BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL of HUD Locals 222
(Union)

Case No. 0-AR-4586

(70 F.L.R.A No. 122 (2018))

PETITIONER'S MOTION FOR RECONSIDERATION

Mark L. Vinson, Esq.
Assistant General Counsel
Office of the General Counsel
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001
Email: vinsom@afge.org
Telephone: (202) 639-6426
Facsimile: (202) 379-2928

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INTRODUCTION

The American Federation of Government Employees ("AFGE") Council 222, AFL-CIO ("Union" or "Council") hereby submits its Motion for Reconsideration of the Federal Labor Relations Authority's ("FLRA" or "Authority") decision in the U.S. Department of Housing and Urban Development and American Federation of Government Employees Council 222, (HUD VIII)[1] Case Number 0-AR-4586, 70 F.L.R.A. No. 122 (2018)) ("Decision") pursuant to 5 C.F.R. § 2429.17. In its sua sponte decision the Authority reversed well over a decade of its decisions where the Authority found that grievance did not concern classification and that the Agency was in violation of the Collective Bargaining Agreement ("CBA"). In this case the Authority found: "this grievance always concerned classification, the Arbitrator has always lacked jurisdiction over the grievance as a matter of law, under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute ("Statute")". Id. As result of its findings, the Authority set aside Dr. Andree Y. McKissick's ("Arbitrator") award and remedies. Id.

This Motion for Reconsideration is supported by a showing of extraordinary circumstances because the Authority erred in its conclusions of law and findings of fact when it reversed its final and binding decisions without any legal authority. Accordingly, the Union requests that the Authority vacate its decision issued in this case and deny the Housing and Urban Development's exceptions to Arbitrator's McKissick's award.

[1]The previous decision will be referred to as follows: 59 F.L.R.A. 630 (2004) ("HUD I"); 65 F.L.R.A. 433 (2011) ("HUD II"); 66 F.L.R.A. 867, (2012) ("HUD III"); 68 F.L.R.A. 631 (2015) (" HUD IV"): 69 F.L.R.A. 60 (2015) ("HUD V"); 69 F.L.R.A. 213 (2016) (" HUD VI"); 70 FLRA 38 (2016) ("HUD VII")); 70 FLRA 122 (2018) ("HUD VIII")

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

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

UNION'S MOTION FOR RECONSIDERATION

AFGE Council of Locals 222 (the "Union"), by and through its undersigned counsel[2], and pursuant to 5 C.F.R. §2429.17, hereby requests reconsideration of the Authority's improper and unprecedented Decision to set aside all awards and written summaries and vacate *HUD I* through *HUD VII*. The Authority's decision was ultra vires and should be set aside.

I. LEGAL STANDARD

A. Request for Reconsideration

Under the Authority's regulations, "[a]fter a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order." 5 C.F.R. § 2429.17. A motion for reconsideration must "state with particularity the extraordinary circumstances claimed" and "shall be supported by appropriate citations." Id.

[2] See Exh. 1. Designation of Representation.

The party seeking reconsideration of a final decision or order is the one who "bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action." *U.S. Environmental Protection Agency,* 61 F.L.R.A. 806, 807 (2006) ("EPA"). The Authority has identified a limited number of situations in which extraordinary circumstances will be found to exist. These circumstances include where a moving party has established, in its motion for reconsideration that:

(1) an intervening court decision or change in the law affected dispositive issues;

(2) evidence, information, or issues crucial to the decision had not been presented to the Authority; or

(3) the Authority had erred in its remedial order, process, conclusion of law, or factual finding.

EPA, 61 F.L.R.A. at 807. As explained below, the Union will demonstrate that extraordinary circumstances exist that warrant granting the request for reconsideration because the Authority erred in its conclusion of law and factual findings.

II. BACKGROUND

In November 2002, AFGE Council of HUD Locals, Council 222 filed a class-action type grievance pursuant to the Parties' Collective Bargaining Agreement, alleging that the Agency violated numerous provisions of the CBA in its hiring processes. Specifically, the Union alleged that the Agency was hiring employees from outside the Agency, and allowed them to have higher promotion potential than already employed individuals, while at the same time requiring existing employees to take a downgrade in order to be eligible for the eventual higher position. The Union also alleged that the Agency was requiring the existing (and lower-graded) employees to train the new hires who would eventually surpass them in grade and pay.

HUD I

The Union filed a grievance alleging the Agency's advertising and filling certain positions with promotion potential to GS-13 deprived employees occupying similar positions with promotion potential to GS-12 of the opportunity to be non-competitively promoted to GS-13. 59 F.L.R.A. 630, 630 (2004), [HUD I]. The grievance sought as a remedy "full promotion potential for all similarly situated employees to the GS-13 level and other just relief. Id. The Agency denied the grievance finding that it was not arbitrable because it concerned the classification of positions. Id. The grievance was submitted for arbitration and the Arbitrator found the grievance was arbitrable. The Arbitrator stated the grievance involves "the fairness of advertisements and vacancy announcements not the proper classification of a position and one's current duties." Id. The Arbitrator ordered the parties to a hearing. Id. The Agency filed exceptions to the Arbitrator's decision. In reviewing the exception the Authority stated:

> The Arbitrator expressly found that the grievance "involves the fairness of advertisements and vacancy announcements, not the proper classification of a position and one's concurrent duties." Award at 6. The Arbitrator also expressly found that the requested remedy was the "reassignment of employees to reclassified positions." Award at 5, 6. In connection with the latter point, the Arbitrator's reference to "reclassified positions" is unclear: although it may reasonably be read to refer to reclassifying the grievants' permanent positions to have noncompetitive promotion potential to GS-13, it may also be reasonably read to refer to reassigning the grievants to the newly-established, already-classified positions with promotion potential to GS-13. **The distinction between the two is critical because the Arbitrator: (1) would not have jurisdiction over a grievance concerning the promotion potential of employees' permanent positions; but (2) would have jurisdiction over a grievance alleging a right to be placed in previously-classified positions.** (emphasis added)

HUD I, at 632.

The Authority remanded the decision to the Arbitrator to clarify the award.

HUD II

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to promote the grievants. See HUD I at 630. In her merits award (MA), the Arbitrator sustained the grievance and awarded an "organizational upgrade" to the grievants. Id. In HUD II the Authority stated:

> In response to the Authority's decision in [HUDI] the Arbitrator identified the previously-classified positions at issue as those newly-created positions - similar to the grievants' positions - with promotion potential to GS-13, and the Arbitrator credited the grievants' unrebutted testimony that they were "told by their supervisors that their applications to [these] various positions would be destroyed, or not considered, and they should not apply." "The Arbitrator concluded that, "but for these inequitable and unfair situations [,]" the grievants would have been promoted to positions with GS-13 potential. Id. at 15. **These findings support the Arbitrator's determination that the grievance was arbitrable because it did not concern classification within the meaning of § 7121(c)(5).**" Id. (emphasis added).

