IN THE MATTER OF THE ARBITRATION	)	FMCS Case No. 16-54673-8
Between	)	AFGE Grievance No. 2959-01-19-2016
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFGE) LOCAL 2959 Union	)	Grievant: C. Wayne Huddleston
And	)	
U. S. SMALL BUSINESS ADMINISTRATION Agency	)	

BEFORE: Dineo Coleman Gary, Arbitrator

APPEARANCES:

For the Agency:
Krista Madison
U.S. Small Business Administration
Office of General Law
101 Marietta Street, Suite 700
Atlanta, Georgia 30303

For the Grievant/Union:
Joseph Ybarra
AFGE, District 10
6800 Park Ten Boulevard, Suite 230-E
San Antonio, Texas 78213

Date of Hearing: January 19, 2017

Location of Hearing:
U. S. Small Business Administration
Fort Worth District Office
Fort Worth, Texas

Date of Award: April 24, 2017

ARBITRATOR'S DISCUSSION, OPINION AND AWARD

INTRODUCTION

The above-captioned matter came to be heard on the nineteenth day of January 2017 at the U. S. Small Business Administration, Fort Worth District Office in Fort Worth, Texas. Official record of the hearing was the court reporter's transcript. Post-hearing briefs were submitted by the parties on or about February 18, 2017, and the record was officially closed February 24, 2017. The parties were afforded the opportunity to examine and cross-examine witnesses, to introduce relevant evidence, to be heard in connection with any objection, and to argue orally. Upon a thorough review of the record, having thoroughly considered the evidence; careful observation of the witnesses, consideration of the arguments of the parties and the post-hearing briefs, the Arbitrator makes the following findings and renders the following Discussion, Opinion and Award.

PARTIES

Charles Wayne Huddleston, hereinafter referred to as the Grievant, is a Senior Area Manager and an employee of the United States Small Business Administration (SBA) hereinafter referred to as the Agency. The Grievant was represented by the American Federation of Government Employees (AFGE), Local 2959, hereinafter referred to as the Union.

ISSUE

The parties agreed to stipulate the issue as follows: Whether the Agency violated the Collective Bargaining Agreement[1] or other law when it rescinded the Grievant's June 4, 2015, promotion; and if so, what should be the remedy?

[1] Hereinafter referred to as the Master Labor Agreement (MLA).

STIPULATION

The parties agreed to stipulate the following: The Grievant worked in the U.S. Virgin Islands for the Small Business Administration June 1 through June 5, 2015. (Tr. at 33)

BURDEN OF PROOF

Inasmuch as the issue as set forth above involves contract interpretation, the Union has the burden of establishing, by a preponderance of the evidence, that the grievance should be sustained. Preponderance of the evidence shall mean that evidence which is more persuasive when compared to all evidence, if any, in opposition therewith. Preponderance of the evidence is additionally defined as "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." (5 C.F.R. §1201.56(c)(2)

STATEMENT OF THE CASE

The Grievant was hired as a Preference Eligible Veteran to the position of Economic Development Specialist for the U.S. Small Business Administration (Agency) in Fort Worth, Texas on June 12, 2013. In February 2015 the Grievant applied for the position of Senior Area Manager for the Puerto Rico/U. S. Virgin Islands (PR/USVI) District Office. Relocation expenses were not authorized. The Grievant's application stated that he was entitled to a 5-point Veterans' Preference. He interviewed for the position at the Puerto Rico District Office on April 9 and 10, and subsequently received a verbal offer on May 14, 2015. The Grievant was also informed by Lead Human Resources Specialist that he would need to go through the suitability process before the effective date for the new position could be established.

Upon the request of PR/USVI District Office personnel, the Grievant worked at the U.S. Virgin Islands (USVI) location during Small Business Week from June 1 through June 5, 2015. During this trip, he was being introduced as the new Senior Area Manager. On June 4 the Grievant

was issued the official final offer letter confirming his selection as the Senior Area Manager GS-1101-13 in the Office of Field Operations, PR/USVI District Office. The effective start date was July 13, 2015. The Grievant took leave on June 8 and 9 to meet with real estate agents in St. Croix. The Grievant's offer for a house in St. Croix was accepted June 15, and secured with an $10,000 earnest money check. June 18, the Grievant accepted a full price offer for the purchase of his Fort Worth home with the closing date set for July 24, 2015.

