



National Council of HUD Locals

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFFILIATED WITH AFL-CIO

Council 222

December 28, 2021

MEMORANDUM FOR: Felicia Gaither, HUD Public Housing Deputy Assistant Secretary
for Field Operations, PQ
Sonya Gaither, HUD Director, Employee and Labor Relations
Division, AHE

FROM: 
Ricardo Miranda, Chief Steward, Regions 1, 2 & 4
AFGE National Council of HUD Locals No. 222

SUBJECT: Grievance of the Parties concerning Public Housing Portfolio
Management Specialist Position's Fiscal Year 2022 Performance
Plan's Repudiation of SMART Standards, Illegal Standards &
Other Collective Bargaining Agreement, Statutory & Regulatory
Violations

Subject Matter of the Grievance of the Parties

Pursuant to Article 51, Sections 51.01(2), 51.01(3), 51.04, and 51.15 of the 2015 HUD-AFGE Agreement (Agreement, collective bargaining agreement, or CBA) and the Federal Service Labor-Management Relations Statute (Statute) at 5 U.S.C. § 7103(a)(9)(B) and (C), 5 U.S.C. § 7121(b)(1)(C)(I)¹, and 5 U.S.C. § 7116(d)², I am filing this Grievance of the Parties (GOP) on behalf of AFGE National Council of HUD Locals No. 222 (AFGE Council 222 or Union) with

¹ The AFGE National Council of HUD Locals No. 222 (AFGE Council 222 or Union) has a statutory right to file a grievance on behalf of all affected bargaining-unit employees in accordance with 5 U.S.C. § 7103(a)(9)(B) and (C) and 5 U.S.C. § 7121(b)(1)(C)(I). See *United States Department of the Army, White Sands Missile Range, White Sands Missile Range, New Mexico (Agency) and National Federation of Federal Employees (NFFE) Local 2049 (Union)*, 67 FLRA 619, 621 (August 29, 2014), Footnote 26, and *United States Department of Veterans Affairs and National Association of Government Employees (NAGE)*, 72 FLRA 194 (April 23, 2021).

² Article 51, Section 51.04 of the CBA and 5 U.S.C. § 7116(d) provide the Union, as the aggrieved party, the option to file an Unfair Labor Practice (ULP) complaint under the statutory appeal procedure of the Federal Labor Relations Authority (FLRA) or as a grievance under the negotiated grievance procedure, but not both. An arbitrator has the authority to decide ULP issues and to provide appropriate remedies in accordance with FLRA case law. See *Department of Health and Human Services (HHS), Region V, and National Treasury Employees Union (NTEU)*, Chapter 230, 45 FLRA 737, 743 (1992); and *Federal Deposit Insurance Corporation (FDIC), Division of Depositor and Asset Services, and National Treasury Employees Union (NTEU)*, Chapter 256, 49 FLRA 894, 900 (1994). The arbitrator's responsibility when presented with a nonfrivolous ULP issue is to resolve the issue in accordance with FLRA law, as the FLRA explained in *National Treasury Employees Union (NTEU), Chapter 168, and Department of Treasury, Customs Service*, 55 FLRA 237, 241 (1999).

you concerning the U.S. Department of Housing and Urban Development's (HUD) Office of Public Housing's (PIH) Fiscal Year (FY) 2022 Performance Plan (i.e., Critical Elements and Performance Standards) for the Portfolio Management Specialist position (attached as *Exhibit 1*).

The Union alleges that these Critical Elements and Performance Standards: (1) constitute an Unfair Labor Practice (ULP) in violation of 5 U.S.C. § 7116(a)(1) and (5) by repudiating the SMART (Specific, Measurable, Attainable, Relevant and Time-bound) standards in Article 30, Section 30.06 of the 2015 HUD-AFGE collective bargaining agreement (CBA or Agreement); (2) are not objective to the maximum extent feasible in violation of the Civil Service Reform Act of 1978 at 5 U.S.C. § 4302(c)(1) and in repudiation and violation of Article 30, Section 30.04(2) of the CBA; and (3) also violate other provisions of the CBA, the Federal Service Labor-Management Relations Statute (Statute), and U.S. Office of Personnel Management (OPM) regulations, including, but not limited to Article 30 and Section 30.06(3)(d) of the CBA that the critical elements and performance standards must be based on major duties in the employee's position description, Sections 30.04(5) and 30.11(6) of the CBA that employees may only be rated for work that is assigned, Section 30.07(5) of the CBA that employees may not be held accountable for factors beyond their control, Section 30.02(1)(d) and 5 CFR § 430.203 that employees' critical elements may only measure performance on the individual employee level, Section 30.15 of the CBA and the Federal Service Labor-Management Relations Statute that the CBA's Article 30 provisions take precedence over any conflicting agency regulation, handbook, policy or guidance on the performance appraisal process, etc. *See Department of the Army and AFGE Local 2022*, 37 FLRA 186 (September 13, 1990); and *Department of Veterans Affairs and AFGE Locals 903 and 3399*, 66 FLRA 856 (August 1, 2012).

