IN THE MATTER OF ARBITRATION BETWEEN:

American Federation of Government, Employees (AFGE), Council of HUD Locals 222, UNION, v. US Department of Housing & Urban Development, AGENCY.	Issue: Fair and Equitable Remedy Case No. 03-07743 Remanded at: 59 FLRA 630 FLRA Docket No. 0-AR-4586 Arbitrator: Dr. Andree Y. McKissick, Esq.

CERTIFICATE OF SERVICE

I hereby certify that copies of the Union's Opposition to the Agency's Exceptions in the above-captioned matter were served on this 23rd day of March, 2012.

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

ONE ORIGINAL & FOUR COPIES
SENT VIA CERTIFIED MAIL

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Washington, D.C. 20410

SENT VIA MAIL

Arbitrator
Dr. Andree McKissick
Arbitrator
2808 Navarre Drive
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Jacob Y. Statman, Esq.

IN THE MATTER OF ARBITRATION BETWEEN:

American Federation of Government, Employees (AFGE), Council of HUD Locals 222, UNION, v. US Department of Housing & Urban Development, AGENCY.	Issue: Fair and Equitable Remedy Case No. 03-07743 Remanded at: 59 FLRA 630 FLRA Docket No. 0-AR-4586 Arbitrator: Dr. Andree Y. McKissick, Esq.

UNION'S OPPOSITION TO AGENCY'S EXCEPTIONS TO ARBITRATION DECISION

AFGE Council of Locals 222 (the "Union"), by and through its undersigned counsel, hereby submits its timely Opposition to the Agency's Exceptions to the Arbitration Decision in the above captioned case and in support thereof states as follows:

JURISDICTION

The Federal Labor Relations Authority has jurisdiction over this matter pursuant to 5 U.S.C. § 7105(2)(H) and 5 U.S.C. § 7122. The Remand Award was dated January 10, 2012. The Agency's Exceptions were dated February 10, 2012. On March 12, 2012, the Authority granted the Union's request for extension to file the Opposition to the Agency's exceptions. The Union's Opposition is timely filed.

BACKGROUND

On January 10, 2012, the Arbitrator issued her Remedy Award (the "Remedy") in the above captioned case. The Remedy was issued as a result of a remand in 59 FLRA 630. In that decision the Authority left the underlying violation found by the Arbitrator intact, but remanded the case to determine an appropriate remedy. Specifically, the Authority upheld the Arbitrator's determination that the Agency violated law rule and regulation in not treating employees fair and equitable when it hired external applicants for higher promotion potential than current employees. *Id.* The Authority did, however, set aside the Arbitrator's remedy in deciding that the proposed remedy – an organizational upgrade - involved classification issues, and the statute does not authorize the Arbitrator to change the promotion potential of employees' permanent positions. *Id.*

Per the Authority, the remedy was set aside and the merits award of the underlying decision was remanded for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy. While the Parties did engage in settlement discussions they were unable to reach settlement. As such, the Arbitrator issued an order requiring the Parties to submit their submission on remedy no later than September 15, 2011. Upon the unsuccessful completion of settlement discussions, however, the Agency ceased its involvement in this case. It failed to provide **any type of response to the Arbitrator or Union** concerning the Arbitrator's deadline for submission of a proposed remedy or a reply to the Union's submission. **Exhibit A**[1]**.** It is interesting and important to note, that despite having been given repeated opportunities to be heard by the Arbitrator, the Agency disregarded those opportunities and is only now, for the first time, taking any issue with the Arbitrator's Remedy.

[1] Exhibit A contains a detailed log concerning the actions and omissions of the Agency on the remand.

The Remedy Order included four alternative remedies in case the Authority vacated any of the remedies. On February 16, 2012, the Union received the Agency's Exceptions. While it is difficult to fully understand what the Agency's exceptions are, it appears that the Agency is contending that the Remedy Order is deficient because it exceeded the Arbitrator's authority, is contrary to law, and fails to draw its essence from the Agreement[2]. For the reasons that follow the Exceptions should be denied.

ARGUMENT & ANALYSIS

I. The Arbitrator did not exceed her Authority by issuing Alternative Remedies.

The Agency contends that the Arbitrator exceeded her authority by issuing four remedies, when the Authority directed that she "only render one." Exceptions, p. 2. Such an argument is flawed. As relevant here, the Authority will find that arbitrators exceed their authority when they resolve an issue that was not submitted to arbitration. *AFGE Local 695 v. U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777 (2005). The Authority, like the federal courts, accords arbitrators substantial deference in the determination of the issues submitted to arbitration. *AFGE Local 2978 v. Veterans Admin.*, 24 FLRA 447 (1986). In cases in which the parties have stipulated the issue for resolution, arbitrators do not exceed their authority by addressing any issue that is necessary to decide the stipulated issue or by addressing any issue that necessarily arises from issues specifically included in the stipulation. *Id.*

