6, Merits Award. The Arbitrator found that the Agency violated Articles 4.01 and 4.06 [grievants were unfairly treated and unjustly discriminated against]; Article 9.01 [classification standards were not fairly and equitably applied]; and Article 13.01 [Agency sought to hire external applicants, instead of promoting and facilitating the career development of internal employees]. *See id.* at p. 15.

In the Merits Award the Arbitrator ordered an "organizational upgrade" of affected positions to the GS-13 level, retroactive to 2002. *See* Ex. 6 at p. 15. In the Merits Award, the Arbitrator also specifically ruled that she would "maintain jurisdiction of this matter for implementation of the Award." *See id.* There was no mention of the Back Pay Act, 5 U.S.C. 5596, or any indication of the statutory basis upon which the award was based. The Agency filed exceptions and on January 26, 2011. The Authority issued a decision, finding the grievance was arbitral because it dealt with issues of fairness and equity. *See U.S. Dept. of Housing and Urban Dev.*, 65 FLRA 433 (2011). However, the Authority vacated the remedy in the Merits Award "and remand[ed] the matter to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy." *See U.S. Dept. of Housing and Urban Dev.*, 65 FLRA at 436.

On January 10, 2012, the Arbitrator issued a new remedial award to replace the vacated Merits Award. In the January 2012 Remedial Award, the Arbitrator found that the Agency violated sections 4.01, 4.06, 9.02, and 13.01 of the Collective Bargaining Agreement (CBA) "as it sought to hire external applicants, instead of promoting and facilitating the career development current employees and that but for these violations... [t]he grievants would have been selected for currently existing career ladder positions with promotion potential to the GS-13 level." *See* Ex. 7, Remedial Award, p. 2. In the Remedial Award the Arbitrator directed the Agency to "process retroactive permanent selections of all affected bargaining unit employees (BUEs) into currently existing career

ladder positions with promotion potential to the GS-13 level." *Id.* at pp. 2-3. Additionally, the Arbitrator proffered three alternative remedies in case the one discussed above was again vacated by the FLRA. *Id.* at pp. 3-4. The Arbitrator also retained jurisdiction to craft alternative remedies if the FLRA vacated the remedies in the Remedial Award and over an award of Attorney Fees upon petition by the Union, which she required the Union to submit in a reasonable time following receipt of the Remedial Award. *Id.* The Arbitrator specifically did not retain jurisdiction to implement the Remedial Award. *See* Ex. 7, Remedial Award. Additionally, the Arbitrator did not mention the Back Pay Act, 5 U.S.C. 5596, or provide any statutory basis for the remedies. *See id.*

On February 10, 2012, the Agency filed exceptions to the Remedial Award. On August 8, 2012, the FLRA issued an Order dismissing the Agency's exceptions, asserting the Agency's failed to challenge the proposed remedy prior to filing its exceptions. *See U.S. Dep't of Housing and Urban Dev.*, 66 FLRA 867 (2012).

On October 24, 2012, the Union brought a ULP charge against the Agency alleging that it failed to implement the final and binding Remedial Award. *See* Ex 8. Thereafter, on March 20, 2013, the FLRA, at the Union's request, withdrew the ULP charge and the case was "closed." *See* Ex. 9.

Notwithstanding the fact that she did not retain implementation jurisdiction over the Remedial Award, on December 9, 2013, the Arbitrator advised the parties of her intent to drag the Agency through what has proven to be a prolonged implementation process consisting of formal meetings. *See* IM Notice.

As stated in a January 4, 2014, email from the Arbitrator, the Agency refused to participate in any IM. *See* Ex. 10, January 04, 2014 email from the Arbitrator (noting that "[t]he 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.")

The Arbitrator convened her first implementation meeting on February 4, 2014. On March 14, 2014, the Arbitrator issued IM Summary Order 1 and she has continued to convene meetings and issue IM Summary Orders since that time.

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

Ex. 11, pp. 7-16, Agency's July 29, 2016 Exception to Summary 10, for a succinct summary of Summary Orders 1-10. Signed Summary Orders 1-10 are attached as Ex.s A1-A10.

Summary Orders 1, 3, and 6 are of particular importance to the current ULP. *See,* Ex. A3, Summary Order 3, p. 1 (noting that although the Arbitrator had not adopted a methodology at this point, she ordered the Agency to process retroactive promotions for all GS-1101 employees, which constituted 1,908 individuals[2];) and, Ex. A6, Summary Order 6, pp. 8-12 (in which the Arbitrator adopted in its entirety the Union's challenge to the Agency's methodology, adopted the Union's methodology, and ordered the Agency to retroactively promote and pay back pay to 3,777 employees effective January 18, 2002.)