Through the FY 2022 Critical Elements and Performance Standards of the Portfolio Management position and the undated memorandum of Public Housing Deputy Assistant Secretary for Field Operations, Felecia Gaither in *Exhibit 2* as explained below, the Union alleges that HUD also violated the following provisions of the HUD-AFGE Agreement, including, but not limited to: the Preamble, Article 6 and Sections 6.01, 6.05, Article 31 and Sections 31.01, 31.02, 31.03, 31.05, Article 59 and Sections 59.01, 59.03, etc. In accordance with Article 51, Section 51.01(1) and (2) of the HUD-AFGE Agreement and the Federal Service Labor-Management Relations Statute at 5 U.S.C. § 7103(a)(9)(B) and (C), the Union reserves the right to raise and grieve **any** violation, misinterpretation, or misapplication of **any** provision of the HUD-AFGE Agreement, law, rule or regulation concerning the FY 2022 Performance Plan for the Portfolio Management Specialist position in this Grievance of the Party or Arbitration. There is no provision in Article 51 or Article 52 of the Agreement that expressly prohibits changes to the violations of the collective bargaining agreement, law, rule or regulation alleged for the subject matter being grieved.

On November 22, 2021³, a HUD San Juan Public Housing bargaining-unit employee provided the Union a copy of Public Housing Deputy Assistant Secretary of Field Operations, Felicia

³ Should HUD argue that the Union should have been aware of these issues earlier, pursuant to Article 51, Section 51.06(1) of the HUD-AFGE Agreement, a grievance concerning a continuing violation may be filed at any time. Elkouri and Elkouri's *How Arbitration Works* (Edited by Kenneth May, Arlington, VA: Bloomberg BNA Books, Seventh Edition, 2012), states the following regarding continuing violations:

Gaither's undated memorandum concerning the FY 2022 Performance Plan for (attached as *Exhibit 2*). The employee was concerned about Ms. Gaither's statements that up to 40% of employees' performance standards could be subjective; that the performance standards did not comply with SMART standards in the CBA; and Ms. Gaither's statement that employees could not cite the same work activities performed for multiple critical elements. *See Exhibit 2*. This is despite the fact that several of the same exact performance standards are repeated in multiple Critical Elements of the Portfolio Management Specialist's FY 2022 Performance Plan. *See Exhibit 1*. That is a violation of Article 6, Section 6.01 of the HUD-AFGE Agreement that employees will be treated fairly and equitably in the administration of the CBA and in policies and practices concerning conditions of employment.

The Union attempted to informally resolve the issues raised in this Grievance of the Parties with the HUD Office of Employee and Labor Relations (ELR) as reflected in the emails attached as *Exhibit 3*. The HUD Office of ELR provided no response to Chief Steward Miranda's emails in *Exhibit 3*.

Threshold Issues

Please be advised that Article 51, Section 51.05 does not exclude establishment of performance elements and standards from the grievance procedures just individual employee progress reports on performance. The Statute at 5 U.S.C. § 7121(c) does not prohibit grievances on the establishment of performance elements and standards. Moreover, in *Newark Air Force Station and AFGE Local 2221*, 30 FLRA 616 (December 29, 1987), the FLRA has ruled that grievances challenging the legality of performance elements and standards are procedurally arbitrable even if the elements and standards have not been applied yet to employees' ratings as they are not excluded in 5 U.S.C. § 7121(c):

Additionally, we note that the concern with arbitrators' "substituting their judgment" for that of management presents no basis on which to preclude the arbitrability of grievances challenging the legality of performance standards

Many arbitrators have held that "continuing violations" of the agreement (as opposed to a single isolated and completed transaction) give rise to "continuing" grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new "occurrence." ... (Elkouri and Elkouri, How Arbitration Works, Seventh Edition, Chapter 5, page 5-28)

The FLRA will not overturn an arbitrator's finding that a grievance was filed timely on the basis of the continuing-violation doctrine; an arbitrator's determination of a continuing violation constitutes a ruling on procedural arbitrability. *See U.S. Department of Veterans Affairs Regional Office, Winston-Salem, N.C. and American Federation of Government Employees, Local 1738*, 66 FLRA 34 (August 25, 2011); and *U.S. Department of Veterans Affairs and National Association of Government Employees (NAGE)*, 72 FLRA 194 (April 23, 2021). This is consistent with U.S. Supreme Court case law precedent on procedural and substantive arbitrability from over sixty years ago in the Steel-workers Trilogy of 1960 [see *United Steelworkers v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corporation*, 363 U.S. 593 (1960); and, progeny]. While it has been modified somewhat since then, the basic and long-standing tenet of the U.S. Supreme Court still being followed by arbitrators is that doubts concerning the arbitrability of a dispute should be resolved in favor of arbitration. This doctrine of presumptive arbitrability standard continues to prevail.

before an employee is evaluated against those standards. Resolution of the grievance in this case by an arbitrator would not require an arbitrator to do anything other than what arbitrators do routinely in resolving other disputes, including those involving the exercise of other management rights such as discipline. An arbitrator would simply be examining an action by management to determine whether that action was lawful; that is, whether the performance standards established by management complied with law, as it is beyond dispute that they must. This sort of examination entails no more of a "substitution of judgment" than does a similar inquiry by arbitrators, MSPB, or the Federal Circuit in proceedings following performance-based actions against employees. [emphasis added]