However, the Authority set aside the remedy and remand the MA to the parties for resubmission to the Arbitrator to formulate an alternative remedy. Id.

HUD III

On January 10, 2012, pursuant to the remand order from the Authority, the Arbitrator issued her Remedial Award. In reviewing the Remedial Award the Authority stated:

> On remand from HUD[II], the Union submitted to the Arbitrator proposed alternative remedies. [] It also asserted that the Agency was continuing to advertise positions in a manner that violated the CBA. The Agency made no submission. Upon consideration of "all prior submissions of the parties," [] the Arbitrator awarded four alternative remedies, [] and also directed the Agency to "stop advertising positions" in a way that requires employees to accept a "constructive demotion" to obtain higher promotion potential, i[. The Agency does not claim - and nothing in the record indicates - that any of the remedies that the Arbitrator awarded on remand differ from those that the Union proposed. In these circumstances, the Agency could have, and should have, presented to the Arbitrator the challenges to the remedies that it now presents in its exceptions. See 5 C.F.R. §§ 2425.4(c), 2429.5; Homeland, 66 FLRA at 337-38. As the Agency did not do so, §§ 2425.4(c) and 2429.5 bar consideration of the exceptions. See FAA, 64 FLRA at 389. Therefore, we dismiss the Agency's exceptions.

HUD III at 869. Thus, the Remedial Award was upheld by the Authority.

HUD IV

After the Authority upheld the remedial award in HUD III, the Arbitrator held a series of meetings to discuss with the parties how they would implement the remedy she directed in the remedial award (implementation meetings). HUD IV at 631. After each implementation meeting, the Arbitrator issued a written summary. Id. The Agency filed exceptions to the third implementation meeting summary. The Agency argued that the Arbitrator exceeded her authority because her summary of the third implementation meeting (the third summary) constitutes a "[m]odification" to the "final and binding" remedial award. Id. The Authority noted that "**the Agency conceded the remedial award was final and binding**". Id. 635. (emphasis added). The Authority found that "even assuming that the Arbitrator modified the remedial award by including all [general schedule job series 1101 (GS-1101)] employees in the class of grievants, the Agency should have filed exceptions when the Arbitrator first made that alleged modification in the second summary." Id. at 635.

The Authority further found that "the Agency's modification arguments fail to identify any characteristic of the third summary's challenged remedy that was not in the second summary." Id. Accordingly, the Authority found the Agency's exceptions were untimely. Id.

HUD V

The Agency filed a request for reconsideration and a motion to stay the Authority's decision in HUD IV. HUD V at 60. The Authority found that the Agency's reconsideration motion merely attempted to relitigate HUD IV's conclusions. *Id.* at 64. The Authority denied the Agency's requests. Id.

HUD VI

The Agency filed exceptions to: (1) the written summary of the sixth implementation meeting (the sixth summary); (2) an order (the job-series order) that identifies the names of all employees working in general schedule job series 1101 (GS-1101) who are entitled to relief under the terms of the remedial award and the Arbitrator's earlier written summaries; and (3) an order (the position-titles order) that identifies the names of all employees holding two particular position titles who are entitled to relief under the terms of the remedial award and the Arbitrator's earlier written summaries. Because the cases -- were previously designated Case Nos. 0-AR-4586-003 (involving the sixth summary), 0-AR-4586-004 (involving the job-series order), and 0-AR-4586-005 (involving the position-titles order) -- arose from the same series of arbitration proceedings and involve the same parties, the Authority consolidated them here for decision. 69 HUD VI at 213.

The Authority found that two of the Agency's argument's –that the remedial award was: (1) incomplete, making implementation impossible and (2) a violation of management's right to determine the numbers, types, and grades of positions—were barred because they had been dismissed under §§2425.4(c) and 2429.5 of the Authority's regulation in the Agency's exception to the remedial award. Id. at 219. The Authority further found that §§2425.4(c) and 2429.5 barred the Agency's arguments that the forty-five day deadline was impossible to implement and that the Arbitrator was biased regarding the sixth summary. Id. at 219.

The Authority also found that the orders were not so uncertain as to make implementation impossible, the disputed awards were not based on non-facts, the disputed awards were not contrary to law, the Arbitrator did not exceed her authority, and the Agency had not established

that the orders demonstrated bias warranting a remand to a different arbitrator. Id. at 220-223. Accordingly, the Authority dismissed and denied the Agency's exceptions. *Id.* at 223.

HUD VII

The Agency filed a motion for reconsideration of HUD VI. In support of the reconsideration motion, the Agency argued that HUD VI rests on erroneous "factual findings," violates the "rulemaking procedures" in the Administrative Procedure Act (the APA), and contravenes "public policy." In addition, the Agency filed a motion to stay HUD VI while the Authority considers its reconsideration motion. HUD VII at 38. The Authority denied the Agency's request. Id. at 40.

SUMMARY 10

On June 30, 2016, the Arbitrator issued Summary 10[3]. The Agency filed exceptions on July 29, 2016. The Agency argued inter alia that the tenth summary modified the remedial award because it calls for a "formal hearing" and "orders the Agency to produce witnesses to give testimony in the effort to implement the award[4]. On September 15, 2016 the Authority issued to the Agency an Order to Show Cause why its exceptions should not be dismissed as untimely.[5] In examining the Agency's exception to the Arbitrator's tenth Summary the Authority's Order to Show Cause stated:

> The Arbitrator stated her willingness to conduct a formal hearing in the ninth implementation meeting summary (ninth summary), which issued on March 26,2016. The Arbitrator further stated in the ninth summary that "[t]he Union indicated its intention to timely serve a witness list and subpoena for the next meeting between the [p]arties". The Arbitrator also stated "that she would sign subpoenas served by the Union so long as the Agency and witnesses are provided sufficient notice." The Agency concedes that the ninth summary stated "that the Arbitrator agreed to '[] conduct

[3] See Exh. 2. Summary 10
[4] See Exh. 3. Authority Show Cause Order.
[5] See Id.

> [a] formal hearing on the record, with testimony, if necessary. Additionally, the Agency's bias exception appears to only address events that occurred prior to implementation of the tenth summary. Therefore, the Authority directs the Agency to show cause why the Authority should not dismiss the Agency's contrary-to-law exceptions as untimely.[6]

Subsequently the Agency filed a response and Union filed its opposition. The Authority never issued a decision on its Order to Show Cause. On March 29, 2018 the Agency supplemented its exceptions. On May 2, 2018, the Union filed its opposition.