Argument

A. Introduction

The FLRA lacks jurisdiction to hear this charge because the Union failed to file its ULP within 6 months of when it alleges the Agency stated that it would not implement the Remedial Award. Additionally, the Arbitrator failed to retain jurisdiction to implement the Remedial Award. Because the Arbitrator failed to retain jurisdiction to implement the Remedial Award she lacked jurisdiction to convene implementation meetings and issue implementation summary orders. Furthermore, even if the Arbitrator could exercise jurisdiction that she did not retain, the awards in this case, including the Remedial Award and IM Summary Orders 1-10, are not binding because they exceed the limited scope of the government's waiver of sovereign immunity in the Back Pay Act, otherwise do not comport with the requirements of the Back Pay Act, and violate the Appropriations Clause of the Constitution. The awards also direct the Agency to unlawfully violate the Anti-Deficiency Act. *See U.S. Dept. of VA, Asheville, N.C.*, 57 FLRA 681, 683 (2002) (parties can raise arguments concerning the Authority's jurisdiction at any stage of the Authority's proceedings). Consequently, the FLRA cannot find that the Agency's failure to implement these Orders violates 5 U.S.C. 7116 or otherwise constitutes a ULP because such a finding would, by necessity, be arbitrary and capricious under the Administrative Procedures Act. *See AFGE, Local 2924 v. FLRA*, 470 F.3d 375, 380 (D.C. Cir. 2006) (noting that the Court will set aside an order of the Authority if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if it is unsupported by substantial evidence.) For these reasons, as will be shown below, the Union has not met the burden of proving the allegations in the complaint by a preponderance of the evidence as is required by the FLRA and therefore its ULP charge must be dismissed with prejudice. *See Letterkenny Army Depot and Int'l Bhd. of Police Officers, Local 358*, 35 FLRA 113, 118-22 (1990).

B. The Union's current ULP is untimely.[3]

Section 7118(a)(4)(A) of the Statute discusses when a ULP must be filed by a charging party. It states: "[N]o complaint shall be issued on any unfair labor practice which occurred more

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[2] *See* Ex. 12, list of GS-1101 employees.

[3] The timeliness of a charge is an affirmative defense. *See Army Armament Research Dev. & Eng'r Ctr. Picatinny Arsenal*, 52 FLRA 527, 532-34 (1996). Thus, the Agency raises this defense and it is preserved. *See id.*

than 6 months before the filing of the charge with the Authority." The Remedial Award was issued by the Arbitrator on January 10, 2012. *See* Ex. 7. An award becomes final when the Authority issues a decision resolving exceptions. *U.S. Dept. of Treasury, U.S. Customs Serv., Nogales, Ariz.*, 48 FLRA 938, 940 (1993). The Agency filed exceptions to the Remedial Award that were denied by the Authority on August 8, 2012. *See* Ex. 13, *U.S. HUD*, 66 FLRA No. 160 (2012).

On October 24, 2012, the Union, undoubtedly conscious of the 6-month statutory requirement, brought a ULP charge against the Agency alleging that it failed to implement the final January 2012 Remedial Award. *See* Ex. 8. However, on March 20, 2013, the FLRA, at the Union's request, withdrew the ULP charge and the case was "closed." *See* Ex. 9.

The FLRA has found that the six-month filing period for a ULP charge starts at the time the alleged unfair labor practice occurred and that a party fails to comply with an award when it expressly rejects its obligation under the award. *U.S. Dept. of the Treasury IRS,* 61 F.L.R.A. 146, 150, (2005) *citing* to *NTEU v. FLRA*, 392 F.3d 498, 500-501 (D.C. Cir. 2004). Therefore, according to the Union's own statements in the current ULP Charge, the six-month deadline began to run between the August 2012 FLRA Decision upholding the Remedial Award and its filing of the October 24, 2012 ULP Charge when the Agency allegedly stated that it would not implement the Award. ULP Charge, p. 2. Hence, at the latest, the six-month deadline began when the Union filed its ULP on October 24, 2012, or when it withdrew the ULP Charge in March 2013.