The following day, June 19, the Grievant received a call from the Lead Human Resources Specialist informing him that the promotion could be postponed. The SBA's Chief of Workforce Acquisitions further revealed that an error may have been made by the Agency as to the determination of his Veterans' Preference when he was first hired in 2013. It was also inferred that due to this possible error, the Senior Area Manager position offer could be rescinded. After several calls and emails in which the Grievant sought information as to the status of his appointment and the passing of the original July 13, 2015, start date, he received notice on July 16 that the Senior Area Manager position offer was pending until further investigation. The notice stated in pertinent part:

> You received a job offer on June 4, 2015, to the position Senior Area Manager, GS-1101-13, with the Office of Field Operations, USVI District Office. I am writing to inform you that the offer to this position is being suspended pending receipt of your military record to assess the documents related to the periods of service you were called to active duty. (Agency Exhibit 7)

The Grievant was instructed to continue serving as Economic Development Specialist in the Fort Worth office. Dated July 20, the Grievant submitted to the Chief of Workforce Acquisitions a detailed reporting of his expenses incurred to date; fixed expenses expected to be incurred in July and August; and projected reoccurring monthly expenses/losses occurring for six months after mid-August. All were attributed to the pending status of his promotion. Upon consummating the sale of his home on July 24, 2015, the Grievant and his family remained in the house for three weeks under a negotiated lease agreement while he sought to secure a temporary residence in the Fort Worth area. The letter formally rescinding the job offer was issued on July 27. It stated in pertinent part:

> I am regretfully writing to inform you that we are rescinding the offer made on June 4th will for the position Senior Area Manager GS-13 with the Office of Field

> Operations, Region ll located at USVI. During your application process under delegate examining you claimed to be a 5-point Preference (TP) eligible. Your DD214 was sent to the Office of Personnel Management (OPM) for review to determine if you are entitled to Veterans' Preference. OPM made the final determination that you are not entitled to Veterans' Preference. Your military records were also sent to U.S. Army Human Resources Command to determine if the period you are were called to active duty for purposes other than training. Their office concluded that your entire active duty service from July 16, 1991 to March 20, 1992 was in a student training status. Based on both reviews, you did not meet the eligibility criteria to be referred with other preference eligible for the Senior Area Manager position. (Agency Exhibit 8)

Expressing the intent to submit a variation request to OPM, the notice also warned that if the request was not approved the Grievant could have been subject to removal from his current position. Pending the OPM decision two options were made available to the Grievant. Specifically, to: remain in his current position as Economic Development Specialist GS-1101-12 step 3 at $79,143 per annum in the Dallas/Ft. W District Office or to accept a voluntary reassignment to the USVI District Office as an Area Manager GS-1101-12 step 3 at $74,873.00 per annum. The decrease in pay was due to the USVI cost-of-living adjustment. (Agency Exhibit 8)

The Grievant chose to remain in the Dallas/Fort Worth District Office. Two days later, the Grievant was informed that the Chief of Workforce Acquisitions was seeking guidance from the Office of Personnel Management (OPM) regarding the submission of a variance request to regularize the Grievant's appointment. Dated August 18, 2015, an email from the Chief of Workforce Acquisitions to the Grievant's Union Representative proposed a timeline for the submission of the variance package to the Office of Personnel Management which anticipated the receipt of a decision during the week of September 14, 2015. The Agency submitted the variation request to regularize the Grievant's erroneous employment on October 7, 2015. During the ensuing months as the Agency worked to obtain the variance from OPM, the Grievant continued to seek information and verification from SBA and OPM personnel and assistance from the office of his congressional representative Kay Bailey Hutchinson.

December 18, 2015, the Office of Personnel Management Deputy Associate Director informed the Grievant that the SBA's variance request was approved and authorized employment

with full-service credit for leave accrual pay, qualifications and retirement. The Agency posted the Senior Area Manager for the Puerto Rico/U.S. Virgin Islands District Office vacancy announcement on January 4, 2016. Two days later the Grievant submitted his application for the position claiming no Veterans' Preference. He was subsequently informed of his selection for the position on January 11, 2016.On January 19, 2016, the Union filed a grievance on behalf of the Grievant. The Grievant received the formal offer letter on February 1, 2016, and began work in St. Croix, USVI on February 22, 2016.

The January 19, 2016, grievance alleged multiple violations of the Master Labor Agreement (MLA) specifically: Article 24 - Veterans' Appointment and Recruitment, Article 22 - Equal Opportunity, Article 44 - Unfair Labor Practice, Article 30 - Merit Promotion and 5 USC 7116 - Unfair Labor Practices. The grievance also attributed monetary financial losses to the rescinded appointment as documented by a detailed accounting of expenses totaling $29,497.44. The relief sought was for the Grievant to be reimbursed for his monetary losses beginning June 4, 2015, refunding of all moving costs and for the Grievant to be made whole in every way.