HUD VIII

On May 24, 2018, the Authority concluded that the grievance concerns classification and is therefore excluded from the grievance process by § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (Statute) and therefore vacated the Arbitrator's awards, written summaries and HUD I through HUD VII. HUD VIII, p. 605.

III. ARGUMENT

I. The Authority's Decision Is Arbitrary, Capricious, an Abuse of Discretion and Contrary to Law.

The Union's Motion for Reconsideration should be granted because the Authority's Decision is arbitrary, capricious, an abuse of discretion and contrary to law. First, the Authority failed to follow its own regulation and procedures in refusing to accept and acknowledge final and binding decisions. Second, the Authority failed to conform to its own prior practices by considering factors in rendering a decision that were not properly before it for consideration. Finally, the Authority's Decision conflicts with its charge of administering the Statute. As a result of these errors the Authority should grant the Motion for Reconsideration.

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[6] Id.

2. The Authority's Actions Were Ultra Vires When It Raised the Issue of Classification When the Only Issue Before the Authority was Summary 10 and the Agency Did not Raise such a Challenge; and Assuming Arguendo it did the Agency's Exceptions Were Untimely.

In reaching its Decision, the Authority impermissibly disregarded prior Authority decisions which were final and binding. The FLRA exceeded its own authority in issuing the Decision and vacating the Arbitrator's and Authority decisions with no legal authority or reasonable explanation.

A. Exception to Summary 10.

On July 29, 2016, the Agency filed exceptions to the Arbitrator's Summary of Implementation Meeting 10. On March 28, 2016 it supplemented its motion. The exceptions are over Summary 10, which is the only Award or Summary which could be subject to a **timely** appeal and was therefore the only arbitrator award or summary over which the Authority had jurisdiction. **5 U.S.C. § 7122(b), 5 CFR § 2425.2(b)**. Summary 10 does not contain any specific orders or requirements which could possibly result in the actions taken by the Authority in its Decision. Summary 10 states that the Arbitrator will be conducting a formal hearing with testimony for the purpose of overseeing implementation of the Award and Summaries.[7]. In Summary 10, the Arbitrator also alleviated Agency concerns, noting that in the event the Union would attempt to elicit improper testimony at the future hearing, the Agency would have a full opportunity to object at that time.[8] In this regard, nothing new was added or changed from the Arbitrator's rulings in Summary 9. In Summary 9, the Arbitrator held that a formal hearing would take place if necessary[9] and in Summary 10 she simply reiterated that same ruling.[10]

[7] Exh. 2, Summary 10
[8] Id.
[9] Exh. 4. Summary 9.
[10] Exh. 2, Summary 10

Summary 10 also contains an order for the Agency to respond to timely and proper requests for information submitted by the Union, and further ordered the Agency to send out a "blast chilling effect" email previously discussed by the parties.[11]

In its Decision, the Authority states that the Exceptions to Summary 10 included the Agency's "ongoing assertion that the grievance concerns classification." **HUD VIII, p. 607.** However, the Agency's Exceptions did not raise the argument that Summary 10, concerned classification. This is an erroneous factual finding. Indeed, Summary 10 did not order any type of remedy, or even make any legal findings or conclusions which could be excepted to; and the Agency's Exceptions to Summary 10 focused on matters **other than** classification. Indeed, the Agency never requested review of any classification issue. Moreover, all prior Arbitrator awards and summaries were otherwise final and binding either because no timely exceptions were filed, **5 U.S.C. §7122(b)**, or by virtue of Authority decisions, *infra*. As such, the Decision was improper and must be reconsidered.

Moreover, any exceptions to the tenth Summary were untimely. As stated above in the Authority's Motion to Show Cause the Agency conceded that the ninth summary, issued March 26, 2016, stated "that the Arbitrator agreed to '[] conduct [a] formal hearing on the record, with testimony, if necessary. As stated above the tenth summary provided the same remedy, i.e. Summary 10 simply states that the Arbitrator would be conducting a formal hearing with testimony for the purpose of overseeing implementation of the Award. The Agency did not file any exceptions to the ninth summary that was issued on March 26, 2016. The Agency filed its exceptions to the tenth Summary's remedy of a formal hearing on July 29, 2016. Thus, the Agency's exceptions challenging a formal hearing expired thirty days after the ninth summary

[11] Id. p. 5

was issued and the Agency's exceptions on the award of a formal hearing was untimely. 5 C.F.R. 2425.2(B).

3. The Authority's Actions were Ultra Vires When it Vacated All Prior Awards, Summaries and Authority Decisions.

Both an agency's power to act and how agencies are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires City of Arlington v. FCC*, 569 U.S. 290, 293 (2013). Government action is ultra vires if the agency or other government entity is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.*, 698 F.3d 171, 174 (4th Cir. 2012).

The Authority's rationale for vacating all prior awards, summaries, and Authority decisions was that this case concerned classification and thus was barred from the negotiated grievance procedure pursuant to 5 U.S.C. § 7121(c)(5). **HUD VIII, p. 605.** As noted above, and contrary to the Decision, the Agency **did not** raise an issue of classification in its Exceptions to the tenth Summary.

The Decision notes that Authority precedent not only permits, but requires, the Authority to address issues of classification regardless of whether or not they were previously raised with the Arbitrator or Authority. ***Id.*** The Union does not dispute that the FLRA's scope of authority permits it to issue determinations related to classification. However, nothing in the decisions cited by the Authority (or any case law) permit the Authority to **re-address classification issues when the Authority has already addressed the issue.** The issue of classification was not before the Authority in the Agency's Exceptions because previous Authority decisions already

determined that the remedial award in this matter **did not** concern classification. ***HUD III – HUD VII.*** As such, the Authority acted *ultra-vires* in vacating prior Authority Decisions when that issue was not before it and had previously been addressed.

4. Federal Statutes, Authority regulations and case law do not permit re-opening of final and binding Arbitration Awards.

Federal statutes, Authority regulations, and case law all uniformly and unequivocally hold that once an arbitration decision is final it cannot be challenged or overturned by any means.