Therefore, the six-month statutory deadline to file a ULP alleging the non-implementation of the January 2012 Remedial Award has long since lapsed. *See* 5 USC 7118(a)(4)(A). In the instant charge the Union alleges that the Agency failed to implement the GS-1101 and PHRS/CIRS Orders,[4] and Summary Order 6; however, those orders all clearly state that nothing in the meeting or Orders should be construed as a new requirement or modification of the existing Remedial Award. *See respectively* Ex. 3, Ex. 2, and Ex. A6. Therefore, by the Arbitrator's own clear language the Remedial Award provides the sole and exclusive remedy for this case and the Summary Orders do not modify or add requirements to the Award. Consequently, because the Union withdrew its timely filed October 24, 2012, ULP charge alleging that the Agency failed to implement the Remedial Award, Section 7118(a)(4)(A) bars them from filing the current ULP charge. To find that Summary Order 6, the GS-1101 Order, or the PHRS/CIRS Order are somehow independent of the Remedial Award violates the plain language of those Orders.

The Agency recognizes that under Section 7118(a)(4)(B) of the Statute there are circumstances that the six-month period may be extended and that the Authority has recognized the doctrine of equitable tolling to permit suspension of a statute of limitations in Section 7118(a)(4) in certain circumstances. The Union has not asserted these issues, but given the Union's October 2012 ULP alleging refusal to implement the remedial award, these exceptions to the 6-month deadline are not applicable. Also, the Agency also notes that the Authority has not applied a continuing violation theory in ULP cases. *See EEOC,* 53 F.L.R.A. 487, 494 (1997).

Additionally, in the current ULP charge, the Union alleges that regarding the prior ULP charge, the "FLRA indicated that it was going to find an Unfair Labor Practice, the Agency finally

[4] As noted in the GS-1101 and PHRS/CIRS Orders, the employees ordered to be promoted under these Orders originated in Summary Order 3. *See* GS-1101 Order, pp. 4-5 and PHRS/CIRS Order, pp. 1-2.

agreed (in theory) to implement the Arbitrator's Award..." ULP Charge, p. 2. The Agency points out that the Union cites to no evidence or support for this allegation. This is because no such evidence or support exists and the allegation is merely the Union Counsel's opinion or invention that in no way weighs in favor of equitable tolling of the statutory six-month filing requirement.

The Agency also points out that the Union has not sought attorney fees pursuant to the Remedial Award, which notes that it must do so in a "reasonable time following receipt of this Award." Remedial Award, p. 5. Therefore, given that the Union has not previously sought Attorney Fees pursuant to the Remedial Award through a timely filed ULP charge, attempting to do so now is not reasonable and it has waived its right to Attorney Fees. Thus, the claim to Attorney Fees is barred by 5 U.S.C. 7116(a) and the doctrine of laches.

Finally, even if the FLRA considers the ULP charge regarding Summary 6 to be timely for purposes of 5 U.S.C. 7118(a), because the Union failed to bring a timely ULP charge regarding Summary Order 3, which contained over 1900 of the same employees listed in the subsequent GS-1101 and PHRS/CIRS Orders and Summary Order 6, claims related to those employees are barred by 5 U.S.C. 7118(a). *See* Ex. 1 (Summary 3 list), Ex. 2 (PHRS/CIRS list), and Ex. 4 (Summary 6 list). Summary 3, for the sake of argument only, became final on May 22, 2015, when the Authority denied the Agency's Exceptions.[5] In the GS-1101 Order dated June 18, 2015, it is noted that the Agency "refused to discuss" the issue of retroactive backpay for the over 1900 employees ordered to be promoted by the GS-1101 Order and Summary Order 3 and that it was "impossible" to process retroactive promotions using the current backpay date. *See* Ex. 3, pp. 4-5. Summary Order 7 dated June 27, 2015 notes that at the Implementation Meeting the Union presented the Agency with a list of GS-1101 class members, including the PHRS and CIRS members, that were to be promoted in compliance with Summary 3, however, the Agency declined to sign a stipulation regarding this list. *See* Ex. A7, Summary Order 7, pp. 2-3.

As noted above, the FLRA has found that the six-month filing period for ULP charges is deemed to start when a party expressly rejects its obligation under the award. *IRS,* 61 F.L.R.A. at 150 *citing* to *NTEU,* 392 F.3d at 500-501. Therefore, the GS-1101 Order and Summary Order 7 clearly shows that as early as June 18, 2015, the Union believed that the Agency expressly rejected its obligation to promote with backpay the over 1900 GS-1101 employees as directed by Summary Order 3 and the GS-1101 Order.[6] Consequently, the six-month filing period to file a ULP charge regarding Summary Order 3 and the GS-1101 Order has long since lapsed and the over 1900 employees that were included in these Orders must therefore be excluded from the current ULP because the Union failed to comply with 5 U.S.C. 7118(a).