Dated April 11, 2016, the Deputy Chief Human Capital Officer denied the grievance writing:

> The Agency took extraordinary measures, working with OPM to normalize your appointment so that you could remain in your then current position. You were eventually selected as a GS-13, Senior Area Manager in the St. Croix VI office, which is a similar position at the same location as was previously offered. Lastly the original position did not cover relocation costs the Federal Government cannot pay for personal expenses that were not authorized. Therefore, your grievance is denied. (Agency Exhibit 14)

Unable to resolve the issues brought forth by the grievance the Union invoked arbitration and this matter was properly brought before the arbitrator.

RELEVANT PROVISIONS OF THE MASTER LABOR AGREEMENT (EFFECTIVE DATE JANUARY 31, 2013)

ARTICLE 22 EQUAL EMPLOYMENT OPPORTUNITY

Section 1. General**.**
The Employer recognizes its responsibilities under law, and the Parties will strive to assure that all employees have equal employment opportunities and that no one is

discriminated against because of race, marital status, color, national origin, sex, religion, age, or mental or physical disability….

ARTICLE 24 VETERANS' RECRUITMENT APPOINTMENTS

Section 1. General.
The in accordance with 5 C.F.R. 307.102(a), the Agency has the responsibility to provide the maximum of employment and job advancement opportunities to eligible Veterans of the Vietnam era and post-Vietnam era who are qualified for such employment and advancement.

Section 2. Appointment.
A Veterans' Recruitment Appointment (VRA) is made to enhance employment opportunities for Veterans' by providing an exempted non-competitive appointment. Employees with VRA appointments, who satisfactorily complete two (2) years of substantially continuous service under the VRA program, including training when required, shall be converted to career-conditional and career employment, as appropriate, pursuant to Public Law 107-288 and applicable Government-wide regulation.

ARTICLE 30 MERIT PROMOTION

Section 1. Purpose.
The purpose and intent of this Article is to ensure that Merit promotion principles applied in a consistent manner throughout the Agency, and that all employees receive fair and equitable consideration with regard to the Merit promotion program.…

Section 4. Definitions.
e. Demotion is the change of an employee to a lower-graded position.
i. Promotion is the change of an employee to a higher-graded position.

ARTICLE 44 UNFAIR LABOR PRACTICES

Section 1. The Parties hereto agree that each shall make every reasonable effort to prevent the occurrence of any Unfair Labor Practice under 5 U.S.C. 7116 and to attempt to resolve any Unfair Labor Practice, if possible, prior to filing a charge with the Federal Labor Relations Authority (FLRA). Nothing herein shall in any way limit the rights each party has in accordance with 5 U.S.C 7118, and any relevant regulations issued by the FLRA.

RELEVANT FEDERAL CODE

5 USC § 5721. Definitions

For the purpose of this subchapter-

(6) "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the territories and possessions of the United States, and the Areas and installations in the Republic of Panama that are made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements (as described in section 3(a) of the Panama Canal Act of 1979) …

5 USC § 5724a. Relocation expenses of employees transferred or reemployed

(a) Under regulations prescribed under section 5738, an Agency shall pay to or on behalf of an employee who transfers in the interest of the Government, a per diem allowance or the actual subsistence expenses, or a combination thereof, of the immediate family of the employee for en route travel of the immediate family between the employee's old and new official stations.

(b)(1) Under regulations prescribed under section 5738, an Agency may pay to or on behalf of an employee who transfers in the interest of the Government between official stations located within the United States-

(A) the expenses of transportation of the employee and the employee's spouse for travel to seek permanent residence quarters at a new official station; and

(B) either-

(i) a per diem allowance or the actual subsistence expenses (or a combination of both); or

(ii) an amount for subsistence expenses, that may not exceed a maximum amount determined by the Administrator of General Services….

(d)(1) Under regulations prescribed under section 5738, an Agency shall pay to or on behalf of an employee who transfers in the interest of the Government, expenses of the sale of the residence (or the settlement of an unexpired lease) of the employee at the old official station and purchase of a residence at the new official station that are required to be paid by the employee, when the old and new official stations are located within the United States.

RELEVANT CODE OF FEDERAL REGULATIONS

Title 41 - Public Contracts and Property Management

§ 302-11.200 What residence transaction expenses will my Agency pay?