Authority precedent has clearly established that Arbitrators may issue alternative remedies in situations where either Party or the Authority finds one of the remedies invalid. *NAIL, Local 5 v. Dept. of Defense, DLA*, 65 FLRA No. 107 (February 14, 2011) (Authority

[2] It is unclear if the Agency is attempting to include additional Exceptions. However, it is clear that none of their other contentions are valid grounds for review pursuant to 5 CFR § 2425.6

upheld Arbitrator's decision ordering two alternative remedies); *AFGE Local 2814 v. U.S. Department of Transportation*, 14 FLRA 240 (1984) (Authority addressed all multiple alternative remedies ordered by Arbitrator). Further, the Authority has held that when an arbitrator has issued an alternative or additional remedy that is not deficient and that remains after the deficient portion is set aside, the matter is not remanded. *United States Dep't of Agric., Fed. Grain Inspection Serv., Grain Inspection, Packers & Stockyards Admin.*, 58 FLRA 98, 100 (2002).

It is clear that the Arbitrator's written Remedy does not require the Agency to implement more than one remedy. Rather, in the interest of ending almost 10 years of litigation, the Arbitrator issued a thorough and complete decision with numerous alternative remedies in case the Authority struck down any of the other remedies. Contrary to the Agency's Exceptions, the Authority decision at 59 FLRA 630 did not preclude the Arbitrator from issuing more than one remedy and by doing so the Arbitrator did not exceed her authority. This exception, therefore, must be denied.

II. Remedy No. 1 is valid, legal, and is supported by Authority precedent.

In her Remedy Order the Arbitrator ordered Remedy No. 1 as follows:

> That the Agency process retroactive permanent selections of all affected BUE's into currently existing career ladder positions with promotion potential to the GS-13 level. Affected BUE's shall be processed into positions at the grade level which they held at the time of the violations noted in my prior findings, and (if they met time-in-grade requirements and had satisfactory performance evaluations), shall be promoted to next career ladder grade(s) until the journeyman level. The Agency shall process such promotions within thirty (30) days, and calculate and pay affected employees all back pay and interest due since 2002. **Exhibit B, p. 2-3**

A. Remedy No. 1 does not require any illegal promotions.

The Agency argues that Remedy No. 1 is contrary to law, rule or regulation. Under Section 7122(a) of the Federal Service Labor–Management Relations Statute, an award is deficient if it is contrary to any law, rule, or regulation; or it is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations. As is discussed below, the award in Remedy No. 1 is not contrary to law, rule or regulation.

The Agency claims that Remedy No. 1 requires the placement of employees into existing, but unidentified, career ladder positions with promotion potential to the GS-13 level without competition. Exceptions, p. 4. The Agency further argues that the remedy is in violation of 5 CFR §335.103(c)(v) because "transfer to a position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service" requires a competitive procedure. In sum, the Agency's argument is that the Remedy calls for an unlawful non-competitive promotion.

However, the Remedy clearly does not **require** any **promotions** at all. Rather, the Arbitrator is simply requiring the Agency to process retroactive selections to positions for affected Grievants – those Grievants who were adversely affected by the Agency's violations of the CBA. The Arbitrator's underlying merits award which was upheld, found that, "but for" the Agency's violations, the Grievants would have been selected for the career ladder positions at issue. **Exhibit B.** The Remedy is a reconstruction of exactly what would have occurred "but for" the violations noted in the prior merits decisions. Indeed, the Authority has long held that creating a remedy based upon a "but for" proper reconstruction of what an Agency would have done had it not violated the law or contract is appropriate. *AFGE Local 3448 v. Social Security Administration, 54* FLRA 142, 148 (1998) (finding award ordering agency to select grievant for

next available position properly reconstructed what agency would have done absent violation of parties' priority consideration provision). While it is true that a Grievant will, if all of the other conditions are met, receive a promotion from this retroactive selection, that would only be based on the nature of the Agency's violation – improperly failing to select the Grievant into career ladder positions, which naturally lead to career ladder promotions. As such, Remedy No. 1 does not include any unlawful competitive or non-competitive promotions and is therefore not contrary to law, rule or regulation.

B. Non-competitive promotions are appropriate and reasonable where an Agency fails to properly consider an applicant during the competitive procedure.

Assuming *arguendo* that the Authority reads Remedy No. 1 to include a promotion, the promotion would be a legal and valid non-competitive promotion. As stated above, the Agency relies on 5 CFR §335.103(c)(v) in support of its argument that any promotion requires a competitive procedure. The Agency, however, failed to read or include the exclusion to §335.103(c)(v). Specifically, §335.103(c) states: "except as provided in (c)(2) and (c)(3) of this section, competitive procedures in agency promotion plans apply....." 5 CFR §335.103(c). It is clear, therefore, that there are conditions under (c)(2) and (c)(3) to which the competitive procedures are inapplicable.