Should HUD management claim that establishment of critical elements and performance standards concern management's rights in 5 U.S.C. § 7106(a), and, therefore, that this subject is not grievable, please be advised that the management rights provisions of 5 U.S.C. § 7106(a) do not provide a basis for determining that an issue is not grievable or arbitrable. The Federal Service Labor-Management Relations Statute (Statute) at 5 U.S.C. Section 7121(c) does not exclude from grievance procedures violations of law, rules or regulations, or collective bargaining agreement provisions that affect management's rights in 5 U.S.C. § 7106(a). *See AFGE Local 1045 and VAMC Biloxi*, 64 FLRA 520 (2010). Conversely, a grievance is arbitrable despite even a successful claim that the resultant award infringes on management's rights. As the FLRA explained in *DHS, Customs & Border Protection Agency and AFGE Local 1917*, 61 FLRA 72, 75 (2005) as quoted below:

CBP's management's rights arbitrability exceptions are misplaced because they ignore applicable Authority precedent. The Authority has consistently held that the management's rights provisions of Section 7106 of the Statute do not provide a basis for finding grievances non-arbitrable. *See, e.g., United States Depot of the Navy, Pac. Missile Test Ctr., Point Mugu, Cal.*, 43 FLRA 157, 159 (1991); *United States Information Agency*, 32 FLRA 739, 748-49 (1988); *Newark Air Force Station*, 30 FLRA 616, 631-35 (1987) (*Newark*); *Marine Corps Logistics Support Base, Pac., Barstow, Cal.*, 3 FLRA 397, 398-99 (1980) (*Barstow*). As the Authority stated in *Newark*: The proper phase of the arbitration proceeding in which to determine the impact or application of Section 7106 is not at the outset so as to preclude by law an arbitrator from having jurisdiction over the matter. Rather, the determination as to the impact or application of Section 7106 is to be made in connection with the arbitrator's consideration of the substantive issue presented by the grievance and any possible remedy. *Newark*, 30 FLRA at 634. *See also Barstow*, 3 FLRA at 399 (nothing in Section 7106 precludes an arbitrator from reaching the merits of a grievance alleging violations of provisions of the collective bargaining agreement). Consequently, insofar as CBP's exceptions contend that the grievance in this case is not arbitrable based on management's rights under Section 7106 of the Statute, the exceptions do not provide a basis for finding the award deficient.

Recent FLRA case law confirmed that bargaining-unit employees may file grievances concerning violations of law and procedures or appropriate arrangements in collective bargaining agreements negotiated pursuant to the Statute at 5 U.S.C. Section 7106(b)(2) and (3). An arbitrator has the authority to find a violation of law or collective bargaining agreement provision and award a remedy even if they affect management's rights as long as the remedy reasonably and proportionally relates to the violation, and the violation interpretation does not excessively interfere with management's rights under 5 U.S.C. Section 7106(a). *See U.S. Department of Justice (DOJ), Federal Bureau of Prisons (FBP) and American Federation of Federal Employees (AFGE), Local 817, Council of Prison Locals #33, 70 FLRA 398 (February 22, 2018)*. In the instant GOP, the Union is trying to hold Public Housing management accountable for complying with the Statute, Civil Service Reform Act of 1978 at 5 U.S.C. § 4302(c)(1), OPM regulation at 5 CFR § 430.203, and the procedure and appropriate arrangement provisions in the HUD-Agreement negotiated pursuant to 5 U.S.C. § 7106(b)(2) and (3) of the Statute cited in this Grievance of the Parties.

Merits of the Grievance

Below please find some non-exhaustive examples of how the Portfolio Management Specialist’s FY 2022 Critical Elements and Standards repudiate and violate the above-cited statutory, regulatory, and CBA provisions and standards.

These are PIH’s Portfolio Management Specialist position’s Performance Standards for Critical Element 3 as quoted below:

Critical Element 3: Meet Agency Priority Goals (APG)

This critical element measures the employee’s effectiveness in obtaining positive results that contribute to the overall achievement of HUD’s APG, PIH, and OFO priorities including but not limited to:

| APG, PIH, & OFO PRIORITIES: Improve PHA Performance |
|---|
| HOUSE MORE FAMILIES |
| Increase public housing occupancy |
| Increase HCV utilization |
| IMPROVE PHYSICAL CONDITIONS |
| Improve the performance of troubled and substandard PHAs |
| IMPROVE FINANCIAL CONDITIONS |
| Increase the number of solvent public housing, HCV, and entity programs |
| Decrease the number of troubled and substandard PHAs |

Outstanding

To attain this rating, the employee successfully participates in and/or implements at least 6 activities in support of the above APG, PIH, and OFO priorities, and proactively leads at least 2. The activities are accurate, complete, and require few edits.

Fully Successful

To attain this rating, the employee successfully participates in and/or implements at least 4 activities in support of the above APG, PIH, and OFO priorities. The activities are complete and do not require substantive changes.

Unacceptable

To attain this rating, the employee participates in and/or implements 2 or fewer activities in support of the above APG, PIH, and OFO priorities.

