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

January 31, 2023

MEMORANDUM FOR: Marcus R. Patton, Agency Co-Representative, 6AC
Anju V. Mathew, Agency Co-Representative, 6AC

FROM: Stephan Caldwell, Legal Rights Attorney & Union Representative
AFGE National Council of HUD Locals No. 222

SUBJECT: 5 U.S.C. § 7114(b)(4) Request for Information #4 for Unfair Labor Practices (ULPs) and Collective Bargaining Agreement (CBA) Violations Grievance of the Parties and Arbitration Concerning Preemptive Exclusion for Remote Work Eligibility

The American Federation of Government Employees (AFGE) National Council of HUD Locals No. 222 (referred to herein as "AFGE Council 222," "the Union," or "the Council") is submitting this information request to the U.S. Department of Housing and Urban Development (referred to herein as "HUD," "the Department," "Management," or "the Agency") pursuant to 5 U.S.C. § 7114(b)(4).

On June 8, 2022, AFGE Council 222 filed an Unfair Labor Practices (ULPs) and collective bargaining agreement (CBA) violations Grievance of the Parties (GOP) concerning the Department's preemptive exclusions of broad groups of AFGE bargaining unit employees who constitute the vast majority of the bargaining unit as ineligible for remote work. In the June 8, 2022, GOP, the Union argued that Management did not give appropriate consideration to the employees' duties, assignments, and functions and did not address how those determinations would specifically affect the Department's business needs in violation and repudiation of multiple provisions of National Supplement 33 related to the Department's implementation of Flexiplace Policy, especially the provisions regarding eligibility criteria and the basis of denial for remote work. The Union also alleged in the GOP that the Department violated the Federal Service Labor-Management Relations Statute (the Statute), National Supplement 34, other HUD-AFGE collective bargaining agreement (Agreement) provisions, the Telework Enhancement Act of 2010, and reserved the right to grieve and raise any other violation, misinterpretation, or misapplication of any applicable provision of the HUD-AFGE collective bargaining agreement, law, rule or regulation on the subject matter being grieved. On July 27, 2022, AFGE Council 222 invoked arbitration due to the Agency's denial of the June 8, 2022, Grievance of Parties on remote work.

Standards for Provision of Information Requested under 5 U.S.C. § 7114(b)(4)

In accordance with U.S.C. § 7114(b)(4)(B), the Agency is required to furnish to the Union data that is reasonably available and necessary for a full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. The duty to provide information to a union applies not only to information needed to negotiate an agreement, but also to data relevant to its administration and the full range of a union's representational responsibilities under the Statute including bargaining, contract administration, processing a grievance, representing an employee in proposed discipline, and determining whether to file a grievance or ULP. *See Department of Health and Human Services (HHS), Social Security Administration (SSA) and AFGE Local 3302*, 36 FLRA 943 (1990); *Federal Aviation Administration (FAA), National Air Traffic Controllers Association (NATC) et al.*, 55 FLRA 254, 259-60 (1999); and *Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) and National Weather Service Employees Organization, MEBA*, 30 FLRA 127, 141 (1987).

The standard adopted by the U.S. Federal Labor Relations Authority (FLRA) requires a union requesting information under 5 U.S.C. § 7114(b)(4) to establish a particularized need for the information by articulating with specificity why it needs the requested information including the uses to which the union will put the information, and the connection between those uses and the union's representational responsibilities under the Statute. *See Internal Revenue Service, Washington, DC, and Internal Revenue Service, Kansas City Service Center, Kansas City, MO and NTEU and NTEU, Chapter 66*, 50 FLRA 661 (1995) (*IRS); VA and AFGE Local 3314*, 28 FLRA 260, 265 (1987); and *Dept. of Navy, Portsmouth Naval Shipyard and Portsmouth FEMTC*, 4 FLRA 619, 624 (1980). In *IRS* at Note 13, the FLRA stated regarding a union's particularized need:

> However, **a request need not be so specific as, for example, to require a union to reveal its strategies** or compromise the identity of potential grievants who wish anonymity. *See, for example, NLRB v. FLRA*, 952 F.2d at 530 ("Necessarily, the bargainers are not obliged to reveal their strategies[.]"); *American Federation of Government Employees, AFL-CIO v. FLRA*, 811 F.2d 769, 774 (2d Cir. 1987) (court acknowledged that protecting the identity of potential grievants is a justifiable union consideration). Moreover, **the degree of specificity required of a union must take into account the fact that, in many cases,** including the one now before us, **a union will not be aware of the contents of a requested document**. [emphasis added]

For a Section 7114(b)(4) information request, a union is not required in its particularized need to describe the exact nature of any alleged misapplication or violation of policy, procedure, law or regulation by the agency. *See Health Care Financing Administration and AFGE Local 1923*, 56 FLRA 156 (March 17, 2000).