Provided that they are customarily paid by the seller of a residence at the old official station or by the purchaser of a residence at the new official station, your Agency will pay the following expenses:

(a) Your broker's fee or real estate commission that you pay in the sale of your residence at the last official station, not to exceed the rates that are generally charged in the locality of your old official station;

(b) The customary cost for an appraisal;

(c) The costs of newspaper, bulletin Board, multiple-listing services, and other advertising for sale of the residence at your old official station that is not included in the broker's fee or the real estate agent's commission;

(d) The cost of a title insurance policy, costs of preparing conveyances, other instruments, and contracts and related notary fees and recording fees; cost of making surveys, preparing drawings or plats when required for legal or financing purposes; and similar expenses incurred for selling your residence to the extent such costs:

(1) Have not been included in other residence transaction fees (i.e., brokers' fees or real estate agent fees);

(2) Do not exceed the charges, for such expenses, that are normally charged in the locality of your residence;

(3) Are usually furnished by the seller;

(e) The costs of searching title, preparing abstracts, and the legal fees for a title opinion to the extent such costs:

(1) Have not been included in other related transaction costs (i.e., broker's fees or real estate Agency fees); and

(2) Do not exceed the charges, for such expenses, that are customarily charged in the locality of your residence

(f) The following “other” miscellaneous expenses in connection with the sale and/or purchase of your residence, provided they are normally paid by the seller or the purchaser in the locality of the residence, to the extent that they do not exceed specifically stated limitations, or if not specifically stated, the amounts customarily paid in the locality of the residence:

(1) FHA or VA fees for the loan application;

(2) Loan origination fees and similar charges such as loan assumption fees, loan transfer fees or other similar charges not to exceed 1 percent of the loan amount without itemization of the lender's administrative charges (unless requirements in

§ 302-11.201 are met), if the charges are assessed in lieu of a loan origination fee and reflects charges for services similar to those covered by a loan origination fee;

(3) Cost of preparing credit reports;

(4) Mortgage and transfer taxes;

(5) State revenue stamps;

(6) Other fees and charges similar in nature to those listed in paragraphs (f)(1) through (f)(5) of this section, unless specifically prohibited in § 302-11.202;

(7) Charge for prepayment of a mortgage or other security instrument in connection with the sale of the residence at the old official station to the extent the terms in the mortgage or other security instrument provide for this charge. This prepayment penalty is also reimbursable when the mortgage or other security instrument does not specifically provide for prepayment, provided this penalty is customarily charged by the lender, but in that case the reimbursement may not exceed 3 months' interest on the loan balance;

(8) Mortgage title insurance policy, paid by you, on a residence you purchased for the protection of, and required by, the lender;

(9) Owner's title insurance policy, provided it is a prerequisite to financing or the transfer of the property; or if the cost of the owner's title insurance policy is inseparable from the cost of other insurance which is a prerequisite;

(10) Expenses in connection with construction of a residence, which are comparable to expenses that are reimbursable in connection with the purchase of an existing residence;

(11) Expenses in connection with environmental testing and property inspection fees when required by Federal, State, or local law; or by the lender as a precondition to sale or purchase; and

(12) Other expenses of sale and purchase made for required services that are customarily paid by the seller of a residence at the old official station or if customarily paid by the purchaser of a residence at the new official station.

§ 302-11.202 What residence transaction expenses will my Agency not pay?

Your Agency will not pay:

(a) Any fees that have been inflated or are higher than normally imposed for similar services in the locality;

(b) Broker fees or commissions paid in connection with the purchase of a home at the new official station;

(c) Owner's title insurance policy, “record title” insurance policy, mortgage insurance or insurance against loss or damage of property and optional insurance paid for by you in connection with the purchase of a residence for your protection;

(d) Interest on loans, points, and mortgage discounts;

(e) Property taxes;

(f) Operating or maintenance costs;

(g) Any fee, cost, charge, or expense determined to be part of the finance charge under the Truth in Lending Act, Title I, Pub. L. 90-321, as amended, and Regulation

Z issued by the Board of Governors of the Federal Reserve System (12 CFR part 226), unless specifically authorized in § 302-11.200;

(h) Expenses that result from construction of a residence, except as provided in § 302-11.200(e)(10); and

(i) Losses, see § 302-11.304.

POSITION OF THE GRIEVANT AND UNION

On behalf of the Grievant, the Union advances the following arguments and contentions to assert that the Agency violated the Master Labor Agreement (MLA) and other law when it rescinded the Grievant's June 4, 2015, promotion. The Agency manifested clear intent to transfer the Grievant and the Grievant's promotion had taken effect since he was given proper notice of the appointment. The Agency's action to rescind the appointment therefore was a demotion. Although the Agency admittedly made the mistake regarding the Grievant's Veterans' Preference status in 2013, the Grievant suffered the resultant financial burden.

The Agency's improper approach to regularize the appointment caused hardship for the Grievant and his family. Failure to act expediently and errors by SBA Human Resources staff caused the Grievant to incur significant expense and caused emotional stress. The promotion was a proper appointment only requiring the variance for service credit for his de facto employment beginning in 2013. As a Merit Promotion, the Senior Area Manager position gave no entitlement to Veterans' Preference therefore, the Grievant was properly appointed to the position.