The exclusion in §335.103(c)(3)(vi) states that competitive procedures do not apply in a situation where a candidate was not given proper consideration in a competitive promotion action. In this case, the Arbitrator's Remedy No. 1, granting non-competitive promotions includes her finding that the Agency failed to properly consider candidates for promotion. In the underlying Decision, the Arbitrator made a finding of fact, and found that "the evidence supports the Union's case that the Grievants were not considered for selections." **Exhibit B, p.15.** The

Arbitrator reached this conclusion in part by finding that "bargaining unit employees applied for positions with higher promotion potential that were posted internally and externally, but that the Agency in all cases selected external applicants." **Exhibit B. pp.12-13.**

Pursuant to 5 CFR §335.103(c)(3)(vi), and because the Agency failed to properly consider the grievants for the previous vacancy announcement, non-competitive promotions are both legal and valid. *NTEU Chapter 3 v. Internal Revenue Service*, 60 FLRA 742 (2005) (holding that Arbitrators have the authority to compel non-competitive promotions pursuant to 5 CFR §335.103(c)(3)(vi)).

As such, Remedy No. 1 is neither contrary to law, rule or regulation, nor is it deficient on any grounds similar to those applied by Federal courts in private sector labor-management relations[3]. The Agency's Exception with regard to Remedy No. 1 must be denied.

III. Remedy No. 2 is valid, legal, and is supported by Authority precedent.

In her Remedy Order the Arbitrator ordered Remedy No. 2 as follows:

> In the alternative and only in the event the FLRA vacates ORDER No. 1 above, and pursuant to my finding that "but for" the Agency's violations, the Grievants would have been selected for the subject vacancy for which they applied, this Arbitrator ORDERS that the Agency retroactively select the affected GS-12 employees into the subject vacant career ladder positions with retroactive grade increases. The Agency shall process such selections within thirty (30) days, and calculate and pay affected employees all back pay and interest due since 2002 **Exhibit B, p. 3.**

The Agency argues that the Arbitrator makes implementation of Remedy No. 2 impossible by defining the class as "All bargaining unit employees in a position in a career ladder (including at the journeyman level), where that career ladder lead (sic) to a lower journeyman grade than the journeyman (target) grade of a career ladder of a position with the same job series, which was posted between 2002 and present." The Agency contends that this definition expands the class to

[3] It must be noted that the Agency's Exceptions fail to describe or explain which Federal decision concerning private sector labor management-relations is at issue here.

an undefined scope beyond employees occupying positions referenced in the record. Exceptions, p. 4.

In order for an award to be found deficient on the basis that it is incomplete, ambiguous, or contradictory so as to make implementation impossible, the appealing party must show that implementation of the award is *impossible* because the meaning and effect of the award is too unclear or uncertain. *AFGE Local 1843 v. U.S. Department of Veterans Affairs, Medical Center, Northport, New York*, 51 FLRA 444, 448 (1995). The Agency takes issue with the definition of the class, yet fails to explain why implementation of Remedy No. 2 is impossible.

Moreover, the Agency is arguing over the merits of the case and its own failures in failing to preserve or produce evidence relevant to the matter. In the underlying Decision, the Arbitrator **found an adverse inference** against the Agency for failing to properly maintain and record vacancy announcements and applications. As the Arbitrator previously stated: "[C]learly there is a right to an adverse inference because there is duty to preserve and protect pertinent and relevant documents." **Exhibit B, pp. 10-14** (finding that an adverse inference is appropriate due to the Agency's failure to keep and maintain proper records).

If there is any doubt as to which employees are affected, the fault lies with the Agency. The Union's position is that there is no doubt about which employees are affected and in any case can identify the class of affected employees through Agency documents which are in the Union's possession and/or in Agency data systems. It is premature to conclude that the Remedy is not able to be implemented. Indeed, the Agency is aware of affected employees, as some of them testified in the case already. Others are easily identifiable through the Agency's data since the Vacancy Announcements have been provided and the records exist which tie those Vacancy Announcements to applicants and selectees. Further, the Agency's pay records reveal precisely

which employees in the affected job series are stagnated at the GS-12 level, and which "leapfrogged" over stagnated employees.

The Arbitrator's adverse inference, which has already been upheld by the Authority, included changing the scope of the class based on the Union's attempts to amend the grievance. The Agency must not be permitted to destroy evidence and then complain that the evidence does not exist. Further, when as here, an arbitrator has found the specific requirements giving rise to entitlement to backpay, there is no requirement for the arbitrator to identify the specific employees entitled to backpay and calculate the amount of backpay. *NATCA v. Federal Aviation Administration*, 55 FLRA 322 (1999). While implementing Remedy No. 2 might be difficult or expensive for the Agency, it is not impossible; as such Remedy No. 2 is not deficient and the Exception must be denied.