C. The Arbitrator did not retain jurisdiction in the Remedial Award and therefore lacked jurisdiction to hold implementation meetings and issue Implementation Summaries 1-10.

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[5] *U.S. Dept. of HUD,* 68 FLRA No. 100 (2015).

[6] Additionally, the Union admitted in the current ULP charge that as early as March 26, 2015, the "Agency repeatedly asserted in writing and in telephone discussions that it did not have the re-sources to come up with a plan to implement, nor to pay the final and binding Award." *See* ULP Charge, p. 7. Thus, this statement by the Union shows as early as March 26, 2015, the Union believed that the Agency could not implement the thousands of retroactive promotions.

The Remedial Award speaks for itself; therefore, it is irrefutable that the Arbitrator did not retain implementation jurisdiction in the Remedial Award. *See id.* The Authority has consistently held that, unless an arbitrator retains jurisdiction after issuance of an award, the arbitrator is without legal authority to take any further action with respect to that award without the joint request of the parties. *See U.S. DOD Dependents Sch.*, 49 F.L.R.A. 120, 122, (1994) *citing* to *GSA and AFGE, Local 2600*, 34 FLRA 1123 (1990). For example, in the matter of the *U.S. Dept. of the Navy v. AFGE, Local 1923,* 56 F.L.R.A. 848; 2000 FLRA LEXIS 162; 56 FLRA No. 141 (September 29, 2000), the FLRA held that an arbitrator may retain jurisdiction for the purpose of "overseeing the implementation of remedies." In that case, the Arbitrator issued five remedial awards and a compliance award. The Authority held that an arbitrator may retain jurisdiction for purposes of overseeing implementation; therefore, the arbitrator had jurisdiction to issue the compliance award regarding three of the awards in that case. The Authority based its holding on its finding that there was no dispute that, in three of the awards, the Arbitrator specifically retained jurisdiction to resolve compliance issues. Otherwise, the Authority explained that without a retention of jurisdiction, an arbitrator becomes *functus officio* and may not exercise jurisdiction over implementation of remedies. In fact, the Authority has taken this position consistently over the years. *GSA and AFGE, Local 2600*, 34 FLRA No. 171 at [*253]; *Overseas Federation of Teachers AFT, AFL-CIO and Department of Defense Dependents Schools, Mediterranean Region*, 32 FLRA 410, 415 (1988); *Veterans Administration Hospital, San Antonio, Texas*, 15 FLRA 276, 277 (1984).

Here, the Arbitrator did not retain jurisdiction over implementation of the Remedial Award and the Agency's "refusal to participate" as noted in the January 4, 2014, email from the Arbitrator,[7] in the implementation meetings, clearly establishes that it did not consent to the Arbitrator's continued jurisdiction or authority. *See Overseas Fed'n of Teachers AFT, AFL-CIO*, 32 F.L.R.A. 410, 415 (1988) *citing* to United *Mine Workers of America, District 28 v. Island Creek Coal Company*, 630 F. Supp. 1278 (W.D. Va. 1986) (noting that in the absence of a joint request by the parties, the Arbitrator fulfilled the function of his office and was *functus officio*). (Emphasis added.)

D. The Agency Complied with the Remedial Award.

Finally, in full and final compliance with the Remedial Award, from 2013 to 2015 the Agency processed the promotions of the 17 affected employees with back pay, including the six witnesses who testified at the arbitration hearings. Ex. 14, SF-50s. Accordingly, the Agency has fully complied with the Remedial Award and the Arbitrator did not retain jurisdiction to question this method of compliance. Thus, the Agency has not committed a ULP in the case by failing to implement or comply with the Remedial Award and the Arbitrator is without further jurisdiction in this case.

E. The Remedial Award and Summary Orders 3 and 6 and the GS-1101 and PHRS/CIRS Orders are not binding because they are contrary to law, exceed the scope of the government's waiver of sovereign immunity in the Back Pay Act, are not consistent with the Appropriations Clause of the Constitution, and direct the Agency to violate the Anti-Deficiency Act.

[7] Ex. 10.

The Agency has argued these grounds in its recently filed Exceptions to Summary 10, which is currently pending with the Authority. The Agency hereby incorporates those Exceptions by reference. *See* Ex. 11. Therefore, the Agency will only briefly summarize those arguments in this Position Statement.