The goals of the Performance Standards for the APG, PIH, and OFO priorities in this Critical Element 3 are general, vague, and subjective without definitions, metrics other than the number of undefined “activities” to be performed by employees, or reasonably accurate measures in violation and repudiation of the HUD-AFGE Agreement for SMART standards in Article 30, Section 30.06 and are also a violation of the Civil Service Reform Act of 1978 at 5 U.S.C. § 4302(c)(1), which requires performance standards to be based on objective criteria to the maximum extent feasible. Article 30, Section 30.04(2) of the HUD-AFGE Agreement also requires performance standards to be objective to the maximum extent feasible. Notice that the goals of the Performance Standards for the APG, PIH, and OFO priorities do not actually contain any of the major duties in the Portfolio Management Specialist’s position description in violation of Article 30, Section 30.06(3)(d) of the CBA.

The Performance Standards are also attempting to hold employees accountable for the actual performance of Public Housing Authorities, which are factors beyond an individual HUD employee's control. For example, any Public Housing Authority’s staff performance or administration regarding marketing the Section 8/Housing Choice Voucher (HCV) and/or Public Housing programs to increase occupancy or HCV utilization or leasing rates, screening of eligible low-income tenants, finding landlords willing to participate or remain in the Section 8/Housing Choice Voucher Program given that Fair Market Rents are usually below market-rate rents, and complying with Housing Quality Standards which can entail significant investments in repairs of the residential properties to achieve higher HCV utilization or leasing rates are not objective criteria because they are beyond the control of any individual HUD Public Housing employee, are unreasonable, unrealistic, and unattainable. Therefore, it is a violation of law at 5 U.S.C. § 4302(c)(1) and the HUD-AFGE Agreement at Article 30, Section 30.07(5) of the HUD-AFGE Agreement to evaluate employees based on Public Housing Authorities’ occupancy, HCV utilization or leasing rates. Moreover, a national cumulative organizational goal of the HUD Office of Public Housing to transition 125,000 units to a more sustainable platform by the end of FY 2021 is also unreasonable, unrealistic, unattainable, beyond an individual bargaining-unit employee's control, and completely inappropriate for evaluating an employee at the individual level as required by OPM regulation at 5 CFR § 430.203 and Article 30, Section 30.02(1)(d) of the HUD-AFGE Agreement as quoted below:

5 CFR § 430.203

...

Critical element means a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable. Such elements shall be used to measure performance only at the individual level. [emphasis added]

Article 30, Section 30.02 of the HUD-AFGE Agreement

(1) For this article, the following terms are defined in 5 CFR 430.203:

- (a) Appraisal means the process under which performance is reviewed and evaluated.
- (b) Appraisal period means the established period of time for which performance will be reviewed and a rating of record will be prepared.
- (c) Appraisal system means a framework of policies and parameters established by an Agency as defined at 5 USC 4301 (1) for the administration of performance appraisal programs under subchapter (i) of Chapter 43 of Title 5 USC in this subpart.
- (d) Critical Element means a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable. Such elements shall be used to measure performance only at the individual level. [emphasis added]

Furthermore, what does transitioning 125,000 Public Housing units to a "more sustainable platform" mean? Moving Public Housing or Housing Choice Voucher tenants to private-sector market-rate housing? What if the tenants can't find jobs that pay well enough because of either lack of opportunities or insufficient higher education or vocational skills to afford expensive market-rate housing to move out of Public Housing or forgo Section 8/Housing Choice Voucher rental subsidies? Does it mean more Public Housing Authorities participating in the Rental Assistance Demonstration (RAD) program to get private-sector investors to invest in the repair of Public Housing? What if there is a lack of interest on the part of private-sector investors if the returns on investment are not sufficient? Those issues are completely beyond the control of individual HUD Public Housing employees, they are not major duties in the employee's position description, and are unreasonable, unrealistic, and unattainable. Another example of the subjectivity, vagueness, lack of definitions, and lack of accurate performance measures of the Performance Standards in Critical Element 3, for the "improve the performance of troubled and substandard PHAs" standard, it is unknown what constitutes "improve the performance"? How is it measured? This "improve the performance" goal is undefined with no criteria for measurement making it completely subjective and in the eyes of the rating beholder.

Please be advised that employees cannot be penalized in their evaluation for factors beyond their control in accordance with Article 30, Section 30.07(5) of the HUD-AFGE Agreement and the law at 5 U.S.C. § 4302(c)(1) because performance standards must be objective defined as reasonable, realistic, and attainable based on reasonably accurate measures. *See U.S. Department*

of Labor, Bureau of Labor Statistics (BLS) and AFGE National Council of Field Labor Locals, 67 FLRA 77 (December 14, 2012); Newark Air Force Station and AFGE Local 2221, 30 FLRA 616, 628-29 (December 29, 1987). Article 30, Section 30.04(2) of the HUD-AFGE Agreement also requires performance standards to be objective to the maximum extent feasible. In the *U.S. Department of Labor, Bureau of Labor Statistics (BLS) and AFGE National Council of Field Labor Locals*, 67 FLRA 77 (December 14, 2012) case, the Federal Labor Relations Authority upheld an arbitrator's finding that an element of economists was not objective and was a violation of law because it measured the survey response rate of small business owners, which was beyond the economists' control whether or not small business owners decided to fill out the surveys and returned them to the Department of Labor's Bureau of Labor Statistics. Below is a quote from the *BLS and AFGE* case (67 FLRA 77, 80):