IV. Remedy No. 3 is valid, legal and is supported by Authority Precedent.

In her Remedy Order the Arbitrator ordered Remedy No. 3 as follows:

> In the alternative, and only in the event the FLRA vacates ORDER No. 1 and 2 above, this Arbitrator hereby ORDERS that the violative Agency selections from 2002 to present be set aside, that the Agency provide each Grievant with one priority consideration and that the Agency must re-run all of the vacancies which were found to have been in violation of the CBA between 2002 and the present. The Agency should process such selections within sixty (60) days, and calculate and pay affected employees all back pay and interest due since 2002. Remedy, p. 3-4.

The Agency argues that Remedy No. 3 is deficient because by failing to identify the vacancy announcements, and failing to find that the original selectees could not have been selected if the Agency had followed proper procedures, the Arbitrator exceeded her authority. The Authority will only find that arbitrators exceed their authority when they resolve an issue that was not submitted to arbitration. *AFGE Local 695 v. U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777 (2005). The Authority, like the federal courts, accords arbitrators

substantial deference in the determination of the issues submitted to arbitration. *AFGE Local 2978 v. Veterans Admin.*, 24 FLRA 447 (1986). In cases in which the parties have stipulated the issue for resolution, arbitrators do not exceed their authority by addressing any issue that is necessary to decide the stipulated issue or by addressing any issue that necessarily arises from issues specifically included in the stipulation. *Id.*

As is discussed *supra*, the Arbitrator's Remedy is not deficient as it requires the Agency to conduct legal non-competitive promotions to a class of grievants defined by the Arbitrator as a result of an adverse inference ruling.

With regards to the portion of Remedy No. 3 requiring the original selections be set aside, such a decision is in accordance with Authority precedent. It is well accepted that an arbitrator's order to rerun a selection action may include a requirement that the initial selection be set aside. *See, e.g., Panama Canal Comm'n,* 56 FLRA 451 (2000) (Authority upheld rerun action); *SSA Chicago,* 56 FLRA 274 (same). As such, in issuing Remedy No. 3, the Arbitrator did not exceed her authority and the remedy is valid and legal. The Agency's Exception to Remedy No. 3 must be denied.

V. Remedy No. 4 is valid, legal and is supported by Authority Precedent.

In her Remedy Order the Arbitrator ordered Remedy No. 4 as follows:

> In the alternative, and only in the event the FLRA vacates ORDER No. 1 , 2 and 3 above, that the Agency retroactively place all affected BUE's into an unclassified position description identical to those of the newly hired current GS-13 employees, which accurately reflects their duties from 2002 to present, and then this Arbitrator ORDERS the Agency to classify and grade those PD's, retroactively placing the Grievants in them effective 2002, with back pay and interest. Remedy, p. 4.

The Agency argues that Remedy No. 4 is deficient for the same reason as Remedy No. 1. As is discussed *supra*, Remedy No. 1 is not deficient. The Agency further argues that Remedy No. 4

is deficient in that it violates management's rights to determine the organization, numbers, types and grades of positions under Section 7106(a)(1) and (b)(1). Exceptions, p. 6.

In resolving whether an arbitrator's award violates management's rights under § 7106 of the Statute, the Authority applies the framework established in *NTEU Chapter 201 v. Department of Treasury, Bureau of Engraving and Printing,* 53 FLRA 146 (1997). Upon finding that an award affects a management right under § 7106(a), the Authority applies a two-prong test to determine if the award is deficient. Under prong I, the Authority examines whether the award provides a remedy for a violation of either applicable law, within the meaning of Section 7106(a)(2) of the Statute, or a contract provision that was negotiated pursuant to Section 7106(b) of the Statute. Under prong II, the Authority considers whether the arbitrator's remedy reflects a reconstruction of what management would have done had it not violated the law or contractual provision at issue. *See BEP*, 53 FLRA at 151-154. (internal citations omitted).

Under Authority precedent, an award requiring an agency to make a selection for an appointment affects management's right to make selections under § 7106(a)(2)(C) of the Statute. *See, e.g., Soc. Sec. Admin., Woodlawn, Md.*, 54 FLRA 1570, 1577 (1998). In this case, the Arbitrator ordered the Agency to select grievants for promotion. In doing so she found that but for the Agency's violations of law, rule and regulation the grievants at issue would have been selected for the positions at issue. The Agency fails to explain how or why Remedy No. 4 violates management's rights in light of the holding in *BEP.* Indeed, under Authority precedent, an arbitrator's interpretation of a priority consideration provision as requiring an agency to select a candidate who meets the minimum standards for a job does not excessively interfere with management's right to make selections. *United States Dep't of Health and Human Serv., Centers for Medicare and Medicaid Serv.*, 60 FLRA 437 (2004). While Remedy No. 4 does not include

the priority consideration factor found in Remedy No. 3, the same test applies and would support a finding that the Remedy does not unlawfully interfere with Management's rights per the two prong test in *BEP*.