5 U.S.C. §7122(b) states:

> If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, **the award shall be final and binding.** An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

5 U.S.C.§7122 (emphasis added).

The Authority has also held that in those cases in which timely exceptions are filed, the award becomes final and binding when those exceptions are denied by the Authority. *AFGE Local 2054 v. Dept. of Veterans Affairs*, 58 FLRA 163 (2002) (internal citations omitted). Addressing this limitation, the U.S. Court of Appeals for the Sixth Circuit noted:

> As noted previously § 7122(b) adds that if no exception is filed "during the 30-day period beginning on the date the award is served on the party, the award becomes final and binding" and that the responsible agency "shall take the actions required by an arbitrator's final award." Since an award becomes final and must be implemented if the parties fail to file an exception within the required period, the necessary implication is that a party can no longer challenge the award by any means. It has become final for all purposes. Accordingly, in order to preserve defenses against an arbitration award under the Act, a party must file exceptions to the award. Failure to do so is considered a failure to exhaust available remedies, thereby precluding collateral attack on an award in a subsequent proceeding.

Dep't of Air Force v. FLRA, 775 F.2d 727, 734-735 (6th Cir. 1985).

In this case the Authority and Arbitrator previously, and repeatedly determined that the case did not concern classification and was not barred by §7121(c)(5). Those decisions were all final and binding, and the Decision did not provide any explanation or rationale as to what legal tool could be used to disrupt their finality. As such, the Decision impermissibly exceeded the scope of the Authority's authority - final means final, and binding means binding. To declare otherwise would be akin to informing all unions and agencies that it has the ability to file a request to re-open a case at any time without noting any real basis to do so hoping for a different result under a more sympathetic tribunal. Indeed, this case could simply be reinstated upon request by the union when the current majority's terms expire.

In fn. 29 of the Decision, Member Abbott states: "The 'decisions' which we vacate may not in any reasonable context be considered 'final and binding.' It is quite obvious that if *HUD I* had resolved the case, there would be no need for *HUD II*; if *HUD II* had resolved the case, there would have been no need for *HUD III*, etc." **HUD VIII, p. 607, fn. 29.** The premise of the legality of the entire Decision is based on those two sentences; that the majority does not believe that the prior arbitrator and authority decisions were final and binding because subsequent decisions were required. However, such a conclusion is in direct conflict with the statutes, regulations, and case law, *supra.*

Subsequent decisions or orders in a case do not mean that prior decisions were not final and binding. Indeed, the Authority routinely issues multiple rulings on the same case and doing so has never resulted in the Authority determining that the prior decisions were not final. See e.g. *AFGE vs. Social Security Administration*, 49 FLRA 483 (1994). Indeed, the Decision's direct conflict and disregard of federal statute is improper and

must be reconsidered.

5. The Authority violated the Administrative Procedure Act in disregarding its own regulations.

Agency rules having the force and effect of law are as binding on agencies as the Constitution and statutes. Accordingly, courts may review agency action for conformance with previously promulgated rules. *Nader v. Bork*, 366 F. Supp. 104, 108-109 (D.D.C. 1973) (an agency regulation has the force and effect of law, and it is binding upon the body that issues it). Agency procedures must also be followed. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959). See also *Schroeder v. West*, 212 F.3d 1265, 1270 (Fed. Cir. 2000) (an agency abuses its discretion if it fails to follow its own regulations and procedures).

The Agency's own regulations make clear that the time limit for filing an exception to an arbitration award is thirty (30) days after the date of service of the award. **This thirty (30)-day time limit may not be extended or waived**. 5 C.F.R. 2425.2(b) (emphasis added). If the 30-day time limit cannot be extended or waived, certainly, when no exception has even been filed do the Authority's regulations permit dismissal of an arbitration and subsequent Authority decision.

Despite this regulation, and despite the Agency ceding that many of the awards and summaries were final and binding[12], the Decision impermissibly set aside prior final and binding decisions.

6. The Decision failed to address the Order to Show Cause issued by the Authority in this matter.

On September 15, 2016, in response to the Agency's Exceptions, the FLRA issued an Order to Show Cause as to why the Exceptions should not be dismissed as untimely.[13]

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[12] The Authority noted that the Agency conceded the remedial award was final and binding. HUD IV, 68 FLRA 631, 635

[13] Exh. 2. Summary 10

Specifically, the Authority noted: "it does not appear that the tenth summary modifies the remedial award in a way that gives rise to the majority of the deficiencies alleged in the Agency's exceptions."[14]

Despite the Parties fully briefing the issue, the Decision fails to address the Authority's concerns that the Exceptions at issue were untimely. Indeed, as noted by the Authority and the Union's prior response, the Exceptions were untimely. Therefore, the Authority acted improperly in vacating all prior decisions and awards on the basis of an un-timely filing.

7. The Authority's Actions are Incompatible With the Statute.

The Authority is charged with administering Title VII of the Civil Service Reform Act of 1978, the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7101 et seq. In establishing the Statute Congress found that:

> experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them; safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment. The public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

See 5 USC § 7101 (a)(1)-(2).

The Authority's Decision, if left in place, would create chaos in its wake. "If those awards, "final and binding for all purposes have somehow ceased to be so, as the majority claims, what is the status of any actions taken, or action specifically not taken, by the Agency, the Union, and thousands of potentially affected employees who may have made decisions on

[14] Id.

taken actions relying on those awards?" See HUD VIII, at 609. Indeed, what prevents the Authority from reviewing any past decision made sua sponte and changing the result. How could any party to an arbitration involving the federal government ever consider a dispute settled? This cannot be the efficient operations of government that Congress had in mind when it charged the Authority with administering the Statute. For all the reasons above the Authority's actions are incompatible with the Statute.

8. The Authority's Decision Deprives Employees who were Awarded Promotions in Reliance on HUDI thru HUD VII of Property Without Due Process.

The Authority's disposition of the grievance deprives all affected employees of property without due process in violation of the Fifth Amendment. "In the realm of federal employment, protected 'property interests' can arise not only through operation of statute and regulation, but also through 'agency-fostered policies or understandings' and the 'implicit ... overall workings of a particular government employer.'" *Kizas v. Webster*, 707 F.2d 524, 539 (D.C. Cir. 1983).

Over 12 years of retaining a position awarded by an arbitrator and (all but once) confirmed by the FLRA solidified an expectation of continued employment within that position, and the vacating of earlier decisions is effectively an Authority ordered demotion rather than a correction of errors made earlier in the same case. Moreover, the Decision violates the Union's "substantive" due process rights by interfering with the Union's (and its members') property interest in the relief promised by the arbitrator's award." *Am. Fed'n of Gov't Employees, AFL-CIO, Local 446 v. Nicholson,* 475 F.3d 341, 352 (D.C. Cir. 2007)".

Conclusion

Based on the foregoing, the Union requests the Authority reconsider its Decision and deny the Agency's Exceptions to Summary 10. Member Abbott's fn. 29 makes crystal clear that

the Authority no longer concerns itself with following law, rule or regulation. It is a sad day when a member of the Authority is not embarrassed to publicly proclaim that he was going to "take whatever steps are necessary to correct the earlier, erroneous decision." In this case, the previous decisions of the Authority were final and binding, which meant that acting *ultra vires* and vacating final and binding decisions was the majority's only option.