Section 4302[c](1) requires that a performance appraisal system establish performance standards "which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria." 5 U.S.C. § 4302[c](1); see also *Greer v. Dep't. of the Army*, 79 M.S.P.R. 477, 483 (1998). The Authority, as well as the Merit Systems Protection Board, has interpreted § 4302[c](1) to require that such "performance standards . . . be based on objective criteria that are reasonable, realistic and attainable." *NTEU, Chapter 229*, 32 FLRA 826, 830 (1988) (*NTEU*) (citing *Walker v. Dep't of the Treasury*, 28 M.S.P.R. 227, 229 (1985)); accord *Newark Air Force Station*, 30 FLRA 616, 628-29 (1987) (*Newark*) (acknowledging court precedent holding that performance must be measured against standards that allow for reasonably accurate measurement of performance and are attainable).

These are PIH's Portfolio Management Specialist position's Performance Standards for Critical Element 4 as quoted below:

Critical Element 4: Risk and Portfolio Management (Book of Business)

OFO's Portfolio Management approach monitors the performance of PIH's assisted-housing programs and the PHAs that carry them out. The employee should fully utilize systems thinking, PRMT, and the risk mitigation framework that results in the assignment of risk and identifies actionable measures for mitigating the risk. The employee should use HUD resources to influence actions to obtain positive results. The employee should also assist in field office activities to recover and sustain insolvent, troubled, and/or substandard PHAs (PHAS and SEMAP) within the portfolios; addressing the highest-risk PHAs; recovering, sustaining, and returning receivership PHAs; and encouraging repositioning.

Outstanding

To attain this rating the employee meets the following:

1. Demonstrates exceptional knowledge of laws, regulations, policies, and procedures in work activities and outcomes and/or identifies and researches available resources to improve or sustain PHA performance

or operations with minimal supervisory involvement. Trains others and works independently to provide accurate work products that require few edits.

2. In at least 3 instances, anticipates and addresses significant and complex issues and develops viable solutions independently or in collaboration with others that influences behavior in PHA performance and operations.
3. In at least 5 instances, analyzes performance to identify risk and risk mitigation strategies and works with the PHA to implement.
4. Uses HUD systems and other tools (e.g., PHARS) to access, analyze, and interpret program performance indicators to influence and provide guidance to all portfolio PHAs to support improved or sustained performance.
5. Monitors and provides timely technical assistance to address risk and/or improve PHA performance with minimal supervision. Trains others and works independently to provide accurate work products that require few edits.
6. With no more than 1 exception, completes activities related to PIH goals within established deadlines with minimal supervision, keeping management informed of progress.

Fully Successful

To attain this rating, the employee meets the following:

1. Demonstrates knowledge of laws, regulations, policies, and procedures in work activities and outcomes and/or identifies and researches available resources to improve or sustain PHA performance or operations. Assists others and works independently to provide accurate work products that do not require substantive changes.
2. In at least 1 instance, anticipates and addresses significant and complex issues and develops viable solutions independently or in collaboration with others that influences behavior in PHA performance and operations.
3. In at least 3 instances, analyzes performance to identify risk and risk mitigation strategies and works with the PHA to implement.
4. Uses HUD systems and other tools (e.g., PHARS) to access, analyze, and interpret program performance indicators to influence and provide guidance to PHAs to support improved or sustained performance.

5. Monitors and provides timely technical assistance to address risk and/or improve PHA performance. Assists others and work independently to provide accurate work products that do not require substantive changes.
6. With no more than 3 exceptions, completes activities related to PIH goals within established deadlines, keeping management informed of progress.

Unacceptable

To attain this rating, the employee fails to meet 50% of the requirements of Fully Successful, such as:

1. Does not demonstrate knowledge of laws, regulations, policies, and procedures in work activities and outcomes. Does not identify and research available resources to improve or sustain PHA performance or operations. Does not assist others or work independently. Work products are inaccurate and/or require substantive changes.
2. Does not analyze performance trends and other data to ensure appropriate risk mitigation strategies are developed and implemented.
3. Does not work to anticipate and address significant and complex issues and develop viable solutions independently or in collaboration with others that influence behavior in PHA performance and operations.
4. Does not use HUD systems and other tools to access, analyze, and interpret program performance indicators to influence and provide guidance to PHAs to support improved or sustained performance.
5. Does not monitor and provide technical assistance to address risk and/or improve PHA performance.
6. In at least 5 instances, does not complete activities related to PIH goals within established deadlines and/or requires significant supervision. Does not keep management informed of progress.

Please be advised that all of the performance standards in Critical Element 4 are general, vague, and subjective without definitions, metrics other than the number of “instances” for undefined work activities, or reasonably accurate measures in violation and repudiation of the HUD-AFGE Agreement for SMART standards in Article 30, Section 30.06 and are also a violation of the Civil Service Reform Act of 1978 at 5 U.S.C. 4302(c)(1). For example, in the Outstanding performance standard 1, what constitutes "exceptional knowledge" of laws, regulations, policies and procedures? How is it measured? What is meant by "improve and sustain PHA financial performance"? How are these measured? For performance standard 2, what constitute "complex issues" and "viable solutions"? How are these measured? What is meant by "influences behavior

in PHA financial performance and operations"? How are these measured? These standards are subjective and in the eyes of the rating beholder.