The Authority has long held that creating a remedy based upon a "but for" proper reconstruction of what an Agency would have done had it not violated the law or contract is appropriate. *SSA, Branch Office, East Liverpool, Ohio*, 54 FLRA 142, 148 (1998) (finding award ordering agency to select grievant for next available position properly reconstructed what agency would have done absent violation of parties' priority consideration provision). As such, Remedy No. 4 is not deficient and should not be set aside. The Agency's Exception with regard to this issue must be denied.

VI. The Arbitrator did not exceed her authority when she Ordered the Agency to Stop Advertising Certain Positions.

In addition to the four alternative remedies ordered by the Arbitrator, she further ordered the Agency to stop advertising positions in a way that requires current employees to take downgrades in order to secure greater promotion potential. Remedy, p. 4.

The Agency argues that the Arbitrator exceeded her authority by resolving an issue not before her. However, such an argument must fail. The Issues before the Arbitrator in the underlying grievance were:

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**?

Exhibit B, p. 3.

As has been discussed, after finding that the Arbitrator's Award was deficient, the Authority remanded the matter back to the Arbitrator to determine an "alternative remedy." The Arbitrator is thus left with deciding Issue No. 2 of the underlying case; that is "what are the appropriate remedies." The Agency argues that the Arbitrator went "beyond that scope" in issuing this order, but completely fails to explain how or why. The issue of **remedies** was submitted for arbitration. There is nothing that precluded the Arbitrator from issuing the cease and desist order in the underlying decision, as such, there is nothing that precludes the Arbitrator from issuing this cease and desist order now.

VII. The Matter must be Remanded if none of the Remedies are Upheld.

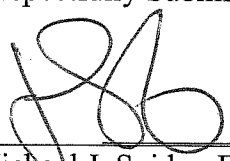
The Agency argues in its conclusion that: "In light of the above, the Agency requests that the Authority vacate the Order and multiple remedies issued by the Arbitrator in their entirety and order this case finally closed." Exceptions, p. 7. It is well established that in cases where the Authority sets aside an entire remedy, but an arbitrator's finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy. *See, e.g, U.S. Dep't of Transp., FAA, Salt Lake City, Utah*, 63 FLRA 673, 676 (2009). Following this principle, the Authority remanded this case at 59 FLRA 630. Further, the Arbitrator retained jurisdiction to provide alternative relief in the event that any relief provided is found to be deficient. The Arbitrator also retained jurisdiction over an award of attorney fees upon petition from the Union.

In the extremely unlikely event that the Authority vacates all four alternative remedies, the principle must be followed yet again. The underlying violation must be left undisturbed and the matter should be remanded yet again for settlement, or submission to the Arbitrator.

CONCLUSION

For all of the foregoing reasons, the Authority should find that the Remedy Decision was not deficient, and all alternative Remedies therein, No. 1- No. 4, are not deficient. As a result, the Authority should dismiss the Agency's Exceptions.

Respectfully Submitted,



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Counsel for the Union

EXHIBITS:

Exhibit A – Documentation relating to Agency's Failure to Respond

Exhibit B – Arbitrator's Underlying Merit Award

EXHIBIT

A

Jacob Statman

From: M Snider
Sent: Monday, December 05, 2011 3:50 PM
To: mckiss3343@aol.com
Cc: Varnado, Russell D; Biggs, William L; Federoff, Carolyn; Jacob Statman; Jason Weisbrot; Reynolds, James M; Mesewicz, Norman
Subject: AFGE 222 v HUD - Fair and Equitable Case - FMCS Case No.03-07743: Union's Submission on Remedy
Attachments: AFGE 222 9-25-11 Email.pdf; AFGE 222 Fair and Equitable - 9-8-11 Arbitrator email.pdf; AFGE 222 v HUD - Fair and Equitable case - letter 8.3.11 regarding remand from FLRA and terms for proposed payment 8-4-11 EMAIL.pdf; F&E McKissisk remand 07.28.11.pdf; AFGE 222 9-21-11 Arbitrator Email.pdf; AFGE 222 8-4-11 Email.pdf
Importance: High

Arbitrator McKissick:

On January 26, 2011, the FLRA issued another Decision in the above captioned case, upholding your liability decision and remanding the issue of remedy.

From January through July, the Union attempted to resolve the matter with the Agency and the Parties jointly agreed to hold the matter in abeyance.

On July 28, 2011, the Union sent a letter which set forth a proposed briefing schedule on the matter of Remedy to you, with a copy to the Agency. (**Attached**).

On August 3, 2011, the Arbitrator issued a letter Order setting forth a briefing schedule for a Remedy in the above captioned matter, adopting the Union's proposal with minor changes. (**Attached**).

On August 4, 2011, the Union sent to the Agency representative, enclosing and referring to the Arbitrator's letter Order: "What is HUD's response? We will wait one week for your response. If you do not respond, we will escrow the funds and submit our proposed remedies/remedy to the Arbitrator." (**Attached**). No response was received.