The Grievant is eligible for and entitled to real estate transaction reimbursement under 5 USC § 572 a(d)(1) as an employee who transfers to a position in the interest of the government. Precedence requires that when a transfer is cancelled for reasons beyond an employee's control, the Agency is to reimburse the costs that would have been incurred had the transfer been completed. The improper demotion of the Grievant has a direct causal connection to his loss of pay during the time he would have been promoted. The relief requested includes reimbursement of real estate transactions, the Union's attorney fees and payment of wages or salary that would have been earned from the July 13, 2015, proposed promotion date to the date his promotion became effective. The Grievant and the Union request that the arbitrator find that the Agency violated the Master Labor

Agreement when it improperly demoted the Grievant without just and sufficient cause, as to promote the efficiency of the Federal Service and that the grievance be upheld.

POSITION OF THE AGENCY

The Agency advances the following arguments and contentions to establish that the grievance should be denied. Once the Grievant was determined to be not eligible for the 5-point Veterans' Preference the Agency properly suspended and subsequently rescinded his promotion. The Agency took extensive steps to first regularize the Grievant's erroneous 2013 appointment by obtaining a variance for him to retain his job with service credit for time-in-grade and career tenure. The extensive efforts put forth by the Agency resulted in the Grievant reapplying for and being offered his current Senior Area Manager position in the same St. Croix location he originally desired.

The Agency did not violate the Master Labor Agreement (MLA) as the Articles cited in the grievance are either irrelevant to the presenting issue or unsubstantiated. The Grievant does not allege protected class discrimination or retaliation (Article 22). Veterans' Recruitment Appointments (Article 24) is not applicable to this issue. No specific Unfair Labor Practice (ULP) as committed by the Agency is claimed (Article 44). Since the Grievant applied for the position through Delegated Examining Procedures, Article 30 pertaining to Merit Promotion Procedures is not applicable here.

The Grievant's advancement from a GS-12 to a GS-13 employee denotes that he was being promoted, not transferred. Therefore, the Agency did not violate 5 USC § 5724a by refusing to reimburse the Grievant's relocation expenses. As the Grievant was aware, the position for which he applied did not authorize relocation. The Grievant has failed to meet his burden of proof to establish that the Agency violated the Master Labor Agreement or any other law when it rescinded the Senior Area Manager promotion and therefore, the grievance should be denied in its entirety.

DISCUSSION AND OPINION

The Grievant served in the U.S. Army reserves from July 16, 1991, to March 20, 1992, having been honorably released from active duty training. The July 20, 2015, memorandum from the Army Human Resources Command, Office of the Adjutant General determined that the Grievant's entire active duty was in student training status. (Agency Exhibit 12) Active duty training does not meet the criteria for a Preference Eligible Veteran. Once it was discovered that the Grievant was not entitled to the benefit of the 5-point Veterans' Preference the Agency properly rescinded his Senior Area Manager promotion in order to preserve the integrity of the process and protect the rights of other candidates who were also listed on the certificate and being considered for the position.

The Agency's Human Resources (HR) staff expended considerable efforts to secure the continued employment of the Grievant as they applied for and successfully obtained a variance and credit service through the Office of Personnel Management. In the interim he incurred expenses for which he believes should be reimbursed although he was aware that the position did not offer relocation benefits and he was offered an opportunity to mitigate many of the expenditures. Testimony elucidated the Agency's policies regarding relocation as rarely being offered and due to the expense borne by the Agency, it is limited to extremely hard to fill positions. (Tr. at 248) Accordingly, relocation reimbursement must be offered up front during the posting of the job announcement. The Agency explained that as a desired location, the St. Croix position receives a high-volume of applications therefore the Agency had no reason to and did not offer relocation. (Tr. at 178, 251) (Agency Exhibit 4)

Nonetheless, the Grievant attributes his financial hardship to the Human Resources staff mishandling his promotion and based upon the delay, he seeks reimbursement for medical and real estate related expenses. Assuming *arguendo* the Grievant was not ultimately promoted, reimbursement of certain real estate transactions could have merit. However, and fortunately, this was not the case; albeit delayed the Grievant has relocated to the U.S. Virgin Islands duty station.