"It is well established that under section 7114(b)(4) of the Statute the exclusive representative is entitled to information that is necessary to enable it to carry out effectively its representational responsibilities, including information which will assist it in the investigation, evaluation and

processing of a grievance." [emphasis added] *National Labor Relations Board and National Labor Relations Board Union Local 6,* 38 FLRA 506 (November 28, 1990). An exclusive representative is entitled to receive information that meets the criteria of 5 U.S.C. § 7114(b)(4) in preparation for an arbitration hearing. *See Federal Aviation Administration, New England Region, Burlington, MA and National Association of Air Traffic Control Specialists,* 38 FLRA 1623 (1991); and *Department of Transportation, Federal Aviation Administration and National Air Traffic Controllers Association Local 171,* 57 FLRA 604 (2001).

In accordance with FLRA case law, please be advised that an information request by a labor organization under 5 U.S.C. § 7114(b)(4) to prepare for an arbitration hearing meets the routine-use exemption at 5 U.S.C. § 552a(b)(3) for judicial and administrative proceedings for the release of documents covered by the Privacy Act. *See Department of the Air Force and NAGE, Local R7-*23, 51 FLRA 675 (December 22, 1995); *Bureau of Indian Affairs (BIA) and NFFE Council of BIA Locals*, 52 FLRA 629 (November 26, 1996); and *General Services Administration and AFGE, Local 2275,* FLRA ALJ SF-CA-00804 (November 18, 2004). The Union needs the names of any individuals contained in the documents requested and disclosed in order to be able to identify potential witnesses for direct or cross examination and rebuttal at the upcoming arbitration hearing(s). Therefore, a less intrusive means is not available. However, the Agency may sanitize identifying information contained in the documentation other than names such as home street address, home phone number, and Social Security number.

Please be further advised that pursuant to U.S. Office of Personnel Management (OPM) regulations at 5 CFR § 293.311, a federal employee's name, title, grade, occupational series, annual salary rate, awards, bonuses, position description, job elements and performance standards, and duty station are publicly available information not subject to the Privacy Act.

Under 5 U.S.C. § 7114(b)(4), HUD is required to furnish to the Union "data which is normally maintained by the Agency in the regular course of business" and "reasonably available." In *Department of Justice, U.S. Immigration and Naturalization Service (INS), U.S. Border Patrol El Paso, Texas and AFGE National Border Patrol Council*, 40 FLRA 792, 804-05 (1991), the FLRA found that information was reasonably available even when the agency had to give the union 10,000 documents. The FLRA has ruled that an agency may be required to produce information that does not exist in the precise format requested, but which can be extracted from records within an agency's control. *See Department of Air Force, Sacramento Air Logistics Center, and AFGE, Local 1857,* 37 FLRA 987 (October 15, 1990).

<u>Information Requested</u>

1. The position descriptions of all bargaining-unit positions approved only for routine telework.

2. The position descriptions of all bargaining-unit positions approved for remote work.

3. A list of all of the position titles as well as the position descriptions of all non-bargaining unit positions approved for remote work. [Information about non-bargaining-unit employees is releasable under 5 U.S.C. § 7114(b)(4) for the union to carry out its representational

responsibilities. *See U.S. Dept. of Air Force and AFGE Local 1857*, 37 FLRA 987 (October 15, 1990); and *Department of Labor and AFGE, National Council of Field Labor Locals*, 39 FLRA 531 (February 13, 1991).]

4. All documentation related to HUD management's analysis of the criteria in Section 14 (Eligibility) and any other Sections of National Supplement 33 of the HUD-AFGE collective bargaining agreement on remote work (Flexiplace Policy) for all bargaining-unit positions approved for remote work.

5. All documentation related to the analysis and criteria utilized by HUD management to approve any and all non-bargaining-unit positions for remote work. [The FLRA has also ruled that a supervisor's memory-jogger notes are releasable to a union for an information request under 5 U.S.C. § 7114(b)(4). *See Department of Health and Human Services, Social Security Administration and AFGE Local 1164*, 37 FLRA 1277 (October 29, 1990).]

6. All documentation related to management's analysis of the criteria in Section 14 (Eligibility), Section 34 (Basis for Denial, Modification, or Termination of Remote Work Arrangement), and any other Sections of National Supplement 33 of the HUD-AFGE collective bargaining agreement on remote work (Flexiplace Policy) for all bargaining-unit positions determined to be ineligible for remote work (i.e., only eligible for routine telework).

