NOV 16 2006

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, DC

U.S DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
WASHINGTON, DC
(Agency)

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL COUNCIL OF HUD LOCALS 222, AFL-CIO,
(Union)

AGENCY' EXCEPTIONS TO ARBITRATION AWARD

AGENCY EXCEPTIONS TO ARBITRATION AWARD

Pursuant to 5 C.F.R. Section 2425.1(a), the Department of Housing and Urban Development (Agency or HUD) hereby files exceptions to the Award of Arbitrator Roger Kaplan concerning the Timely Payment of Performance Awards. A copy of the award is attached as Exhibit 1 (see Ex 1). As set forth fully below, the Award is deficient and should be set aside because (1) the award is based on a non-fact and (2) the Arbitrator did not carefully weigh the evidence to support that the Agency had an established past practice in place contrary to the alleged contract violation of Article 11, Section 11.02 of the HUD/AFGE Agreement (Agreement) (see Ex 4) and (3) the award is deficient because it does not specify what the remedy is for the employees covered by the grievance.

BACKGROUND

In July 2005, the Union filed a grievance of the parties on behalf of all bargaining unit employees represented by AFGE Council of HUD Locals 222 alleging that the Agency violated the Collective Bargaining Agreement (Articles 1, 2 ,3 ,4 and 11), Prompt Payment Act, Back Pay Act and other applicable MOU's, MOA's and agreements and all other applicable law, rule and regulation when it failed to timely process awards.

In the grievance filed by the union, they alleged the Agency violated Article 11, Section 11.02(3) when it failed to process performance awards within (3) pay periods of the date of the decision to make the awards, or the appraisal, whichever is later, on a

continuous and repeated basis for the past (6) years. The remedy sought was that management cease and desist from failing to process and pay awards timely, payment of back pay and interest for untimely awards for the current year, payment of interest for violations of the cited authority for the past 6 years and reasonable attorney fees, cost and expenses. The union did not present any evidence at the grievance meeting held on January 19, 2006, in support of the Agency's violation of Articles 1 ,2 ,3 ,4 or 11.02(3), nor did they present any evidence to support a violation of the Back Pay Act. The only evidence presented by the Union was a case that dealt with the Prompt Payment Act. The Deciding Official limited the grievance period to fiscal year 2005 citing Article 22.15 of the HUD/AFGE Agreement and denied the grievance.

The Union invoked arbitration on February 17, 2006 and the parties jointly agreed on March 1, 2006, to have Mr. Roger Kaplan serve as arbitrator. During the pre-hearing conference call, both parties agreed to a hearing date but later agreed to submit briefs on the merits of the case instead. Management issued an information request to the Union on April 6, 2006, asking for any and all documents, reports and case law the Union was using to support its case against the Agency. The union denied this request on the grounds that they were not required to respond to an information request from the Agency. The arbitrator requested a second conference call where he asked for stipulations and evidence. Management sent copies of stipulations and evidence relied upon (see Ex 2).

ARBITRATION AWARD

The parties could not agree on a stipulation of the issue. The arbitrator defined the issue as: What is the appropriate remedy, if any, for HUD's failure to make timely payments of awards pursuant to the collective bargaining agreement (CBA) (see Ex 4). Since the parties agreed to submit briefs and stipulate the facts, no hearing on the evidence was held. In fact, the union submitted no evidence for any of the allegations in the grievance. The Agency and the Union was asked to hold a second conference call with the arbitrator where he asked for additional documentation in order to rule on the case.

The arbitrator decided that because the Agency stipulated that the "Agency failed to timely pay thousands of Bargaining Unit employees their awards under the CBA provision… "there can be only one conclusion." The arbitrator also decided that management did not have evidence to support the argument that there was an established past practice of paying the awards contrary to the provision in Article 11.02 of the CBA despite memorandums issued by management that clearly show an established past practice contrary to Article 11.02 of the CBA. The union was aware of this established past practice since 1999 and did nothing to change this process. As a result of these findings, the arbitrator ruled that the Union should be awarded interest for the years 2003 through 2005 and attorney's fees.

ARGUMENT

THE ARBITRATOR'S AWARD IS BASED ON A NON-FACT

To establish that an award is based on a non-fact, the appealing party must demonstrate that the central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *Lowery AFB, Denver, Colorado and NFFE Local 1497, 48 FLRA 589 (1993).* The arbitrator ruled that based on the stipulated facts and what he determined was a violation of Article 11.02 of the CBA, the Agency must pay interest on awards paid from 2003 thru 2005, plus attorney's fees. The award is based on a non-fact because the Agency never stipulated to being late for the years 2003 through 2005. The stipulations (see Ex 2) between the Agency and the union only agree that (stip 6) the Agency was late in the past on awards payments and that (stip 5) all employees were paid awards for the years 2003 through 2005.