Member DuBester said it best:

> To be clear, I understand, and accept, that Authority Members may differ, sometimes sharply, on how cases that parties bring to the Authority should be resolved. But it is also my expectation, which I believe is reasonable, that the Authority's Members will be unified in their allegiance to the rule of law, a pillar of our democratic society, to fundamental adjudicatory principles applied by courts and administrative agencies, and to interpreting and applying the Statute "in a manner consistent with the requirement of an effective and efficient government."

70 FLRA 609-610.

The Decision does not demonstrate the majority's allegiance to the rule of law. For all the reasons stated above he Union urges and respectfully requests the Authority to reconsider its Decision.

Respectfully Submitted,

Mark L. Vinson
AFGE Office of General Counsel
80 F St. NW
Washington, DC 20001
Phone: (202) 639-6426
Fax: (202) 379-2928
Counsel for the Union

CERTIFICATE OF SERVICE

I hereby certify that copies of the Union's Motion for Reconsideration were served on this 7th day of June, onto:

FLRA
Chief Office of Intake and Publication
Federal Labor Relations Authority
1400 K Street, NW; Suite 200
Washington, DC 20424-0001

ONE ORIGINAL & FOUR COPIES
SENT VIA CERTIFIED MAIL

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

SENT VIA CERTIFIED MAIL

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

SENT VIA FIRST CLASS MAIL

Mark L. Vinson

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

American Federation of Government, Employees (AFGE) Council of HUD Locals 222	)	Docket # 0-AR-4586-003
UNION,	)	
v.	)	June 6, 2018
U.S. Department of Housing and Urban Development	)	
AGENCY.	)	

DESIGNATION OF REPRESENTATIVE

I, Holly Salamido, hereby designate the following individual as the representative for the American Federation of Government Employees Council of HUD Locals 222 in the above-referenced FLRA case:

Mark Vinson, Esq.	(202) 639-6477	(202) 379-2928
Name of Representative	Telephone No.	E-Facsimile No.

Address: American Federation of Government Employees
Office of General Counsel
80 F Street NW, 10th Floor
Washington, DC 20001

E-mail address: vinsom@afge.org

Holly Salamido — 6/7/18

Signature of Council President — Date

EXHIBIT 1

IN THE MATTER OF ARBITRATION BETWEEN:

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

SUMMARY NO. 10 OF IMPLEMENTATION MEETING AND ORDER

This Arbitrator met with the Parties on April 12, 2016, to discuss the progress of the Parties with implementation of the January 10, 2012, Opinion and Award (the "Award") in the above captioned matter. Present for the Union were: Michael J. Snider, Esq., Jacob Y. Statman, Esq., from Snider & Associates, LLC, and Holly Salamido, Union Council President. Present for the Agency were: Javes Myung, Esq. and David M. Ganz, Esq. This is the tenth Summary of Implementation Meeting ("Summary No. 10"), the first nine (9) having been issued on March 14, 2014 ("Summary No. 1"), May 17, 2014 ("Summary No. 2"), August 2, 2014 ("Summary No. 3"), January 10, 2015 ("Summary No. 4"), February 27, 2015 ("Summary No. 5"), May 16, 2015 ("Summary No. 6"), June 27, 2015 ("Summary No. 7"), February 27, 2016 ("Summary No. 8"), and March 26, 2016 ("Summary No. 9") respectively.

I. Introduction

The Union provided an Agenda for the Implementation Meeting (IM). The items described herein generally follow that Agenda. As a preliminary matter, the Union arranged for a court reporter at this Implementation Meeting, and requested that, as has been the practice in prior Implementation Meetings, the court reporter would be used only when the Arbitrator deemed necessary.

At the onset of the Implementation Meeting the Agency raised its continued objection to these implementation meetings pending the current United States Federal Labor Relations Authority (FLRA). As was the case during the ninth Implementation Meeting, the Union stated that it only intended to raise specific matters not currently on appeal before the FLRA. This Arbitrator agreed with the Union that any pending Requests for Reconsideration did not preclude the Implementation Meeting from taking place as FLRA regulations clearly state that neither a request for reconsideration, nor a request for a stay, serves to stay the effectiveness of any FLRA Decision. To date, such a Stay has not been issued by the FLRA. This Implementation Meeting Summary and Order contains a summary of the matters discussed at the Implementation Meeting/Hearing, as well as rulings based upon those discussions.

II. Hearing Testimony

Prior to the hearing, the Union requested this Arbitrator to issue subpoenas for three (3) Agency employees to appear at the Implementation Meeting/Hearing. Specifically, the Union requested the appearance of (1) Deputy Secretary Nani Coloretti; (2) Acting Chief financial Officer Joseph Hundgate; and (3) Chief Human Capital Officer Towanda Brooks in order to elicit testimony relevant to this matter. Pursuant to Section 23.09 of the Parties Collective Bargaining Agreement, the Union also timely filed a witness list naming those three (3) individuals with the Agency and Arbitrator.

At the hearing, it was revealed that while the Arbitrator did sign the requested subpoenas, a copy of the signed subpoenas was only sent to the Union. The Union failed to serve the subpoenas erroneously believing that the Arbitrator has sent a copy to the Agency as well.

The Agency argued that it did not have proper notice of the expectation that the witnesses appear because it did not receive the signed subpoenas. **Tr., p. 4.** However, the Union timely and

properly provided its witness list pursuant to the Parties' Collective Bargaining Agreement ("CBA" or "Contract"). Moreover, there was no doubt that the Agency received the un-signed subpoenas and that this Arbitrator had shared her intention to sign the subpoenas. **Tr., pp. 19-20.** There is no additional obligation to provide notice and this Arbitrator finds that the Agency was on proper notice of this expectation because the Union previously stated its intention to call these witnesses and properly filed its witness list.

The Agency further argued that the Union's proffer as to the testimony of the witnesses was improper because the Union was allegedly attempting to obtain testimony that was "pre-decisional and deliberative, and it's protected from release by several [Office of Management and Budget] OMB circulars." **Tr., p. 6.** However, the Union pointed out that every single proffer noted that the Union "does not intend to elicit any testimony concerning privileged or confidential information." **Tr., p. 12.** Instead, the Agency strongly asserts that the expected testimony is privileged and confidential.

This Arbitrator agrees with the Union that the subpoenas and witness list were not improper. Moreover, the Agency will have counsel present for any elicited testimony and has the ability to object to any specific or general line of questioning. At that time a ruling can be issued as to the appropriateness, or lack thereof, of the question(s) presented.