As related to a ULP proceeding pursuant to 5 U.S.C. 7118, the FLRA has consistently ruled that claims of statutory impediments to an arbitrator's authority can be raised to defeat finality in a ULP proceeding despite the fact that the Authority does not review the merits of the award in a ULP proceeding. *See U.S. Dept. of VA, Temple, Texas*, 67 F.L.R.A. 269 (2014); *see also Dep't of Health & Human Servs., SSA*, 976 F.2d 1409, 1414, 298 U.S. App. D.C. 105 (D.C. Cir. 1992) (concluding that the Authority properly considered the existence of a statutory, as opposed to a contractual, bar to the arbitrator's jurisdiction in ULP proceedings for enforcement of a final and binding award); *United States Army v. AFGE, 22 F.L.R.A. 200, 206-07 (1986)* (concluding that where the challenge is to the arbitrator's very jurisdiction, as opposed to his interpretation of a collective bargaining agreement, its usual approach is inappropriate). Additionally, parties can raise arguments concerning the Authority's jurisdiction at any stage of the Authority's proceedings. *See U.S. Dep't of Veterans Affairs, VAMC, Asheville, N.C.*, 57 FLRA 681, 683 (2002) *citing* to *United States Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, San Francisco, Cal.*, 55 FLRA 193, 195 (1999).

In any suit in which the United States is a defendant, there must be a cause of action and waiver of sovereign immunity to have subject matter jurisdiction. A waiver of sovereign immunity is a prerequisite to subject-matter jurisdiction. *See Presidential Gardens Assocs. v. United States*, 175 F.3d 132, 139 (2d Cir. 1999). Therefore, the Agency's arguments related to the limited waiver of sovereign immunity in the Back Pay Act, the Appropriations Clause of the Constitution, and the Anti-Deficiency Act are properly raised in this forum.

1. The Awards fail to identify a statute that the Agency violated and the recipients have not suffered a withdrawal or reduction of pay, allowances, or differentials.

The United States, as sovereign, is immune from suit save as it consents to be sued. *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941). Thus, as the FLRA has recognized, "there is no right to money damages in a suit against the United States without a waiver of sovereign immunity." *U.S. Dep't of Transp., FAA*, 64 FLRA 325 (2009).

First, the only statute allegedly waiving sovereign immunity so as to permit back pay and interest in this case, which was not contained in the Remedial Award, but rather in Summary 3, which noted that it did not modify or otherwise change the Remedial Award, is the Back Pay Act, 5 U.S.C. § 5596(b).[8] *See* Ex. A3, IM Summary 3, p. 1. In *Fed. Bureau of Prisons Fed. Det.*

[8] The Back Pay Act provides, in relevant part:

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

Ctr., 66 F.L.R.A. 858, 859 (2012), the FLRA found that an award was contrary to law and set it aside because the arbitrator awarded monetary damages to an employee, but provided no statutory authority supporting the award of damages. Thus, the Remedial Award is deficient on this basis.

Second, the award recipients identified in Summary Orders 3 and 6 and the PHRS/CIRS and GS-1101 Orders, have not suffered a withdrawal or reduction of pay, allowances, or differentials.[9] "[I]n order to constitute 'pay, allowances, and differentials' recoverable under the Back Pay Act, a remedy must not only constitute "pay, leave, [or] other monetary employment benefits[,]' but also must be something to which the employee 'is entitled by statute or regulation.'" *U.S. D.O.T. F.A.A. Detroit*, 64 FLRA 325 (2009). (Emphasis added). The Arbitrator herein has not identified any statute or regulation entitling Union members to back pay in the Awards or Summaries aside from the Back Pay Act in Summary 3 as discussed above. Rather, her award is based strictly on a finding of a violation of the very general provisions of the collective bargaining agreement requiring the Agency actions to be "fair and equitable."

Third, even if there were a violation of some statute or regulation, the Back Pay Act would not apply because Union members suffered no withdrawal or reduction of pay, allowances, or differentials. In *United States v. Testan*, 424 U.S. 392 (1976), GS-13 employees claimed they should have been paid as GS-14 employees because they were performing similar work to GS-14 employees at other agencies. The Supreme Court ordered the suit dismissed, noting: "There is no claim here that either respondent has been denied the benefit of the position to which he was appointed. The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it." 424 U.S. at 402. Since *Testan,* Federal courts have repeatedly held the Back Pay Act inapplicable to claims that employees should have obtained more pay or a higher position.[10]

2. Even assuming a reduction in pay, allowances, or differentials, the Award cannot be implemented under Federal courts' or the FLRA's interpretation of the Back Pay Act because they have not suffered an unwarranted personnel action.