On September 8, 2011, the Union sent to the Arbitrator and Agency an email confirming the briefing schedule and escrow agreement (**Attached**).

On September 15, 2011, the Union submitted its Submission on Remedy in accordance with the Arbitrator's Order. No submission was received from the Agency.

On September 21, 2011, the Arbitrator acknowledged receipt of the Union's Submission. (**Attached**)

On September 25, 2011, the Union sent an email to the Arbitrator and Agency that "It is our understanding that the Agency is declining to submit its own Submission on Remedy. Therefore, the only proposal before you is the **Union's Submission on Remedy and Proposed Order**. We will await the Agency's comments on the Union's submission and request that you adopt the Union's Submission and sign the Union's Proposed Order." (**Attached**).

On September 26, 2011, the Agency forwarded to the Arbitrator confidential settlement communications and, for the very first time, claimed that it was "Department is not a Party to the resolution process submitted to you by the union, and is working to develop a solution to this matter." The Union responded the same day, objecting to the submission of confidential settlement communications to the Arbitrator and noting that the Arbitrator's Order regarding submission of Briefs regarding Remedy was not ex parte and the Arbitrator's Order was binding on both Parties.

The Agency at no time between July 28, 2011 and September 26, 2011 did the Agency object to the Arbitrator's Order setting forth a briefing schedule, despite receiving copies of the letter and emails discussing the same. Nor since the January 2011 FLRA Remand did the Agency ever make any progress towards otherwise resolving the dispute.

The Agency cannot seriously contend that the Parties are or were engaging in any settlement discussions which would preclude a Remedy Briefing, as those discussions ended in July 2011. In support of this fact, Ms. Federoff forwarded to

the Arbitrator on September 27, 2011 an email and other evidence showing that HUD has not only failed to engage in settlement discussions but has also continued the exact same policies and practices that the Arbitrator found to be violations of the CBA, law, rule and regulation. ("Management did not respond to our entreaties for settlement discussions until after you issued an order for briefs on remand. The context of the one conference call we had in August appeared to be a discussion of process for remand, rather than settlement. To my knowledge, no one with authority to settle for HUD attended the conference call, they failed to make any concrete offer, and they failed to propose any process for further settlement discussions. HUD has never wanted to have this matter resolved, and has done everything possible to delay resolution. HUD should not be able to further delay resolution of this matter.").

The Agency failed and refused to file any Response or Opposition to the Union's Submission on Remedy. I understand that the Union's escrow check has been received and deposited by the Arbitrator.

Now that the record is closed, we look forward to your Decision and Award on the issue of an appropriate Remedy.

Thank you.

M. J. Snider, Esq.
Law Offices of Snider and Associates, LLC
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600 Reisterstown Road, 7th Floor
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M Snider

From: M Snider
Sent: Sunday, September 25, 2011 3:22 AM
To: mckiss3343@aol.com
Cc: Varnado, Russell D; Biggs, William L; Federoff, Carolyn; Jacob Statman; Jason Weisbrot; Reynolds, James M; Mesewicz, Norman
Subject: RE: AFGE 222 v HUD - Fair and Equitable Case - FMCS Case No. 03-07743: Union's Submission on Remedy

Arbitrator McKissick:

It is our understanding that the Agency is declining to submit its own Submission on Remedy.
Therefore, the only proposal before you is the **Union's Submission on Remedy and Proposed Order**.
We will await the Agency's comments on the Union's submission and request that you adopt the Union's Submission and sign the Union's Proposed Order.

I will defer to Ms. Federoff on the check issue and would expect you to receive that before working on the case any further.

Thank you.

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From: mckiss3343@aol.com [mckiss3343@aol.com]
Sent: Wednesday, September 21, 2011 1:57 PM
To: M Snider
Cc: Varnado, Russell D; Biggs, William L; Federoff, Carolyn; Jacob Statman; Jason Weisbrot; Reynolds, James M; Mesewicz, Norman
Subject: Re: AFGE 222 v HUD - Fair and Equitable Case - FMCS Case No. 03-07743: Union's Submission on Remedy

Hi Mr. Snider:
This is to acknowledge you recent submission via e-mail as well as the hard copy..

Please be advised that I have not yet received the check for escrow, as promised. Thank you.

Dr. McKissick
Sent from my Verizon Wireless BlackBerry

From: "M Snider" <m@sniderlaw.com>

Date: Thu, 15 Sep 2011 17:53:53 -0400
To: <mckiss3343@aol.com>
Cc: Varnado, Russell D<russell.d.varnado@hud.gov>; Biggs, William L<William.L.Biggs@hud.gov>; Federoff, Carolyn<Carolyn.Federoff@hud.gov>; Jacob Statman<jstatman@sniderlaw.com>; Jason Weisbrot<Jason@sniderlaw.com>; Reynolds, James M<James.M.Reynolds@hud.gov>; Mesewicz, Norman<Norman.Mesewicz@hud.gov>
Subject: AFGE 222 v HUD - Fair and Equitable Case - FMCS Case No. 03-07743: Union's Submission on Remedy

Arbitrator McKissick:

Please find attached the **Union's Submission on Remedy and Proposed Order.**
The document is also being sent today by US First Class Mail.