After additional discussions concerning this issue both on and off the record, the Union agreed that it would waive the appearance of the requested witnesses at this particular Implementation Meeting/Hearing, but that the Union would request new subpoenas and would again timely file a witness list so that there could be no dispute as to the Agency's notice at the next scheduled Hearing. It was also agreed that the next meeting, when these witnesses would be called, would be a formal, on the record hearing, with testimony. This Arbitrator finds that given

the current posture of the case, there is a need for a formal evidentiary hearing so that this Arbitrator can ascertain the status of implementation.

III. Remaining Agenda Items

After discussing the testimony portion of the Implementation Meeting/Hearing, the Parties proceeded to discuss various outstanding items from the Agenda.

a. Union's Fair Labor Standards Act (FLSA) Request for Information

On March 7, 2016, the Union properly filed a Request for Information pursuant to 5 U.S.C. §7114(b) requesting information about payments made for overtime to class members pursuant to the FLSA. This information request was made so that the Union could properly ascertain damages in this case and this Arbitrator finds that it was a proper request. The Agency acknowledged receipt of the Request and stated that they would look into a formal response. This Arbitrator ordered the Agency to provide an update to the Union no later than June 1, 2016.

b. Chilling Effect Email

The Union noted that the Agency was still not in compliance with this Arbitrator's Orders concerning certain outstanding matters. Specifically, the Union stated that the Agency had still not sent out the chilling effect blast email to the Bargaining Unit. This Arbitrator ordered the Agency to send out the agreed-upon blast email no later than May 1, 2016.

c. Remaining Items from Agenda

The remaining Agenda items were continued until the next Implementation Meeting/Hearing.

IV. Conclusion

The purpose of the April 12, 2016 Implementation Meeting/Hearing was to monitor and oversee implementation in 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 all subsequent Summaries as well as the Union's request for attorney fees, costs and expenses until the matter is completed. This jurisdiction extends to all outstanding items in this matter.

The next meeting will be a formal, evidentiary Hearing. However, it shall be rescheduled by mutual agreement due to a scheduling conflict with a prior scheduled mediation.

Dr. Andrée Y. McKissick, Esq.
Arbitrator

June 30, 2016

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF HUD LOCALS 222
(Union)

0-AR-4586
(65 FLRA 433 (2011))
(66 FLRA 867 (2012))
(68 FLRA 631 (2015))
(69 FLRA 60 (2016))
(69 FLRA 213 (2016))

ORDER TO SHOW CAUSE

September 15, 2016

In the above-captioned case, Arbitrator Andrée Y. McKissick issued two awards: a merits award in 2009 and a remedial award in 2012. Additionally, between 2014 and 2016, the Arbitrator issued ten implementation meeting summaries. On June 30, 2016, the Arbitrator issued her tenth implementation meeting summary (tenth summary). The Agency has filed exceptions to that summary. For the following reasons, the Authority directs the Agency to show cause why its exceptions should not be dismissed as untimely.

I. Background

In *U.S. Dep't of HUD* (*HUD I*),[1] the Agency filed exceptions to the third implementation meeting summary (third summary).[2] The Agency argued that the third

[1] 66 FLRA 631 (2015) (Member Pizzella dissenting).

implementation meeting summary modified the remedial award.[3] The Authority found that "even assuming that the Arbitrator modified the remedial award by including all [general schedule job series 1101 (GS-1101)] employees in the class of grievants, the Agency should have filed exceptions when the Arbitrator first made that alleged modification in the second summary."[4]

The Authority further found that "the Agency's modification arguments fail to identify any characteristic of the third summary's challenged remedy that was not in the second summary."[5] Accordingly, the Authority found that the Agency's exceptions were untimely.[6]

In *U.S. Dep't of HUD (HUD II)*,[7] the Authority denied the Agency's motion for reconsideration of *HUD I* and its motion for a stay.[8] The Authority found that the Agency's reconsideration motion merely attempted to relitigate *HUD I*'s conclusions and thus did not establish extraordinary circumstances warranting reconsideration.[9]

In *U.S. Dep't of HUD (HUD III)*,[10] the Agency filed exceptions to: (1) the sixth implementation meeting summary (sixth summary), (2) an order that identified the names of all employees working in GS-1101 who were entitled to relief under the terms of the remedial award and the Arbitrator's earlier written summaries, and (3) an order that identified the names of all employees holding two particular position titles who were entitled to relief under the terms of the remedial award and the Arbitrator's earlier written summaries (the orders).[11] The Authority found two of the Agency's arguments – that the remedial award was: (1) incomplete, making implementation impossible and (2) a violation of management's right to determine the numbers, types, and grades of positions – were barred because they had been dismissed under §§ 2425.4(c) and 2429.5 of the Authority's Regulations[12] in the Agency's exceptions to the remedial award.[13] The Authority further found that §§ 2425.4(c) and 2429.5 barred the Agency's arguments that the forty-five-day deadline was impossible to implement and that the Arbitrator was biased regarding the sixth summary.[14]

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[2] *Id.* at 631.
[3] *Id.* at 634.
[4] *Id.*
[5] *Id.* at 635.
[6] *Id.*
[7] 69 FLRA 60 (2015) (Member Pizzella dissenting).
[8] *Id.* at 63-64.
[9] *Id.* at 64 (citing *Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010) (Member DuBester concurring)).
[10] 69 FLRA 213 (2016) (Member Pizzella dissenting).
[11] *Id.* at 213.
[12] 5 C.F.R. §§ 2425.4(c), 2429.5.
[13] *HUD III*, 69 FLRA at 218-19.
[14] *Id.* at 219.

The Authority denied the Agency's remaining exceptions finding that: the orders were not so uncertain as to make implementation impossible,[15] the disputed awards were not based on nonfacts,[16] the disputed awards were not contrary to law,[17] the Arbitrator did not exceed her authority,[18] and the Agency had not established that the orders demonstrated bias warranting a remand to a different arbitrator.[19] On March 9, 2016, the Agency filed a motion for reconsideration of *HUD III*, which is currently pending before the Authority.