The Civil Service Reform Act of 1978 at 5 U.S.C. § 4302(c)(1) requires that performance standards must be objective defined as reasonable, realistic, and attainable based on reasonably accurate measures. *See U.S. Department of Labor, Bureau of Labor Statistics (BLS) and AFGE National Council of Field Labor Locals*, 67 FLRA 77 (December 14, 2012); *Newark Air Force Station and AFGE Local 2221*, 30 FLRA 616, 628-29 (December 29, 1987). Article 30, Section 30.04(2) of the HUD-AFGE Agreement also requires performance standards to be objective to the maximum extent feasible. Below is a quote from the *BLS and AFGE* case (67 FLRA 77, 80):

Section 4302[c](1) requires that a performance appraisal system establish performance standards "which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria." 5 U.S.C. § 4302[c](1); *see also Greer v. Dep't. of the Army*, 79 M.S.P.R. 477, 483 (1998). The Authority, as well as the Merit Systems Protection Board, has interpreted § 4302[c](1) to require that such "performance standards . . . be based on objective criteria that are reasonable, realistic and attainable." *NTEU, Chapter 229*, 32 FLRA 826, 830 (1988) (*NTEU*) (citing *Walker v. Dep't of the Treasury*, 28 M.S.P.R. 227, 229 (1985)); accord *Newark Air Force Station*, 30 FLRA 616, 628-29 (1987) (*Newark*) (acknowledging court precedent holding that performance must be measured against standards that allow for reasonably accurate measurement of performance and are attainable).

These are PIH's Portfolio Management Specialist position's Performance Standards for Critical Element 5 as quoted below:

Critical Element 5: Operational Excellence (Book of Business)

This critical element measures the employee's contribution to improving how HUD does business through effective communication and customer service and the production of high-quality work products. By improving fundamental work processes and supporting HUD's mission, the employee will contribute to improved efficiency and effectiveness within the Department.

Outstanding

To attain this rating, the employee meets the following:

1. Develops and retains a positive working relationship with HUD staff, PHAs, and/or other partners, as evidenced by at least 4 instances of positive feedback or recognition and no instances of valid negative feedback from internal and/or external stakeholders.
2. Effectively represents HUD at a minimum of 4 internal or external meetings or events to communicate Departmental goals and policies and engage stakeholders.

3. Completes assignments of exceptional quality as demonstrated by no more than 1 product requiring substantive changes. Prepares written work that accurately emphasizes key issues; considers HUD policy, regulations, and statutes; is concise, responsive, and accurate; and is provided prior to or within established deadlines.
4. Develops at least 1 innovative practice or demonstrates initiative in leading a project that improves the effectiveness and/or efficiency of the field office, OFO, or HUD.
5. As demonstrated by at least 2 examples, responds constructively to feedback, seeking ways to improve, and consistently raises concerns in a constructive manner, offering potential solutions.
6. Provides updates, information, and recommendations to supervisor on work-related matters, describing accomplishments, status, and problems.
7. Resolves inquiries and responds to requests for information accurately and within established deadlines.

Fully Successful

To attain this rating, the employee meets the following:

1. Develops and retains a positive working relationship with HUD staff, PHAs, and/or other partners, as evidenced by at least 2 instances of positive feedback or recognition and no more than 2 instances of valid negative feedback from internal and/or external stakeholders.
2. Effectively represents HUD at a minimum of 2 internal or external group meetings or events to communicate Departmental goals and policies and engage stakeholders.
3. Completes assignments of high quality as demonstrated by no more than 3 products requiring substantive changes. Prepares written work that accurately emphasizes key issues; considers HUD policy, regulations, and statutes; is concise, responsive, and accurate; and is provided within established deadlines.
4. As demonstrated by at least 1 example, responds constructively to feedback, seeking ways to improve, and consistently raises concerns in a constructive manner, offering potential solutions.
5. Provides updates, information, and recommendations to supervisor on work-related matters, describing accomplishments, status, and problems.

6. Resolves inquiries and responds to requests for information accurately and within established deadlines.

Unacceptable

To attain this rating, the employee fails to meet 50% of the requirements of Fully Successful, such as:

1. Does not develop and retain a positive working relationship with HUD staff, PHAs, and/or others, as evidenced by no instances of positive feedback or recognition and more than 4 instances of valid negative feedback from internal and/or external stakeholders.
2. Does not effectively represent HUD at internal or external group meetings or events to communicate Departmental goals and policies and engage stakeholders.
3. Does not prepare written work that accurately emphasizes key issues; considers HUD policy, regulations, and statutes; is concise, responsive, and accurate; and is provided within established deadlines, as demonstrated by at least 5 products requiring substantive changes.
4. Does not respond constructively to feedback, seeking ways to improve. Does not consistently raise concerns in a constructive manner, offering potential solutions.
5. Does not provide updates, information, and recommendations to supervisor on work-related matters, describing accomplishments, status, and problems.
6. Does not resolve inquiries and does not respond to requests for information accurately and within established deadlines.