Federal courts, including the D.C. Circuit, have interpreted the Back Pay Act to allow retroactive backpay only for non-selections involving noncompetitive, mandatory promotions and specifically exclude discretionary promotions of the type in the current case. In *Brown v. Secretary of the Army*, 918 F.2d 214, 216 (D.C. Cir. 1990), the D.C. Circuit Court of Appeals stated "... we comprehend the 1978 Back Pay Act definitional amendment to mean that if an upgrade is mandatory once specified conditions are met, the Act now affords a retrospective remedy. If an upgrade is not of that virtually automatic, noncompetitive kind, the Act affords no relief." (Emphasis added). *See also Bowden v. United States*, 106 F.3d 433, 440 (D.C. Cir. 1997) "[the Back Pay Act] does not cover denials of discretionary promotions; it covers only denials of

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of the pay, allowances, or differentials of the employee (A) is entitled... (i) an amount equal to all or any part of the pay, allowances, or differentials. (Emphasis added).

[9] 5 C.F.R. § 550.803, the Office of Personnel Management Regulations define "pay, allowances, or differentials" as "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment." (Emphasis added.)

[10] *See Carroll v. U.S.* 67 Fed. Cl. 82 (2005) ("Alleging the performance of duties warranting or justifying higher pay than that previously received does not state a valid claim under the BPA"); *Collier v. U.S.* 379 F.3d 1330, 1333 (Fed Cir. 2004).

otherwise mandatory promotions, such as upgrades required under seniority systems." The Merit and Remedial Awards, even as modified by the Summary Orders, made no findings regarding the types of GS-13 job selections that the Agency allegedly denied employees. The Merit Award, p. 9, found that "the Union contends that although there were postings both internally and externally for vacancies... current employees were discouraged from applying." Additionally, "when a current employee was told she was not selected for a position... she trained the actual selectee." Ex. 6, Merit Award, p. 9. The Merit Award makes clear the interview process the Arbitrator found unfair was for competitive promotions rather than career ladder promotions or some other type of virtually automatic promotion. Additionally, there are no specific findings that any of the 3,777 employees were actually minimally qualified for the GS-13 positions into which they were ordered. Thus, under the above precedent from Federal courts it is plainly obvious that the promotions ordered by the Arbitrator were not mandatory promotions of the virtually automatic, noncompetitive type and retroactive backpay cannot be paid under the Back Pay Act.

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

The Authority has upheld an award ordering a retroactive promotion where the arbitrator found that, but for the Agency's unlawful discrimination, the grievant would have been selected for the position where the arbitrator made detailed findings that the grievant was more qualified than the selectee and no evidence was submitted as to the other applicants' qualifications. *United States GPO Wash., DC*, 62 F.L.R.A. 419, 424 (F.L.R.A. 2008) *citing* to *Soc. Sec. Admin., Woodlawn, Md.*, 54 FLRA 1570, 1578 (1998). (Emphasis added). *See also VA Cleveland,* 41 FLRA 514, 517-19 (1991) (upholding an award of a retroactive promotion with backpay, finding that there was a direct connection between the unjustified and unwarranted inclusion of a particular evaluation factor in the rating and ranking process in a job selection and the grievant's failure to be one of the six candidates selected for promotion.)

Here, the Merit and Remedial Awards and Summary Orders 1-10, including the PHRS/CIRS and GS-1101 Orders, made no findings that any specific employee of 3,777 employees ordered to be promoted other than those who testified would have been even minimally qualified for any of the positions to which they are to be promoted, let alone that they were the best qualified for the position. *See GPO Wash., DC*, supra. The Arbitrator did not attempt to carefully reconstruct the selection process for any vacancy as the arbitrator in *VA Cleveland*, supra., did. Nor did Merit or Remedial Awards or Summary Orders attempt to make such findings as the number of award recipients increased to 3,777 employees. The Arbitrator could not have made such a finding because she never identified the positions to which employees were to be promoted or identified vacant positions that were actually advertised and filled by the Agency. *See* Merit and Remedial Awards and Summaries 1-10, Ex.s, respectively, 6, 7, and A1-A-10. Rather the Arbitrator merely recited in the Merit and Remedial Awards that "but for" the Agency's supposed unjustified action

that the "affected positions" would have been upgraded. *See* Ex. 6, Merit Award, p. 16; Ex. 7, Remedial Award, p. 2. It is clear that the Arbitrator couched her award in the "but for" language in the Merit and Remedial Awards without making any actual findings regarding causation of individual employees and then latter used "implementation meetings" to expand the award recipients from six witnesses to class of recipients of 3,777 employees based on the sanction/adverse inference in the Merit Award.