Transfer v. Promotion

Much of the Union's argument regarding the reimbursement of the Grievant's expenses is based upon the inaccurate perception that the Grievant was being transferred; perhaps because transfers, "in the interest of the government" can be eligible for relocation benefits. However, the Grievant was advancing in pay grade from GS-12 to GS-13. Furthermore, the June 4, 2015, offer letter defines the personnel action, "The effective date of your promotion will be July 13, 2015." (Agency Exhibit 6) The Union relies on *Johann Schlager 113 LRP 23585 Civilian Board of Contract Appeals (CBCA) May 29, 2013* (Schlager), to establish that expenses can be reimbursed if the Agency manifested a clear and administrative intent to transfer the employee. As in Schlager, the Agency's contact with the Grievant did provide a clear intent to promote him to Senior Area Manager until the offer was rescinded. However, Mr. Schlager was being transferred and incurred expenses prior to a pending official Travel Order that authorized his moving expenses. In the case before us, there was no promise of relocation and consequently there should be no expectation of expense reimbursement.

The Union also cites *Zaki M. Saad, 25 FPBR 51, 109 LRP 4587, Civilian Board of Contract Appeals, January 22, 2009.* (Saad) in which the Civilian Board of Contract Appeals (CBCA) confirms the general rule on canceled transfers as established by their predecessor, the General Services Board of Contract Appeals (GSBCA)

> When an Agency cancels a transfer due to circumstances beyond an employee's control, it should reimburse the employee for expenses. It would have reimbursed had the transfer been completed, provided the employee incurred expenses before the Agency cancelled the transfer, in good faith, and in anticipation of the transfer.[2]

However, the rule is not applicable here since the Grievant was not being transferred, he was being promoted; and none of his expenses would have been reimbursed as relocation was not authorized. Moreover, in denying the claimant's appeal, the CBCA concluded, "Before incurring the miscellaneous expenses, an employee is expected to exercise the same care as a prudent person relocating at personal expense."

[2] Zaki M. Saad, 25 FPBR 51, 109 LRP 4587, Civilian Board of Contract Appeals, January 22, 2009.

Expenses Incurred

Pending the OPM variation request decision two options were made available to the Grievant, specifically, to remain in his position as Economic Development Specialist GS-1101-12 step 3 earning $79,143 per annum in the Dallas/Fort Worth District office or accept a voluntary reassignment to the USVI District Office as an Area Manager at the same pay grade earning $74,873.00 per annum, a lesser amount due to the cost-of-living adjustment. (Agency Exhibit 8) While the uncertainty Grievant and his family experienced certainly took an emotional toll, many of the expenses incurred were expenditures he would have encountered later when filling the vacancy in February 2016. Alternatively, other expenses could have been avoided had he opted to go to the St. Croix office on a temporary volunteer basis while his variance was being processed. Expenses that were considered to be real estate related and therefore based on the Grievant's decision to remain in the Fort Worth office while awaiting the variance include: storage (Union Exhibit 30); temporary housing rental expenses (Union Exhibit 31); moving expenses (Union Exhibit 35); and St. Croix survey and home inspection expenses (Union Exhibit 27)

One day after signing the Purchase and Sales Agreement for his Fort Worth property, the Grievant was informed that the promotion was in jeopardy. One day into the transaction and given the uncertain circumstances the Grievant could have attempted to negotiate a breach of contract to remain in his home until selling at a later date. The Default clause of the Grievant's Purchase and Sales Agreement prescribes: "If Seller fails to comply with this contract, Seller will be in default and Buyer may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money thereby releasing both parties from this contract." (Union Exhibit 28). Notably the Grievant successfully mitigated the financial loss of his prospective house purchase in St. Croix, with the negotiated return of his $10,000 earnest money.

Expenses related to the Fort Worth home, specifically preparing it for sale ($1000) and broker's fees ($24,518.57) would have been incurred before the St. Croix move, albeit on a different timeline. The Grievant additionally requests reimbursement for his temporary housing ($17,115.23). However, he would have incurred a housing expense be it for his Fort Worth home or a mortgage or rent in St. Croix. The Grievant could have moved directly to St. Croix had he

accepted the Agency's offer of a temporary volunteer Senior Area Manager appointment. Albeit a lateral pay grade move, the temporary monetary sacrifice may have compensated for the inconvenience and stress that the Fort Worth temporary housing situation seemingly produced. Certainly it was a gamble and as such the Grievant should not and cannot hold the Agency responsible for the consequences of his decisions.

The Grievant testified that he would not have taken leave and paid for the trip to interview in person had he known that he was not eligible for the position ($1386.73). Nonetheless, he did eventually secure the position, therefore the trip was a successful investment. It would also seem that the interview contributed to the Agency's later dedicated efforts to reinstate his promotion. Ultimately, unless the Agency specified reimbursement of in-person interview costs, the Grievant should have no expectation of these costs being refunded.