Particularized Need

AFGE Council 222 needs the above-requested information to prepare for the upcoming arbitration hearing(s) schedule for April 10-11, 2023, concerning the Union's June 8, 2022, ULPs and CBA violations Grievance of the Parties on the preemptive exclusions for remote work eligibility for the vast majority of the AFGE bargaining unit. The Union needs Information Requested items #1, #2, #4, and #6 above to compare the position descriptions and other eligibility documentation of the positions approved for remote work with those of the positions approved only for routine telework that were denied full-time remote work supposedly on the basis of in-person collaboration, communication, and other requirements. This comparison will allow the Union to examine the evidence of the Department's compliance with the eligibility criteria and basis for denial of remote work in accordance with the relevant provisions of National Supplement 33 for the Department's implementation of the Flexiplace Policy (remote work) such as Sections 14 (Eligibility), Section 34 (Basis for Denial, Modification, or Termination of Remote Work Arrangement), and any other Section(s) in National Supplement 33. The Union also needs Information Requested items #3 and #5 to examine the positions, position descriptions, and criteria utilized to determine that non-bargaining-unit positions are eligible for remote work compared to the documentation and reasons given for denial of remote work for bargaining-unit positions on the basis of in-person collaboration, communications, and other requirements. This will allow the Council to determine and present evidence of possible lack of fair and equitable treatment among bargaining-unit employees in violation of Article 6, Section 6.01 of the HUD-AFGE collective bargaining agreement as well as evidence of the Agency's arbitrary and capricious actions and decisions based on managerial preference in violation of Section 14 and Section 34 of National Supplement 33. In accordance with FLRA case law, information about non-bargaining-unit employees is releasable under 5 U.S.C. §

7114(b)(4) for a union to carry out its representational responsibilities. *See U.S. Dept. of Air Force and AFGE Local 1857*, 37 FLRA 987 (October 15, 1990); and *Department of Labor and AFGE, National Council of Field Labor Locals*, 39 FLRA 531 (February 13, 1991). For example, under FLRA case law, supervisors' disciplinary records are subject to release under 5 U.S.C. § 7114(b)(4) to prepare for an arbitration hearing in both sanitized and unsanitized form to compare the discipline imposed on management officials to bargaining-unit employees to determine if bargaining-unit employees were treated disparately even though management officials are held to a higher standard of conduct; the release of information on management officials' disciplinary records in unsanitized form also serves the public interest regarding the transparency of management officials' conduct. *See Federal Aviation Administration, New England Region, Burlington, MA and National Association of Air Traffic Control Specialists*, 38 FLRA 1623 (1991); *Department of the Air Force, Scott Air Force Base, IL and National Association of Government Employees (NAGE) Local R7-23, SEIU, AFL-CIO*, 51 FLRA 675 (1995); and *Department of Veterans Affairs, Veterans Medical Center, Decatur, Georgia, and National Federation of Federal Employees (NFFE), Local 2102*, 71 FLRA 428 (2019). Please do not sanitize any names contained in the documentation requested above as it is necessary to disclose the names in Information Requested items #4 through #6 for the Council to be able to identify possible management witnesses to testify at the arbitration hearing(s) as hostile, direct examination witnesses or for rebuttal. In accordance with FLRA case law, please be advised that an information request by a labor organization under 5 U.S.C. § 7114(b)(4) to prepare for an arbitration hearing meets the routine-use exemption at 5 U.S.C. § 552a(b)(3) for judicial and administrative proceedings for the release of documents covered by the Privacy Act. *See Department of the Air Force and NAGE, Local R7-*23, 51 FLRA 675 (December 22, 1995); *Bureau of Indian Affairs (BIA) and NFFE Council of BIA Locals*, 52 FLRA 629 (November 26, 1996); and *General Services Administration and AFGE, Local 2275*, FLRA ALJ SF-CA-00804 (November 18, 2004).

With respect to Information Requested items #1 through #3 and any possible allegation of insufficient requisite specificity, the FLRA has found that a union establishes a particularized need where the union states that it needs information: (1) to assess whether to file a grievance; (2) in connection with a pending grievance; (3) to determine how to support and pursue a grievance; or (4) to assess whether to arbitrate or settle a pending grievance; moreover, a union's citation to specific provisions of the collective bargaining agreement notify the agency that the information is necessary to enforce and administer the agreement. *See U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Ray Brook, Ray Brook, NY and American Federation of Government Employees (AFGE), Local 3882*, 68 FLRA 492, 495-496 (2015); and *Department of Veterans Affairs, Veterans Medical Center, Decatur, Georgia, and National Federation of Federal Employees (NFFE), Local 2102*, 71 FLRA 428 (2019) (*NFFE Local 2102*). In the *NFFE Local 2012* case [71 FLRA 428, 430 (2019)], the FLRA specifically ruled:

> We reject the argument that a union has failed to articulate its need with requisite specificity, where, as here, the information request referenced a specific agency action and specified that the union needed the information to assess: (1) whether the agency violated established policies, and (2) whether to file a grievance, **even though the union did not explain exactly how the information would enable it**

> **to determine whether to file a grievance.** The Authority has emphasized that such information is necessary because arbitration can function properly only when the grievance procedures leading to it are able to sift out unmeritorious grievances. [emphasis added]