The Authority has struck an arbitrator's order of a retroactive promotion with backpay as deficient and contrary to the Back Pay Act in a case where the arbitrator reviewed the selection process, including the ratings of the applicants and, rejected the Agency's proffered justification for its selections. *See SSA Office of Hearings & Appeals,* 54 F.L.R.A. at 613-614. Here, the promotions at issue were not mandatory, nor were they virtually automatic or noncompetitive. The affected employees in this case would have had to apply for the positions in question, and their selections for the positions were not guaranteed. Indeed, neither the Union nor the Arbitrator have ever identified those "previously classified" positions that any of the employees would have applied for or whether they were even minimally qualified for the positions. Thus, under FLRA case law the backpay awarded in this case cannot be paid under the Back Pay Act.

The award and order to promote 3,777 employees is based on sanctions and adverse inferences drawn from the July and August 2008 arbitration hearings. *See* Ex. A6, IM Summary 6, pp. 12 and 15; Ex. 6, Merits Award. However, a waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text. *Lane v. Pena*, 518 U.S. 187 (1996). Thus, under *Lane,* the awards by the Arbitrator that are premised on a sanction or adverse inference cannot serve as the basis of the waiver of sovereign immunity.

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

As shown above, the Back Pay Act does not apply to the orders in this case instructing the Agency to pay employees back-salary based on retroactive promotions. In addition, the broad-sweeping remedy of retroactive promotions and backpay, to include TSP payment and annuity and retirement benefits ordered by the Awards and Summaries, is far greater than what is permitted by the limited scope of relief provided for in the Back Pay Act.

OPM regulations state:

> "Pay, allowances, and differentials means pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment. Agency and employee contributions to a retirement investment fund, such as the Thrift Savings Plan, are not covered. Monetary benefits payable to separated or retired employees based upon a separation from service, such as retirement benefits, severance payments, and lump-sum payments for annual leave, are not covered." (Emphasis added.) 5 C.F.R. § 550.803.

Summary 6, ordered the Agency to produce certain TSP data from class members and

potential class members requested by the Union within 14 days and Summary 7 required the Agency to request a meeting with OPM regarding "recalculated annuities for retired class members." Ex. A6, Summary 6, p. 2; Ex. A7, Summary 7, p. 4, respectively. Summary 8, pp. 9-10 also notes that "TSP information regarding class members is a critical step in the implementation of the Award and Summaries." Ex. A8.

Consequently, it is clear that Arbitrator McKissick's award, including the above mentioned Summaries, are contrary to law because they order retroactive payments to current and retired employees of money that cannot be paid under the Back Pay Act or OPM regulation.[11] Given this the awards direct the Agency to expend money that is not authorized by law in violation of the Anti-Deficiency Act. *See* 31 U.S.C. § 1341(a)(1)(A).

4. Because the Back Pay Act cannot be used to pay the award, the government has not waived sovereign immunity and therefore the Award violates the Appropriations Clause of the Constitution.

This case involves the important constitutional issue of the limits of an arbitrator in a Federal sector employment dispute to order the U.S. taxpayers to foot a windfall to federal employees up to $700 million that is contrary to law and in violation of the Appropriations Clause. An unauthorized award of money from the Treasury, as here, violates the Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7, which provides that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *See Dep't of Air Force,* 648 F.3d at 844-45 (drawing a parallel between Appropriations Clause issues and sovereign immunity issues). Likewise, "Federal collective bargaining is not exempt from the rule that funds from the Treasury may not be expended except pursuant to congressional appropriations." *U.S. Dep't of the Navy v. Fed. Labor Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012).

The principle of sovereign immunity rests on fundamental jurisdictional limitations, necessarily implicating courts recognition that judicial and FLRA review is permitted when an arbitrator exceeds her jurisdiction. *See,* e.g., *Cohen v. United States,* 650 F.3d 717, 723 (D.C. Cir. 2011) ("[s]overeign immunity is jurisdictional"), quoting *FDIC v. Meyer,* 510 U.S. 471, 475 (1994). Appropriations Clause issues are also fundamental to the separation of powers. For example, the D.C. Circuit recognized in *In re Aiken County,* 725 F.3d 255, 259 (D.C. Cir. 2013), that the Executive cannot act where "Congress appropriates no money for a statutorily mandated program."

Given that the Back Pay Act cannot be used to pay the Awards, the current case involves an order to pay a massive unauthorized amount of approximately $700 million in violation of the Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7. As such the Award is contrary to law, including the Anti-Deficiency Act, and failure to comply with it cannot be the basis for a finding of a ULP.

