

IN THE MATTER OF ARBITRATION BETWEEN:

U.S. Department of HUD,]	
]	
Agency,]	Fair and Equitable Grievance
]	
and]	
]	FMCS No: 03-07743
]	
Council of HUD, Local 222,]	
]	Arbitrator: Dr. Andrée Y. McKissick
Union.]	

**ARBITRATOR'S RESPONSE TO THE UNION'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS AND COMPLIANCE WITH THE ORDER OF THE
ARBITRATOR AND FOR SANCTIONS**

BACKGROUND

Based upon the Union's request, dated October 19, 2002, and pursuant to 5 U.S.C. §7112, the Agency is required to provide data in the regular course of business. This request for information was also congruent with Articles 3, 4, 20 and 22 of the Agreement. Still further, this Arbitrator ordered the Agency to provide the data requested to allow the complete identification of all potential Grievants on June 23, 2002. Notwithstanding that order, the record reflects that the Agency refused to fully comply with the breadth of that request.

It is significant to note that, in the interim, the Agency has not contested the Union's rights to the requested information, nor has the Agency established a countervailing anti-disclosure interest in this matter. In addition, the Agency also has not claimed FOIA/Privacy Act protection for these documents.

The specifics of that request for information are as follows:

REQUEST FOR INFORMATION
(Dated: October 9, 2002)

The Union requested information in a Request for Information dated October 9, 2002, as follows:

Information Requested:

- A. Please furnish the personnel action of each person selected to fill the attached vacancy announcements. Listed by announcement number on the attached spreadsheet. You may delete those items, which may be subject to the Privacy Act, such as social security numbers, date of birth etc.
- B. Please furnish the previous personnel action prior to selection, prior to the current position.
- C. Please furnish the successful applications' resume. SF 171 or OF-612 application.
- D. Please identify and furnish any vacancy announcements in which a waiver of qualifications was given for the other person selected for the vacancy.
- E. Please furnish the vacancy announcements that were withdrawn or canceled prior to the selecting of any applicant, from the spreadsheet attached.

This list was fleshed out *reiterated and cited and incorporated into the Grievance*, as follows:

- 1) On or about August 5, 2002 Program Analyst, GS-0343-09 (vacancy number GS-MSH-2002-0101z and GR-DEU-2002-0043z) with maximum grade potential to GS-13.
 - a. similarly situated persons (GS-0343 Program Analysts) working for HUD whose grade potential is limited to GS-12.
- 2) On or about August 7, 2002 – 22 Contract Industrial Relations Specialists, GS-0246-09/11/12 (vacancy number PO-MSH-2002-0153z and PO-DEU-2002-0098z) with maximum grade potential to GS-13.
 - a. similarly situated persons (GS-0246 Contract Industrial Relations Specialists) working for HUD whose grade potential is limited to GS-12.
- 3) On or about August 6, 8, 12, 2002, the agency advertised Engineers, GS-0801-09/13 (vacancy numbers 06-MSR-2002-0106Z, 06-MSR-2002-0107, 06-MSR-2002-0112Z, 06-MSR-2002-0113Z, 06-DEU-2002-00832Z, 06-DEU-2002-0084, 06-DEU-2002-0089Z, and 06-DEU-2002-0090Z) with maximum grade potential to GS-13.
 - a. similarly situated persons (GS-0801 Engineers) working for HUD whose grade potential is limited to GS-12.
- 4) On or about August 8, 2002, the agency advertised Financial Analysts, GS-1160-09/13 (vacancy number 04-MSA-2002-0048Z and 04-DEU-2002-0036Z) with maximum grade potential to GS-13.
 - a. similarly situated persons (GS-1160 Financial Analysts) working for HUD whose grade potential is limited to GS-12.

- 5) On or about August 9, 2002, the agency advertised Construction Analysts, GS-0828-11/13 (vacancy number RE-MSH-2002-0247Z and RE-DEU-2002-0124Z) with maximum grade potential to GS-13.
 - a. similarly situated persons (GS-0828 Construction Analysts) working for HUD whose grade potential is limited to GS-12.

- 6) On or about August 16, 2002, the agency advertised Public Housing Revitalization Specialists, GS-1101-09/13 (vacancy number 04-MSA-2002-0051Z and 04-DEU-2002-0039Z) with maximum grade potential to GS-13.
 - a. similarly situated persons (GS-1101 Public Housing Revitalization Specialists) working for HUD whose grade potential is limited to GS-12.