II. Discussion

The time limit for filing exceptions to an arbitration award is thirty days "after the date of service of the award."[20] The date of service is the date the arbitration award is deposited in the U.S. mail, delivered in person, deposited with a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service or, in the case of email or fax transmissions, the date transmitted.[21]

Absent evidence to the contrary, an arbitration award is presumed to have been served by mail on the date of the award.[22] If the award was served by email or fax, then the date of service is the date of transmission, and the excepting party will not receive an additional five days for filing the exceptions.[23] If the award was served by email, fax, or personal delivery on one day, and by mail or commercial delivery on the same day, the excepting party will not receive an additional five days for filing the exceptions, even if the award was postmarked or deposited with the commercial delivery service before the email or fax was transmitted.[24] The time limit for filing exceptions may not be extended or waived by the Authority.[25] Under Authority precedent, only where an arbitrator modifies an award in such a way as to give rise to the deficiencies alleged in the exceptions does the filing period begin with the date of service of a supplemental award.[26]

Additionally, as the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *U.S. DHS, U.S. CBP Scobey, Montana v. FLRA (Scobey)*,[27] recently explained, in cases where the sovereign-immunity waiver in the Back Pay Act [BPA] applies, other

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[15] *Id.* at 220.
[16] *Id.*
[17] *Id.* at 221-22.
[18] *Id.* at 222.
[19] *Id.* at 223.
[20] 5 C.F.R. § 2425.2(b).
[21] *Id.* § 2425.2(c).
[22] *See Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 32 FLRA 165, 167 (1988).
[23] 5 C.F.R. § 2425.2(c)(3).
[24] *Id.* § 2425.2(c)(5).
[25] *Id.* § 2429.23(d).
[26] *See, e.g., U.S. Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Cal.*, 52 FLRA 1471, 1474 (1997) (*Navy*).
[27] 784 F.3d 821 (D.C. Cir. 2015).

> [r]outine statutory and regulatory questions . . . are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity. Otherwise, Congress's creation of a mostly unreviewable system of arbitration would be eviscerated, as every Authority decision involving an arbitral award arguably in excess of what the [BPA] authorizes would be reviewable.[28]

In its exceptions, the Agency argues that the Arbitrator is biased and that the case should be remanded to a different arbitrator.[29] The Agency also argues that the tenth summary is contrary to law for reasons that do not appear to be linked to any potential modifications arising from the tenth summary.[30] The Agency further argues that tenth summary modifies the remedial award because it calls for a "formal hearing" and "order[s] the Agency to produce witnesses to give testimony in the effort to implement the award."[31] For the reasons that follow, it does not appear that the tenth summary modifies the remedial award in a way that gives rise to the majority of the deficiencies alleged in the Agency's exceptions.[32]

The Arbitrator stated her willingness to conduct a formal hearing in the ninth implementation meeting summary (ninth summary), which issued on March 26, 2016.[33] The Arbitrator further stated in the ninth summary that "[t]he Union indicated its intention to timely serve a witness list and subpoena for the next meeting between the [p]arties".[34] The Arbitrator also stated "that she would sign subpoenas served by the Union so long as the Agency and witnesses are provided sufficient notice."[35] The Agency concedes that the ninth summary stated "that the Arbitrator agreed to '[] conduct [a] formal hearing on the record, with testimony, if necessary.'"[36] Additionally, the Agency's bias exception appears to only address events that occurred prior to implementation of the tenth summary.[37]

Therefore, the Authority directs the Agency to show cause why the Authority should not dismiss the Agency's contrary-to-law exceptions as untimely. The Authority orders the Agency to explain why its purported sovereign-immunity claims do not fall within the D.C. Circuit's discussion in *Scobey* that "[r]outine statutory and regulatory questions . . . are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity."[38] And further, the Authority orders the

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[28] *Id.* at 823.
[29] Exceptions at 3, 41-42.
[30] *Navy*, 52 FLRA at 1474.
[31] Exceptions at 18.
[32] *Navy*, 52 FLRA at 1474.
[33] Meeting Summary 9 (Summary 9) at 4-5.
[34] *Id.*
[35] *Id.*
[36] Exceptions at 18 (quoting Summary 9 at 4).
[37] *Id.*at 3, 41-42.
[38] *Scobey*, 784 F.3d at 823.

Agency to show cause why its bias exception is not untimely to the extent that it appears that the Agency's bias exceptions to only address events that occurred prior to implementation of the tenth summary.[39]

The Agency must file with the Authority, by **September 29, 2016**, five copies, one of which contains an original signature, of its response to this order. The Agency's response must also include five copies, one of which contains an original signature, of a statement of service that complies with the Authority's Regulations showing that the Agency has served its response to this order on all counsel of record or other designated representatives.[40] The Agency should direct its response to Cabrina S. Smith, Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, 1400 K Street, NW, Suite 201, Washington, DC 20424-0001.

The Agency's failure to comply with this order to show cause by **September 29, 2016**, may result in dismissal of the Agency's exceptions.

The Union may file a response to the Agency's response within fourteen days of service of the Agency's response on the Union.

For the Authority:

Cabrina S. Smith, Chief
Office of Case Intake and Publication

[39] Exceptions at 3, 41-42.
[40] 5 C.F.R. § 2429.27(a) & (c).

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 NO. 9 OF IMPLEMENTATION MEETING AND ORDER

This Arbitrator met with the Parties on February 25, 2016 to discuss the progress of the Parties with implementation of the January 10, 2012, Opinion and Award (the "Award") in the above captioned matter. Present for the Union were: Michael J. Snider, Esq., Jacob Y. Statman, Esq., and Yehuda Goldberg, Esq. from Snider & Associates, LLC, and Holly Salamido, Union Council President. Present for the Agency were: Javes Myung, Esq. and David M. Ganz, Esq. This is the ninth Summary of Implementation Meeting ("Summary No. 9"), the first eight (8) having been issued on March 14, 2014 ("Summary No. 1"), May 17, 2014 ("Summary No. 2"), August 2, 2014 ("Summary No. 3"), January 10, 2015 ("Summary No. 4"), February 27, 2015 ("Summary No. 5"), May 16, 2015 ("Summary No. 6"), June 27, 2015 ("Summary No. 7"), and February 27, 2016 ("Summary No. 8") respectively.

I. Introduction

The Union provided an Agenda for the Implementation Meeting ("IM"). The items described herein generally follow that Agenda. As a preliminary matter, the Union arranged for a court reporter at this Implementation Meeting, and requested that, as has been the practice in prior

Implementation Meetings, the court reporter would be used when the Arbitrator deemed necessary. This proposal was not objected to by the Agency.

At the onset of the IM the Agency raised its continued objection to these Implementation Meetings pending the current Federal Labor Relations Authority (FLRA). As was the case during the eighth Implementation Meeting, the Union stated that it only intended to raise specific matters not currently on appeal before the FLRA. This Arbitrator agreed with the Union that the then pending exceptions did not preclude the IM from taking place as there were items to be discussed that were not then on appeal. This Implementation Meeting Summary and Order contains a summary of the matters discussed at the Implementation Meeting, as well as rulings based upon those discussions, the subsequent FLRA decision, *infra*, and subsequent written communications.