Please be advised that all of the performance standards in Critical Element 5 are general, vague, and subjective without definitions, metrics other than the number or “instances” of undefined work activities or meetings, or reasonably accurate measures in violation and repudiation of the HUD-AFGE Agreement for SMART standards in Article 30, Section 30.06 and are also a violation of the Civil Service Reform Act of 1978 at 5 U.S.C. 4302(c)(1). For example, in Outstanding performance standard 3, what constitute "exceptional quality" and "substantive changes"? How are these measured? For Outstanding performance standard 4, what is meant by an "innovative practice"? How is this measured? These standards are subjective and in the eyes of the rating beholder.

Moreover, in Outstanding performance standard 4, requiring an employee to demonstrate initiative to get an Outstanding rating is a violation of Article 30, Section 30.11(6) of the HUD-AFGE Agreement, which states that employees may only be rated for work that is assigned; if work for

a particular performance standard was not assigned, then that performance standard must be excluded from the rating in the Critical Element.

For Outstanding performance standard 1, not only is "positive feedback" not defined nor any criteria or measures provided, it is a factor beyond an employee's control to receive positive feedback or recognition from HUD staff, PHAs and/or other partners unless the employee solicits the "positive feedback", which could cause a conflict of interest, for example, if the HUD employee tells PHA staff that his/her determination of the PHA's regulatory compliance and possible findings/monetary sanctions are dependent on providing him/her positive feedback.

Please be advised that employees cannot be penalized in their evaluation for factors beyond their control in accordance with Article 30, Section 30.07(5) of the HUD-AFGE Agreement and the law at 5 U.S.C. § 4302(c)(1) because performance standards must be objective defined as reasonable, realistic, and attainable based on reasonably accurate measures. *See U.S. Department of Labor, Bureau of Labor Statistics (BLS) and AFGE National Council of Field Labor Locals*, 67 FLRA 77 (December 14, 2012); *Newark Air Force Station and AFGE Local 2221*, 30 FLRA 616, 628-29 (December 29, 1987). Article 30, Section 30.04(2) of the HUD-AFGE Agreement also requires performance standards to be objective to the maximum extent feasible. In the *U.S. Department of Labor, Bureau of Labor Statistics (BLS) and AFGE National Council of Field Labor Locals*, 67 FLRA 77 (December 14, 2012) case, the Federal Labor Relations Authority upheld an arbitrator's finding that an element of economists was not objective and was a violation of law because it measured the survey response rate of small business owners, which was beyond the economists' control whether or not small business owners decided to fill out the surveys and returned them to the Department of Labor's Bureau of Labor Statistics. Below is a quote from the *BLS and AFGE* case (67 FLRA 77, 80):

Section 4302[c](1) requires that a performance appraisal system establish performance standards "which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria." 5 U.S.C. § 4302[c](1); see also *Greer v. Dep't. of the Army*, 79 M.S.P.R. 477, 483 (1998). The Authority, as well as the Merit Systems Protection Board, has interpreted § 4302[c](1) to require that such "performance standards . . . be based on objective criteria that are reasonable, realistic and attainable." *NTEU, Chapter 229*, 32 FLRA 826, 830 (1988) (*NTEU*) (citing *Walker v. Dep't of the Treasury*, 28 M.S.P.R. 227, 229 (1985)); accord *Newark Air Force Station*, 30 FLRA 616, 628-29 (1987) (*Newark*) (acknowledging court precedent holding that performance must be measured against standards that allow for reasonably accurate measurement of performance and are attainable).

Remedies Requested

To resolve this Grievance of the Parties, AFGE Council 222 requests the following equitable relief remedies from HUD management:

(1) Rescind the Fiscal Year 2022 Critical Elements and Performance Standards of the Portfolio Management Specialist position issued in November of 2022 in *Exhibit 1*. Please be advised that

an arbitrator has the authority to invalidate an employee's entire performance appraisal or the rating of an element for violations of CBA provisions or law. See *U.S. Department of the Army and AFGE, Local 1658*, 67 FLRA 14 (October 24, 2012); and *U.S. Department of Labor, Bureau of Labor Statistics (BLS) and AFGE National Council of Field Labor Locals*, 67 FLRA 77 (December 14, 2012). See also *Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service v. Federal Labor Relations Authority (NTEU, Intervenor)*, 91-1316 (Washington, D.C. Circuit Court of Appeals: April 14, 1992).

(2) Cease and desist in the future from issuing any Critical Elements and Performance Standards to any Public Housing bargaining-unit employees that do comply with the SMART standards in Article 30, Section 30.06 of the HUD-AFGE Agreement and that are not objective to the maximum extent feasible in accordance with the Civil Service Reform Act of 1978 at 5 U.S.C. § 4302(c)(1), and Article 30, Section 30.04(2) of the CBA.

(3) The HUD Office of Public Housing shall issue new Fiscal Year 2022 Critical Elements and Performance Standards that comply with SMART standards in Article 30, Section 30.06 of the HUD-AFGE Agreement and are objective to the maximum extent feasible in accordance with the Civil Service Reform Act of 1978 at 5 U.S.C. § 4302(c)(1), and Article 30, Section 30.04(2) of the CBA. The new FY 2022 Critical Elements and Performance Standards shall not be applied retroactively in an adverse manner in accordance with Article 30, Section 30.07(1) of the HUD-AFGE Agreement.