The Grievant additionally claims medical costs for emergency room visits on July 4 ($100) and July 15, 2015, ($653.52) listing the line items as "Health expenses related to call on 7/2 threatening demotion and possible termination." (Union Exhibits 24, 29) These expenses cannot be considered reimbursable as they are highly speculative. The Grievant testified that he was on leave from the end of June to sometime in August. Although unsure about exactly what kind of leave. it was, medical, sick, or paternity leave, he established that he took leave because of medical complications. his wife experienced during the recent birth of their child. (Tr. at 109-110) Therefore, it is reasonable to conclude that the health challenges faced by the family would at the very least have been a contributing factor to the emergency room visits. In the case of the July 15 emergency room treatment for the Grievant's kidney stone, it's formation is just as likely attributed to diet and hydration over an extended period of time.

By far the most questionable expense is that in the amount of $9450 to reimburse the Grievant's mother and father in law for a trip they took to St. Croix to search for a house. In his emailed request for a list of their expenses, the Grievant advised his in-laws, "I am hoping they (SBA) come to their senses. But just in case this continues in the wrong direction. I intend to provide them with a full listing of expenses incurred due to the offer. I will be requesting full reimbursement if they do not honor the original job offer." (Union Exhibit 26). Even if the Grievant's expenses had been covered under CFR Title 41§ 302 as the Union proposes, these items would certainly meet

the criteria for not reimbursable expenses as CFR Title 41§ 302-11.202 (a) specifies "Any fees that have been inflated or are higher than normally imposed for similar services in the locality;" (Union Brief at 8-9). Moreover, it is doubtful that had relocation been authorized, the third-party house hunting trip would stand as a reasonable and necessary expense.

Merit Promotion v. Competitive Examination Procedures

Citing the Agency's violation of MLA Article 30, Union contends that the Grievant's promotion to Senior Area Manager was proper and only required a variance for service credit for his de facto employment. Factually, the Agency can fill a position concurrently under internal Merit Promotion and external Competitive Examination procedures. The difference between the procedures is delineated in the nonprecendential case of *Bradford v. Department of Veteran Affairs, 111 LRP 59303 (MSPB 2011).* Here the Merit Systems Protection Board (Board) establishes:

> Under the Merit promotion process, the Agency has the right to select or not select from "other appropriate sources."… Veterans' points preferences do not apply in the Merit motion process… The other selection process is the open competitive examination process, which is generally used to fill vacant positions within the competitive service and is based on a fair test of the "relative capacity and fitness of the persons examined for the position to be filled."… An integral part of the open competitive examination process is the assignment of numerous numerical scores, followed by the rating and ranking of candidates according to the scores… Preference-eligible Veterans are entitled to 5 additional points, and disabled Veterans as well as certain relatives of disabled Veterans are entitled to 10 additional points which are added to their passing examination scores.[3]

The Union additionally relies on *Joseph v. the Federal Trade Commission, 103 MSRP 684 (MSPB 2006), aff'd 505F. 3d 1380 (Fed. Cir. 2007)* regarding the discretion that Agency has, to fill the vacant position. The Board establishes, "OPM expressly recognizes the possibility that an Agency may solicit applications from the general public and "Merit Promotion applicants" "simultaneously," and that this results in 'both external and internal competitions'." Moreover, and in support of the Union's argument, the Board concludes that an individual is not entitled to Veterans' Preference under Merit Promotion procedures.

[3] Bradford v. Department of Veteran Affairs, 111 LRP 59303 (MSPB 2011, nonprecendential).

However, in the case before us, there is no evidence or testimony provided to indicate that there was a simultaneous competition; the evidence is to the contrary. The vacancy announcement specified "Who may apply: U.S. citizens and status candidates." (Agency Exhibit 4). The Agency considered the Grievant's erroneous 5-Point Veterans' Preference, as well as the status of other applicants, under the External Competitive Examination process. (Agency Exhibit 5) the Chief of Workforce Acquisitions addressed the scenario, testifying that the Grievant, "… had applied under Delegated Examining as opposed to a Merit Promotion. And based on that, there were other Preference eligibles that were listed on the certificate. So we have to remove him from consideration in order-so that we were not violating Veterans' entitlements to the other candidates that were on a certificate." (Tr. at 183).

Notably, the Agency conducted an effort to reposition the Grievant in the Senior Area Manager position in January 2016 listing the vacancy as a Merit Promotion. The Grievant who now had a regularized appointment was given the opportunity to apply and be considered under Merit Promotion procedures unhampered by the lack of Veterans' Preference points. The Deputy Chief of Human Capital summarized the Agency's commitment stating, "…we jumped through flaming hoops really do what's right in terms of what's right by him, what's right by the Agency, and what's right in terms of the other Preference Eligible Veterans." (Tr. at 252) The Union alleges multiple other violations of the Master Labor Agreement, specifically Article 22 - Equal Employment Opportunity; Article 24 - Veterans' Recruitment Appointments; and Article - 44 Unfair Labor Practices. However, no testimony or evidence was presented to support the allegations.