Stipulation 6 does not state what year or years it was late nor was there any evidence presented by the union to support a basis for this conclusion by the arbitrator. The Agency stipulated that it was late because of an established past practice that modified the terms of Article 11.02 of the CBA. See *American Federation of Government Employees, Local 3369 and Social Security Administration, New York Region, New York, 55 FLRA 1074, 1077 (1999).* This non-fact was not disputed at the

prehearing or in the briefs but came as a result of a clearly erroneous assumption made by the arbitrator that the Agency was not timely providing awards from 2003 through 2005. *See GSA, Region 2, 46 FLRA 1039.* In *Electronics Corporation of America v. International Union of Electrical, Radio and Machine Workers, AFL-CIO Local 272, 492 F.2d 1255 (1st Cir 1974)* the court states "where the fact" underlying an arbitrator decision is concededly a non-fact and where the parties cannot be charged with the misapprehension, the award cannot stand.

In conclusion, the arbitrator decision was based on non-fact because he assumed t the Agency was not timely for the years 2003 through 2005, when in fact, there was no stipulation or evidence to support this assumption. As a result of that non-fact, he ordered the Agency to pay interest on awards that were not timely from 2003 through 2005. It is the Agency position that the arbitrator's decision is deficient and cannot stand.

THE ARBITRATOR FAILED TO WEIGH THE EVIDENCE SUPPORTING AN ESTABLISHED PAST PRACTICE

In order to establish the existence of a past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. See *United States Dept. of Justice, Executive Office for Immigration Review, Bd. Of Immigration Appeals, 55 FLRA 454, 456 (1999).* Evidence that an agreement provision has been amended may be established by the parties' intent. *See id,* Frank Elkouri & Edna Asper Elkouri, How Arbitration Works 653 (5th Ed. 1997) at 653 (citation omitted)

([A]n) arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties intent.

The Arbitrator stated in his decision (see Ex 1), page 5 "In light of stipulation 6, there can be only one conclusion. I find that HUD failed to timely pay awards." This is a clear indication that the arbitrator failed to examine any evidence to support the Agency position that there was an established past practice. It appears that the arbitrator made his decision solely on stipulation 6, between the parties. As stated in the Agency's brief (see Ex 7), there was an established past practice contrary to Article 11.02 of the CBA, going back to 1999, that the union was fully aware of and did nothing to challenge. This past practice clearly amended Article 11.02 by paying awards to employees who received an Outstanding and **Highly Successful** ratings unlike the language in Article 11.02 which provides awards to employees with Outstanding ratings (see Ex 5). Where a past practice establishes a condition of employment, the condition of employment is incorporated into the parties' collective bargaining agreement. *AFGE Local 2128 and Dept. of Defense DCMA, 58 FLRA 519, 523 (2003).*

The Agency issued memorandums for 1999, 2000, 2001, 2002, 2003, 2004 and 2005 that all stated employees with Outstanding and **Highly Successful** will be paid performance awards (see Ex 3). As a result of the Agency processing awards for both Outstanding and Highly Successful, it caused a significant increase in the workload (see Ex 6) and time needed for processing awards. In addition, because the Agency established a past practice of paying Outstanding and Highly Successful performance

awards, it essentially amended the language of Article 11.02 to include Outstanding and Highly Successful performance awards but also eliminated the timeframe for processing awards (3 pay periods). The memorandums issued each year approving the awards became the new terms that effectively amended Article 11.02 of the CBA. Thus, the argument made by the arbitrator that the contract violation was an unjust and unwarranted personnel action which entitled the union to back pay, interest and attorney's fees is eliminated by the established past practice. Based on these facts, the arbitrator's award cannot stand.

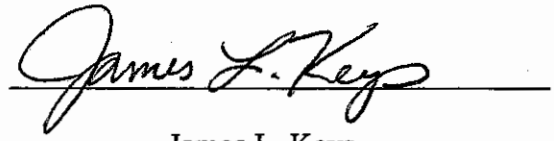
THE AWARD IS DEFICIENT BECAUSE IT DOES NOT CLEARLY STATE WHAT THE REMEDY IS FOR EMPLOYEES WHO RECEIVED HIGHLY SUCCESSFUL RATINGS COVERED BY THE GRIEVANCE

During the entire period covered in the grievance by the union, 1999 thru 2005, the Agency has paid all employees with a rating of Outstanding and Highly Successful, performance awards. The arbitrator's award was based on Article 11.02 of the CBA (Ex 5) which only covers employees with Outstanding ratings. The award does not state what is the remedy, if any, for employees who were paid awards for Highly Successful ratings (Ex 6). The Agency cannot properly implement this award, if upheld, because the arbitrator's decision does not state whether those employees with Highly Successful ratings for 2003 through 2005 should also be paid interest.

CONCLUSION

The Award is based on non-fact, failed to weigh the evidence supporting an established past practice and does not state what the remedy is for employees who received Highly Successful ratings. Accordingly, the Award is deficient and must be set aside.

Respectfully submitted,



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U.S. Department of Housing and Urban Development, Washington, DC (Agency), and American Federation of Government Employees, National Council of HUD Locals 222, AFL-CIO (Union)	)

Certificate of Service

I, James L. Keys, hereby certify that on this date the Agency's exceptions to the arbitration award and attachments in the above-captioned matter were filed with the Case Control Office, Federal Labor Relations Authority, and served on the following in the manner indicated:

By Messenger Delivery (Original and 4 copies):
Case Control Office
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Docket Room, Suite 201
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By Priority Mail
Michael Snider
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Dated this 16th of November 2006

James L. Keys