Please note our new address below.

Thank you.

M. J. Snider, Esq.
Law Offices of Snider and Associates, LLC
The Pikesville Plaza Building
600 Reisterstown Road, 7th Floor
Baltimore, MD 21208

410-653-9060 phone
410-653-9061 fax

m@sniderlaw.com email
www.sniderlaw.com website

M Snider

From:	mckiss3343@aol.com
Sent:	Thursday, September 08, 2011 4:36 PM
To:	Federoff, Carolyn; Reynolds, James M; Mesewicz, Norman; M Snider
Cc:	Varnado, Russell D; Biggs, William L; Casper, Perry; Murillo, Marinella G; Christie, Will G
Subject:	Re: FMCS Case No. 03-07743: Escrow

Hi Ms.Federoff:
Thanks for your diligent effort in arriving at this solution.

Thanks to all for this arrangement.

Dr. McKissick

Sent from my Verizon Wireless BlackBerry

From: "Federoff, Carolyn" <Carolyn.Federoff@hud.gov>
Date: Thu, 8 Sep 2011 07:37:20 -0400
To: Reynolds, James M<James.M.Reynolds@hud.gov>; Mesewicz, Norman<Norman.Mesewicz@hud.gov>; 'mike@sniderlaw.com'<mike@sniderlaw.com>
Cc: 'McKiss3343@aol.com'<McKiss3343@aol.com>; Varnado, Russell D<russell.d.varnado@hud.gov>; Biggs, William L<William.L.Biggs@hud.gov>; Casper, Perry<perry.casper@hud.gov>; Murillo, Marinella G<MARINELLA.G.MURILLO@hud.gov>; Christie, Will G<will.g.christie@hud.gov>
Subject: FMCS Case No. 03-07743: Escrow

Gentlemen,

Please be advised that since the parties could not mutually agree upon an escrow, the Council of HUD Locals has authorized the Treasurer to send a check to Arbitrator McKissick for the full sum of $7500. It will be accompanied by a letter advising that it is our understanding that

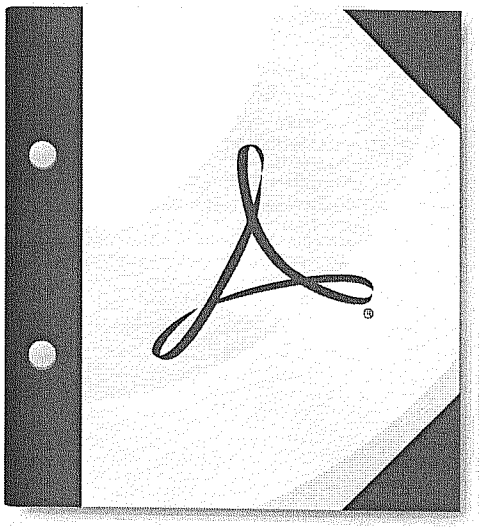
- the check will be held in escrow;
- Arbitrator McKissick will deliver a decision setting forth a remedy;
- the decision will be accompanied by a demand for payment of fees, allocating the fees in accordance with the parties' agreement at Section 23.04;
- Arbitrator McKissick will advise the Council of HUD Locals if payment in full is not received within 30 days of demand, whereupon she will cash the check and remit any overage to the Council;
- the Council will pursue reimbursement from HUD; and
- if for any reason HUD eventually pays Arbitrator McKissick directly, Arbitrator McKissick will reimburse the Council the amount received from HUD.

Provided this is acceptable to Arbitrator McKissick, we anticipate that the dates for resubmission of the matter will stand; by September 15, 2011, the parties will each submit alternative remedies, including any supporting documentation

and a proposed order granting the relief requested, with copies to the other party; by October 15, 2011, each party will respond to the other party's recommended alternative remedies.

We look forward to reaching a conclusion in this matter.

Carolyn Federoff, EVP
AFGE Council 222
617/994-8264



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National Council of HUD Locals
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFFILIATED WITH AFL-CIO
Council 222

July 28, 2011

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

Subject: FMCS Case No. 03-07743; FLRA Docket No. 0-AR-4586
Fair and Equitable Grievance of the Parties—Remand from FLRA

Dear Dr. McKissick,

In a decision issued January 26, 2011, the Federal Labor Relations Authority upheld your decision in the subject matter, but set aside the remedy. The FLRA remanded the decision "to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy." (HUD and AFGE Council 222, 65 FLRA 433, 436, attached.)