REQUEST FOR INFORMATION CONTAINED IN THE GRIEVANCE
(Dated: November 13, 2002)

The Union requested information in the Grievance, dated November 13, 2002, as follows (numbering continued for ease of reference):

- 7) Additional instances like those listed above. Union is requesting copies of certain vacancy announcements in order to make an assessment. These announcements include, but are not limited to:
 - a. 02-MSD-2002-0066Z and 02-DEU-2002-0013Z
 - b. 152700
 - c. 152698
 - d. 152696
 - e. PHJT-2-152800S0
 - f. PHJT-2-152806S0
 - g. 152702
 - h. 03-MSA-2002-0032Z

- 8) Additionally, to fully assess the matter, we are requesting a list of employees as follows:
 - a. For all Program Analysts GS-0343: name, duty station, maximum promotion potential;
 - b. For all Contract Industrial Relations Specialists GS-0246: name, duty station, maximum promotion potential;
 - c. For all Engineers GS-0801: name, duty station, maximum promotion potential;
 - d. For all Financial Analysts GS 1160: name, duty station, maximum promotion potential;
 - e. For all Construction Analysts GS-0828: name, duty station, maximum promotion potential;
 - f. For all Public Housing Revitalization Specialists GS-1101: name, duty station, maximum promotion potential;

- 9) Finally, we need to know if persons were hired under each of the vacancy announcements listed in the fact section above. For each person hired, please advise of his/her name, duty station, grade at which s/he was hired, and the vacancy announcement under which s/he was hired.

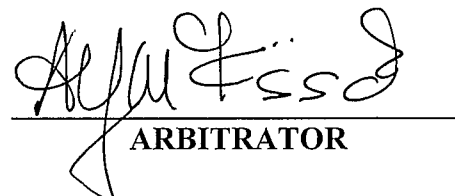
FINDINGS AND SANCTIONS

In light of the foregoing, the Agency is again **ordered** to fully comply with this information request immediately, but no later than **June 30, 2008**. If this order is not fully complied with by the above date, this Arbitrator is compelled to draw an adverse inference that the unreleased information must be adverse to the Agency.

It is well settled that adverse inferences can be made upon a party's failure to comply with discovery orders thus sanctions can rightfully ensue. Moreover, such an omission to produce documents is also viewed as a presumption and functions as an admission that those requested documents lack merit. (See Insurance Corporation of Ireland, LTD, et al., Bauxites de Guinee, 456 US 694, 102 S.Ct. 2099, December 1, 1982; Also See Hammond Packing Co. v. Arkansas, 212 US 322, 351, 29 S.Ct. 370, 380, 53, L.Ed. 530 (1909). Still further, the Court has held that such sanctions are not against due process of the recalcitrant party.

Moreover, this Arbitrator views this requested information to be relevant and necessary for the Union to assert its case (See Internal Revenue Service, Austin District Office, Austin, TX, Federal Labor Relations Authority, DA-CA 30106; 51 FLRA No. 95, 51 FLRA 1166, April 19, 1996). Accordingly, if this Order is not timely complied with, this Arbitrator shall bar any evidence on the part of the Agency on these issues in the forthcoming hearing on the merits of this grievance.

Date: May 29, 2008



ARBITRATOR

Dr. A. Y. McKissick, Arbitrator
2808 Navarre Drive
Chevy Chase, Maryland 20815-3802
Voice: (301) 587 - 3343
Fax: (301) 587 - 3609
E-Mail: McKiss3343@aol.com
May 29, 2008

Walter C. Vick, Labor Relations Specialist
L&E Relations Division
U.S. Department of HUD
451 Seventh Street, SW
Washington, DC 20410
Voice: (202) 402 - 5782

Michael J. Snider, Esquire
Law Offices of Snider & Associates, LLC
104 Church Lane, Suite 100
Baltimore, Maryland 21208
Voice: (410) 653 - 9060
Fax: (410) 653 - 9061

In the Matter of the Arbitration between:

U.S. Department of HUD

and

National Council of HUD Local 222

Fair and Equitable Grievance

FMCS No: 03-07743

SERVICES RENDERED:

Arbitrator's Response to the Union's Motion to Compel Production of Documents and Compliance with the Order of the Arbitrator and for Sanctions. Drafting and Analysis of Case Law.

PROFESSIONAL FEES:

Per Diem Charge: \$ 1,300.00

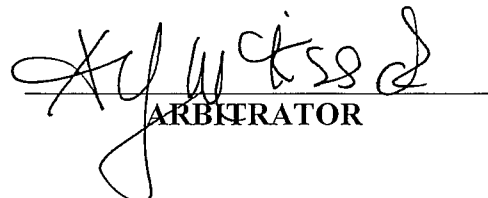
2 Study Days\$ 2,600.00

TOTAL.....\$ 2,600.00

Payable by Management\$1,300.00

Payable by the Union\$1,300.00

This bill is due in thirty (30) days. If this invoice is unpaid by sixty (60) days from the initial bill date, a ten percent (10%) charge on the remaining balance will ensue. If this invoice is unpaid by ninety (90) days from the initial bill date, a twenty percent (20%) charge on the remaining balance will then be assessed.


ARBITRATOR