(4) Public Housing management shall send an Unfair Labor Practice (ULP) email posting to all Public Housing bargaining-unit employees in the national consolidated bargaining unit as well as do physical postings on all bulletin boards at all HUD Offices represented by AFGE Council 222 that the HUD Office of Public Housing will not repudiate the SMART Standards and objective criteria to the maximum extent feasible for performance appraisals at Article 30, Sections 30.04(2) and 30.06 of the HUD-AFGE Agreement. An electronic posting is an appropriate remedy available for a ULP violation. See *U.S. Department of Justice, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City and American Federation of Government Employees (AFGE), Council of Prison Locals 33, Local 171*, 67 FLRA 222 (January 31, 2014). The Union will subsequently provide the ULP posting language to be sent by email and physically posted at all HUD Office bulletin boards.

(5) Pay all arbitration fees and expenses in accordance with Article 52, Section 52.04 of the HUD-AFGE Agreement should the Union have to pursue arbitration for denial of this Grievance of the Parties.

(6) Pay the Union's attorneys' fees should the Union have to invoke and pursue arbitration for denial of this Grievance of the Parties pursuant to the Back Pay Act of 1966 at 5 U.S.C. § 5596(b)(1)(A)(ii) if any Public Housing Portfolio Management Specialist bargaining-unit employee receives a subjective performance appraisal due to the application of the subject FY 2022 Critical Elements and Performance Standards in *Exhibit 1* that results in a lower performance appraisal rating, lower or no performance award, or is removed from Federal Service due to a performance-based action under Chapter 43 of the Civil Service Reform Act of 1978. Under the Back Pay Act of 1966 at 5 U.S.C. § 5596(b)(4) and (5), for an unjustified or

unwarranted personnel action resulting in loss of pay, allowances or differentials, employees can receive retroactive back pay, allowances or differentials dating back 6 years from the filing of the grievance. The improper denial of a performance award to an employee is an unjustified "personnel action" supporting a remedy under the Back Pay Act. *See Social Security Administration, New York Region, and American Federation of Government Employees (AFGE)*, 48 FLRA 370 (1993). The Federal Labor Relations Authority has previously determined that retroactive payment of performance awards is available as a remedy for violations of collective bargaining agreements under the Back Pay Act of 1966. *See U.S. Department of Health and Human Services, Social Security Administration, and AFGE*, 48 FLRA 370 (August 23, 1993); and *Federal Aviation Administration and NAGE R3-10*, 55 FLRA 1271 (January 24, 2000).

(7) Any other remedy available to the fullest extent of the law, rule, regulation, CBA, policy, past practice, or arbitrator's award. There is no provision in Article 51 or Article 52 of the Agreement that expressly prohibits changes in remedies requested.

These remedies are reasonably and proportionally related to the statutory, OPM regulatory, and CBA violations cited above and do not excessively interfere with management's rights provisions in 5 U.S.C. § 7106(a) in accordance with *U.S. Department of Justice (DOJ), Federal Bureau of Prisons (FBP) and American Federation of Federal Employees (AFGE), Local 817, Council of Prison Locals #33*, 70 FLRA 398 (February 22, 2018) (*DOJ*). The remedies merely seek HUD Public Housing management's compliance with the statutory, OPM regulatory, and CBA provisions cited above. In any event, the FLRA has upheld arbitrators' awards ordering agencies to increase employees' performance ratings in elements for CBA violations. *See Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, and National Treasury Employees Union (NTEU)*, 65 FLRA 568 (2011); and *Department of the Army, Defense Language Institute, Monterey, California, and American Federation of Government Employees (AFGE), Local 1263*, 65 FLRA 668 (2011). According to FLRA case law precedent, rewarding performance is not an exercise of the management right to direct employees and assign work; an arbitrator's decision ordering an award for a grievant is not contrary to the management right's provision of the Statute. *See Federal Deposit Insurance Company, and National Treasury Employees Union (NTEU), Chapter 207*, 64 FLRA 79 (2009). Alternatively, should an arbitrator award the Union's remedies requested above and the Department files exception(s) with the Federal Labor Relations Authority (FLRA), AFGE Council 222 requests that the FLRA reconsider its existing case law precedent in *DOJ* and revert back to the abrogation test for arbitrators' authority to fashion remedies to enforce appropriate-arrangement provisions negotiated pursuant to 5 U.S.C. § 7106(b)(3) even if it affects management's rights at § 7106(a) [*Environmental Protection Agency (EPA) and American Federation of Government Employees (AFGE), Council 238*, 65 FLRA 113 (September 29, 2010)], and re-establish the broader discretion of arbitrators to fashion remedies even if it affects management's rights [*Federal Deposit Insurance Corporation (FDIC) and National Treasury Employees Union (NTEU), Chapter 273*, 65 FLRA 102 (September 29, 2010)].

Meeting

The Union is not requesting a meeting to discuss this Grievance of the Parties. Therefore, in accordance with Article 51, Section 51.15(3) of the HUD-AFGE Agreement, please provide your response within 30 days.

cc: Salvatore T. Viola, AFGE Council 222 President
Jerry Gross, AFGE Council 222 Steward