II. Current Case/Appeal Status

The Agency filed Exceptions before the FLRA to Summary No. 3; those Exceptions were dismissed by the FLRA on May 22, 2015. **68 FLRA 631**. The Agency filed a Motion for Stay and Request for Reconsideration to the FLRA's May 22, 2015 Decision on June 8, 2015; both were denied by the FLRA on November 4, 2015. **69 FLRA 60**. The Agency also filed Exceptions to Summary No. 6, as well as two (2) Orders subsequently issued by this Arbitrator regarding promotions of certain GS-1101 and Public Housing Revitalization Specialist (PHRS)/Contract Industrial Relations Specialist (CIRS) employees. The Agency relied upon those pending Exceptions in support of its contention that the Implementation Meeting was improper. On February 25, 2016, subsequent to the IM, but prior to the issuance of this Summary, the FLRA issued its consolidated decision denying or dismissing in their entirety all of the Agency's pending Exceptions. **69 FLRA 213**.

III. Agency Funding Request

The Union raised the allegation that the Agency had failed to report this matter as a contingent liability or obligation to the United States Department of Housing and Urban

Development (HUD) Office of Inspector General (OIG) or Office of Management and Budget (OMB), and had failed to request an appropriation or supplemental appropriation from Congress in order to fulfill its obligations to make class members whole in this case. The Agency responded to a question from Mr. Snider as to whether there was a supplemental Fiscal Year (FY) 2016 budget request to fund the award. Agency counsel instructed the Union that they could file a request for information regarding this information. In response to requests that the Agency provide officials to help them interpret the published FY 2016 budget, Agency counsel informed them that the documents speak for themselves and the existence and contents of any pending FY 2016 supplemental budget, if it exists, is pre-decisional and deliberative. The Union pointed out that the Secretary of the Agency had, in fact, publicly released information about the budget request prior to its official release, in an interview with a news organization. The Union further stated that its review of the FY 2016 and FY 2017 budgets revealed that the Agency has continuously, to date, appeared to have failed to request funding for this case. The Agency was unable and/or refused to answer whether funding had been requested and maintained its position in this regard.

The Union orally presented numerous specific and pointed data requests as it pertains to whether the Agency has requested funding for this matter. The Agency is directed to respond to those requests within fourteen (14) days of the date of this Summary and Order. This Arbitrator is greatly concerned if it is indeed true that the Agency failed to properly report this matter and request funding, since the Agency has been aware of its potential liability for many years and has stated on the record that it has insufficient funding to pay the damages.

IV. Action on Non-disputed GS-1101 Employees

The Union requested the status of the Agency's taking action to promote and pay back pay and emoluments to certain non-disputed class members. The Agency responded that it was not willing to discuss any promotions or relief for any employees due to the then-pendency of its Exceptions, nor would it engage in piecemeal implementation. The Agency's objection to

proceeding with implementation is now moot. As stated *supra*, the FLRA has denied or dismissed all of the pending Exceptions. **69 FLRA 213 (February 25, 2016).** At this juncture, Summary No. 6 as well as this Arbitrator's PHRS/CIRS and GS-1101 Orders are now final and binding. The Agency has filed a Motion for Reconsideration of the FLRA's most recent decision **(Agency's Motion for Reconsideration, March 9, 2016).** The FLRA's regulations, however, clearly state that such a filing does not operate to stay the effectiveness of the February 25, 2016 Decision of the Authority, unless so ordered by the Authority:

> **§2429.17 Reconsideration.**
> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within ten (10) days after service of the Authority's decision or order. A motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by appropriate citations. The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority. A motion for reconsideration need not be filed in order to exhaust administrative remedies.

The Agency is instructed to fully comply with the Orders which are now final and should expect to discuss that implementation at the next IM. The Agency cannot unilaterally determine the course of implementation or the timing of it, but rather shall work cooperatively with the Union and with the oversight of this Arbitrator.

V. Future Implementation Meetings

The Union stated that while the Parties were currently operating under an agreement to conduct implementation meetings, nothing precluded it from requesting a more formal hearing to proceed with resolving this matter. This Arbitrator noted that jurisdiction has been retained over all outstanding matters and agreed to conduct a formal hearing on the record, with testimony, if necessary. The Union indicated its intention to timely serve a witness list and subpoena for the

next meeting between the Parties. This Arbitrator stated that she would sign subpoenas served by the Union so long as the Agency and witnesses are provided sufficient notice.

VI. Revisiting Back Pay Date for Original Seventeen (17) Class Members

This Arbitrator previously ordered the Agency to retroactively promote and pay back pay and emoluments to seventeen (17) employees. In Summary No. 4, this Arbitrator ruled that the start of the damages period is January 18, 2002. However, Summary No. 4 also contained a footnote that that ruling does not yet apply to the employees already promoted by the Agency while the Parties work together to resolve their back-pay date. **Summary No. 2, p. 2.** The Union stated that the Parties had been unable to resolve the back-pay date and requested that the Agency be ordered to retroactively promote and provide back pay to those seventeen (17) employees utilizing the January 18, 2002, damages date.

The Agency did not object to discussing this matter generally, but stated that it was not prepared to discuss specifics and indicated that it would look into the matter. This Arbitrator ordered the Agency to provide a response to the Union no later than March 21, 2016.

VII. Attorney Fees

The Union noted this Arbitrator's prior Awards and statements confirm that the Union is the prevailing party and is entitled to recover attorney fees, costs and expenses pursuant to the Back Pay Act. The Union then stated that it intended to file a partial petition for attorney fees addressing certain aspects of a fee request.

VIII. Other Outstanding Matters

The Union noted that the Agency was still not in compliance with this Arbitrator's Orders concerning certain outstanding matters. Specifically, the Union stated that the Agency had still not sent out the chilling effect blast email to the Bargaining Unit. The Agency stated that Ms. Rice and Mr. Statman had resolved that issue; however, Mr. Statman denied that assertion and stated that he had not received any response to his June 8, 2015 email to Ms. Rice. The Agency agreed

to resolve this issue. This Arbitrator ordered the Agency to respond to the email no later than March 10, 2016.

IX. Conclusion

The purpose of the February 25, 2016 Implementation Meeting was to monitor and oversee implementation in 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 all subsequent Summaries as well as the Union's request for attorney fees, costs and expenses until the matter is completed. This jurisdiction extends to all outstanding items in this matter.

The next Implementation Meeting will take place on April 12, 2016 at a location to be determined.

Dr. Andrée Y. McKissick, Esq.
Arbitrator

March 26, 2016