Back Pay Differential

The Agency concedes that it erroneously accepted the Grievant's claimed 5-point Veterans' Preference when considering him for the Economic Development Specialist position in 2013, It then proceeded to remedy the mistake by normalizing his job. However, the Agency had several preemptive opportunities by which to avoid the events arising from the 2015 promotion. According to his testimony when he applied for the Senior Area Manager position, the Grievant was instructed, "If you believe you're qualified it's our responsibility to determine that. Submit the documents." (Tr. at 160). He submitted his DD 214, "Certificate of Release or Discharge from Active Duty", which clearly states "Release from Active Duty Training." (Tr. at 60) (Union Exhibit 4) Responding

to the Grievant's congressional representative's inquiry the Chief Human Capital Officer/Deputy Chief Operating Officer revealed that the Agency was aware of the Grievant's status as she explained rescinding the promotion:

> …it was later discovered that Mr. Huddleston had recently applied for another SBA position. The Agency determined that he was not entitled to claim a 5-point veteran's preference eligibility for that position. Thereafter, the Agency discovered that it had improperly adjudicated Mr. Huddleston as having 5-point Preference in his initial SBA appointment (Union Exhibit 17)

It logically follows that if the Grievant had been informed of his ineligibility for the Veterans' Preference after his previous application, he would not have claimed it on his Senior Area Manager application.

More significantly, the Agency prematurely issued the June 6 2015, offer letter. The Chief of Workforce Acquisitions, provided testimony as to the impropriety the offer letter.

> Q. And based on your experience with hiring and recruitment in the federal government, was it appropriate to send this letter to Mr. Huddleston on June 4th, 2015?
>
> A. No, it was not.
>
> Q. And why not?
>
> A. In reviewing the case file, once the certificate is returned to HR, a final quality review and audit of the certificate was not performed. That has to be done first in making sure that we've complied with all of the rules and regulations associated with the selection.… We have to wait until we get a green light from the suitability office that the person has been deemed suitable before we can make a job offer. Once that occurs, then, if the candidate is accepting of the job offer, then this letter goes out. (Tr. at 180-181)

The issuance of the offer letter before the suitability process was complete, thereby triggered the series of events that led to the Grievant's delayed promotion and consequently loss of income.

In Conclusion

Seeking assistance from the Office of Personnel Management in mid-December 2015, the Grievant wrote, "The hiring official for my GS-13 position has been gracious enough to hold off on hiring a new person for my position until this matter is resolved. However, we never thought it

would take this long." (Union Exhibit 18). This single expression of both gratitude and frustration voiced by the Grievant summarizes much of what this case is about. The initial error regarding the Grievant's Veterans' Preference status set into motion the subsequent series of events that led to the Grievant's promotion, rescinding of the promotion and finally him serving as a Senior Area Manager in the U.S. Virgin Islands.

Albeit a lengthy process, the Agency was resolute in its efforts to help the Grievant re-claim his promotion. Accordingly, the Grievant should not expect the Agency to reimburse him for financial losses that for the most part resulted from decisions he made during an uncertain and transitional time. However, due primarily to the premature issuance of the June 4, 2015, offer letter, the Grievant is deserving of the pay differential for what he would have earned had his promotion began at the original start date, and the salary he actually received. (Union Exhibit 23) The calculation is to be based on the DFW locality where the Grievant lived and worked during the time.

AWARD

Based on the foregoing evidence, findings, reasoning, conclusions, rulings and determinations, the Arbitrator rules that the appeal of the Grievant is SUSTAINED in part and DENIED in part. The Agency is to pay the Grievant back pay in the calculated amount of: the difference between his promotion salary: GS-13 step 1 DFW locality, and his previous salary: GS-12 step 3 DFW locality salary for the period from July 13, 2015 (the date his promotion was to go into effect) through February 21, 2016, (the last day before his promotion was effective). Any other relief requested is hereby DENIED.

JURISDICTION IS RETAINED

The Arbitrator retains jurisdiction of this matter for sixty (60) days after the issuance of this decision in order to clarify or assist in the implementation of the Award, if either party requests in

writing prior to that date to do so. Any such request if not made jointly should be forwarded to the other party so that an opportunity is afforded to all parties for the full expression of their positions and arguments on the questions or issues raised.

Issued at Pittsburgh Pennsylvania, the 24th day of April 2017

Dineo Coleman Gary

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Dineo Coleman Gary

Arbitrator