The parties have been unable to settle this matter. Moreover, the Agency is presently engaging in the exact conduct that was found to be a violation of the parties collective bargaining agreement; the Agency has recently advertised and is in the process of filling many positions advertised at GS-9/11, with promotion potential to GS-13 (copy of evidence attached).

Furthermore, we have been unable to secure agreement with the Agency for the resubmission of the matter to you. Our goal was, at a minimum, to reach agreement with the Agency over the process for resubmission, including the process for securing timely payment of any fees that may become due.

Under the circumstances, we are writing directly to you, with a copy to the Agency. We are proposing that:

1. Within thirty days, but no later than September 15, 2011, the parties individually submit for your consideration recommendations for alternative remedies, including any supporting documentation and a proposed order granting the relief requested, with copies to the other party;

2. The parties have thirty days thereafter, but no later than October 15, 2011, within which to respond to the other party's recommended alternative remedies;

3. Upon issuance of your order granting relief and a billing statement, if the Agency fails to remit any amount it may owe within sixty days, AFGE Council 222 will remit the amount to Dr. McKissick within thirty days of notice, and seek reimbursement directly from the Agency.

Please advise if this process is satisfactory. We continue to be represented by attorney Michael Snider in this matter. His electronic mail address is Mike@sniderlaw.com, and his street address is:

Michael Snider
Snider & Associates, LLC
104 Church Lane, Suite 100
Baltimore, MD 21208

Thank you for your assistance in this matter.

Carolyn Federoff
Council Representative
AFGE Council 222
Carolyn.Federoff@hud.gov

cc: James Reynolds, Deputy Director
Labor and Employee Relations Division
Department of HUD
451 7th Street, S.W., Room 2150
James.M.Reynolds@hud.gov

Russell Varnado, President
AFGE Council 222
P.O. Box 23076
Washington, D.C. 20026-3076
Russell.D.Varnado@hud.gov

Michael Snider

M Snider

From: mckiss3343@aol.com
Sent: Wednesday, September 21, 2011 1:58 PM
To: M Snider
Cc: Varnado, Russell D; Biggs, William L; Federoff, Carolyn; Jacob Statman; Jason Weisbrot; Reynolds, James M; Mesewicz, Norman
Subject: Re: AFGE 222 v HUD - Fair and Equitable Case - FMCS Case No. 03-07743: Union's Submission on Remedy

Hi Mr. Snider:
This is to acknowledge you recent submission via e-mail as well as the hard copy..

Please be advised that I have not yet received the check for escrow, as promised. Thank you.

Dr. McKissick

Sent from my Verizon Wireless BlackBerry

From: "M Snider" <m@sniderlaw.com>
Date: Thu, 15 Sep 2011 17:53:53 -0400
To: <mckiss3343@aol.com>
Cc: Varnado, Russell D<russell.d.varnado@hud.gov>; Biggs, William L<William.L.Biggs@hud.gov>; Federoff, Carolyn<Carolyn.Federoff@hud.gov>; Jacob Statman<jstatman@sniderlaw.com>; Jason Weisbrot<Jason@sniderlaw.com>; Reynolds, James M<James.M.Reynolds@hud.gov>; Mesewicz, Norman<Norman.Mesewicz@hud.gov>
Subject: AFGE 222 v HUD - Fair and Equitable Case - FMCS Case No. 03-07743: Union's Submission on Remedy

Arbitrator McKissick:

Please find attached the **Union's Submission on Remedy and Proposed Order.**
The document is also being sent today by US First Class Mail.

Please note our new address below.

Thank you.

M. J. Snider, Esq.
Law Offices of Snider and Associates, LLC
The Pikesville Plaza Building
600 Reisterstown Road, 7th Floor
Baltimore, MD 21208

410-653-9060 phone
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M Snider

From: M Snider
Sent: Thursday, August 04, 2011 8:23 PM
To: 'James.M.Reynolds@hud.gov'
Cc: 'carolyn.federoff@hud.gov'; Jason Weisbrot; Jacob Statman
Subject: AFGE 222 v HUD - Fair and Equitable case - letter 8.3.11 regarding remand from FLRA and terms for proposed payment 8-4-11
Attachments: Letter 8.3.11 regarding remand from FLRA and terms for proposed payment 8-4-11.pdf

Sir:

What is HUD's response?

We will wait one week for your response.

If you do not respond, we will escrow the funds and submit our proposed remedies/remedy to the Arbitrator.

Thank you.

M. Snider, Esq.
Law Offices of Snider and Associates, LLC
104 Church Lane, Suite 100
Baltimore, MD 21208
410-653-9060 phone
410-653-9061 fax

Sent from my wireless
Blackberry handheld device.

----- Original Message -----
From: Katie Strauss
To: M Snider
Sent: Thu Aug 04 17:15:47 2011
Subject: Letter 8.3.11 regarding remand from FLRA and terms for proposed payment 8-4-11.pdf - Adobe Acrobat Standard

EXHIBIT

B

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:

Michael Snider, Esquire
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

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