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[11] *See U.S. HHS Gallup Indian Med. Ctr. Navajo Area Indian Health Serv.*, 60 F.L.R.A. 202, 212 (2004) ("Applying this regulation [5 C.F.R. § 550.803], we conclude that the Back Pay Act does not authorize the award of lost retirement benefits, and we set aside that portion of the award); *see also SSA, Baltimore v. FLRA*, 201 F.3d 465, 470 (D.C. Cir. 2000) (noting that "[t]he OPM also stated that benefits received after retirement were not encompassed by its definition of pay, allowances, or differentials, despite the connection of such benefits to federal employment.")

CONCLUSION

Based on the foregoing, the Agency has not violated 5 USC 7116(a). Accordingly, the Agency requests that the ULP Charge is dismissed with prejudice.

cc: Melissa Coward, FLRA

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SALARIES AND EXPENSES

	FY 2014 Actual		FY 2015		FY 2016		FY 2015 TO FY 2016	
	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount
	(Dollars in Thousands)							
PROGRAM OFFICES								
Community Planning and Development	744.5	$ 99,405	761.6	$ 102,000	819.3	$ 112,100	57.7	$ 10,100
Fair Housing and Equal Opportunity	527.2	68,236	515.8	68,000	607.9	81,100	92.1	13,100
Office of Lead Hazard Control and Healthy Homes	50.9	7,061	46.3	6,700	53.6	7,800	7.3	1,100
Housing	2,839.9	374,041	2,833.8	379,000	2,921.6	397,200	87.8	18,200
Policy Development and Research	137.4	20,983	152.1	22,700	158.5	23,900	6.4	1,200
Public and Indian Housing	1,345.0	196,628	1,421.1	203,000	1,453.3	210,000	32.2	7,000
SUBTOTAL	**5,644.9**	**768,353**	**5,730.6**	**781,400**	**6,014.1**	**832,100**	**283.5**	**50,700**
EXECUTIVE SUPPORT OFFICES								
Immediate Office of the Secretary	18.9	4,108	21.2	3,908	19.1	3,571	(2.2)	(337)
Office of the Deputy Secretary	3.3	1,168	8.1	1,162	8.8	1,267	0.7	105
Office of Congressional and Intergovernmental Relations	15.5	2,272	18.1	2,675	18.5	2,766	0.4	91
Office of Public Affairs	18.9	3,037	21.7	3,418	22.8	3,631	1.1	213
Office of Adjudicatory Services	8.0	1,341	8.3	1,363	8.4	1,397	0.1	34
Office of Small and Disadvantaged Business	4.0	597	4.5	697	4.5	713	0.1	16
Office of Faith-Based and Neighborhood Partnerships	8.2	1,088	8.3	1,277	8.3	1,255	0.1	(22)
SUBTOTAL	**76.8**	**13,611**	**90.1**	**14,500**	**90.3**	**14,600**	**0.2**	**100**
ADMINISTRATIVE SUPPORT OFFICES								
Office of the Chief Human Capital Officer	190.8	54,400	190.0	57,000	180.0	61,475	(10.0)	4,475
Office of Administration	232.2	202,243	238.0	200,000	241.0	210,504	3.0	10,504
Office of the Chief Financial Officer	188.8	46,460	180.8	47,000	180.8	81,357	0.0	34,357
Office of the Chief Procurement Officer	115.1	16,124	118.7	16,500	121.0	17,036	2.3	536
Office of Field Policy and Management	363.3	51,240	360.3	50,000	384.1	55,401	23.8	5,401
Office of Departmental Equal Employment Opportunity	18.6	3,131	19.7	3,200	19.9	3,270	0.2	70
Office of the General Counsel	596.1	93,217	600.9	94,000	609.9	96,981	9.0	2,981
Office of Strategic Planning and Management	25.5	4,483	30.0	4,400	30.1	5,774	0.1	1,374
Office of the Chief Information Officer	233.3	35,785	252.9	46,000	252.9	46,102	(0.0)	102
SUBTOTAL	**1,963.8**	**507,083**	**1,991.3**	**518,100**	**2,019.7**	**577,900**	**28.4**	**59,800**
TOTAL HUD SALARIES & EXPENSES *	**7,685.4**	**1,287,047**	**7,812.1**	**1,314,000**	**8,124.1**	**1,424,600**	**312.1**	**110,600**
Government National Mortgage Association*	109.7	19,435	138.8	23,000	167.8	28,300	29.0	5,300
Office of Inspector General*	602.8	124,084	637.0	126,000	643.0	129,000	6.0	3,000

*HUD Salaries & Expenses totals excludes Government National Mortgage Association (GNMA) & Office of the Inspector General (OIG), which receive funding under their respective Program Accounts.