An agency is not relieved of the duty to provide requested information merely because it is available to the union from another source. *See National Federation of Federal Employees (NFFE), Local 1655 and U.S. Department of Defense, Department of Military Affairs, Springfield, Illinois*, 39 FLRA 1087 (1991): "Nothing in the language of section 7114(b) of the Statute or its legislative history indicates that Congress intended a union's right to information under that provision to be dependent on whether the information is reasonably available from an alternative source. *U.S. Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 38 FLRA 3, 7 (1990). *See also U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 37 FLRA 515, 519 (1990) (*Portsmouth Naval Shipyard*); *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 FLRA 788, 796-97 (1986)."

Please be further advised that with respect to Information Requested items #4 through #6, the Federal Labor Relations Authority held in *National Labor Relations Board*, 38 FLRA 506, 523 (1990) (NLRB), *aff'd sub nom. NLRB v. FLRA*, 952 F.2d 523 (D.C. Cir. 1992), that § 7114(b)(4)(C) "does not exempt from disclosure **guidance, advice, or counsel to management officials concerning the conditions of employment** of a bargaining unit employee, for example: the personnel[] policies and practices and other matters affecting the employee's working conditions **that are not specifically related to the collective bargaining process**." [emphasis added] The FLRA reiterated that position in *Department of the Army, Army Corps of Engineers, Portland District, Portland, Oregon and United Power Trades Union*, 60 FLRA 413, 416 (2004), again stating explicitly that "Section 7114(b)(4)(C) does not exempt from disclosure guidance, advice, or counsel to management officials concerning the conditions of employment of bargaining unit employees."

In sum, AFGE Council 222 needs all of the information requested above to meet its burden of proof by a preponderance of the evidence for the June 8, 2022, Unfair Labor Practices and collective bargaining agreement violations Grievance of the Parties (GOP) concerning remote work at the upcoming arbitration hearings scheduled for April 10-11, 2023. This information requested will also be used to submit documentary evidence and identify and prepare witnesses for direct examination, cross-examination, and rebuttal for the arbitration hearing(s). Therefore, a less intrusive means is not available to collect this information because the Union needs to be able to identify potential witnesses' names. The Union needs the information to prove at the arbitration hearings that the Department indeed violated and repudiated National Supplement 33 and Article 6, Section 6.01 of the HUD-AFGE Agreement, and violated the Federal Service Labor-Management Relations Statute, National Supplement 34, all HUD-AFGE Agreement provisions cited, the Telework Enhancement Act of 2010, and any other violation, misinterpretation, or misapplication of any applicable provision of the HUD-AFGE collective bargaining agreement, law, rule or regulation as alleged in the Union's June 8, 2022, ULPs and CBA violations Grievance of the Parties on remote work.

Deadline to Furnish the Information Requested

Please provide the information requested above in 30 days (i.e., by March 2, 2023) so that the Union has sufficient time to evaluate the evidence given the volume of documentation requested, to prepare Union exhibits for the arbitration hearing based on the documentation furnished by the Agency, and to submit the evidence at the upcoming arbitration hearing dates of April 10-11, 2023. The Union notes that it is an Unfair Labor Practice in violation of 5 U.S.C. § 7116(a)(1), (5) and (8) not to timely furnish documentation in response to an information request under 5 U.S.C. § 7114(b)(4), which the FLRA defines as timely to meet the Union's representational responsibilities. *See Bureau of Prisons, Lewisburg Penitentiary and AFGE Local 148*, 11 FLRA 639 (1983); *Department of Defense Dependent Schools and North Germany Area Council, Overseas Education Association*, 19 FLRA 790 (1985); and *Department of Transportation, Federal Aviation Administration and National Air Traffic Controllers Association Local 171*, 57 FLRA 604 (2001). **Please be advised that in *Department of Transportation, Federal Aviation Administration and National Air Traffic Controllers Association Local 171*, 57 FLRA 604 (2001), the FLRA found that the agency committed an Unfair Labor Practice even though the union submitted the information request under 5 U.S.C. § 7114(b)(4) only five days prior to the arbitration hearing and the agency provided the information on the day of the arbitration hearing as it was untimely for the union to meet its representational responsibilities**.

Please do not attempt to interpret any part of this request that you may not understand. If you have any questions concerning this request, or if you do not understand any part of this request, please contact me at (678) 216-6687 or by email at Stephan.Caldwell@afge.org.

I appreciate your cooperation in timely processing and furnishing the information requested. Thank you in advance.

cc: Salvatore T. Viola, AFGE Council 222 President
Ricardo Miranda, AFGE Council 222 Chief Steward
Jerry Gross, AFGE Council 222 Chief Steward
AFGE Council 222 Executive Board
AFGE Local Presidents at HUD