U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
One Sansome Street, 12th Floor
San Francisco, CA 94104

Office of the Chief Human Capital Officer
San Francisco Regional Office

DATE: September 14, 2022

MEMORANDUM FOR: Jerry Gross, Bargaining Committee Co-Chair,
AFGE Council 222

Salvatore T. Viola, President,
AFGE National Council 222

Ginger Burnett

FROM: Ginger Burnett, Sr. Labor Relations Advisor,
Employee & Labor Relations Division

SUBJECT: Response to AFGE Grievance of the Parties Regarding HUD's Anti- Harassment Policy (AHP)

This is in response to AFGE's Grievance of the Parties (GOP or Grievance) filed on July 21, 2022 (Attachment 1) and amended on July 28, 2022 (Attachment 2) relating to HUD's Anti-Harassment Policy. AFGE claims that HUD violated the HUD/AFGE collective bargaining agreement (CBA) and Labor Management Statute by failing to bargain in good faith over the new Anti-Harassment Policy and repudiating the parties' previously negotiated Supplement 18.

The remedies requested in the GOP are: (1) An order that the Agency immediately post Supplement 18 on the HUD@Work website on the HUD/AFGE Supplements page; (2) An order directing the Agency to distribute a complete copy of Supplement 18 by email to each HUD employee; (3) An order directing HUD to comply with all the terms of Supplement 18, including but not limited to negotiating the procedures for bullying and hostile work environment and all other harassment with the Union, notifying employees annually of the Agency's anti-harassment policy and procedures, providing the contact information for utilizing the anti-harassment policy on HUD@Work, providing training that reiterates employees' rights to be represented by the local union, requiring supervisors and managers to receive training to understand their responsibilities under the Agency's anti-harassment policy, notifying the Union of all fact-finding inquiries and investigations into allegations of workplace harassment, and providing the Union with copies of OCHCO's quarterly aggregate statistical reporting related to addressing harassment; (4) A finding that the Agency committed unfair labor practices by violating §§ 7116(a)(1) and 7116(a)(5); (5) An order directing the Agency to specifically acknowledge its violations in an electronic message to all bargaining unit employees and

pledging to not violate the Labor-Management Relations Statute in the future; (6) An order directing the Agency to implement an Anti-Harassment Policy that complies with Supplement 18 within 30 days; (7) Payment of 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; (8) Attorneys' fees related to the preparation and conduct of arbitration, if arbitration is necessary, as well as the full costs of arbitration, including but not limited to arbitrator's fees, reporting services, and the travel expenses and per diem of Union witnesses who travel to the arbitration site to testify; (9) Any other remedy available to the fullest extent of the law, rule, regulation, policy, past practice, the HUD-AFGE Agreement, and arbitrator's award.

The Agency denies the allegations in the grievance and rejects it on the following grounds.

1. The Agency did not fail to negotiate in good faith

Management consulted and offered to negotiate with the Union in good faith pursuant to the Labor Management Statute and Article 49 of the parties' CBA. Management issued a formal Article 49 notice to the Union with an opportunity to bargain on two occasions: August 18, 2021 and April 18, 2022 (Attachments 1 and 3). Moreover, the agency attempted to consult with the Union several times regarding the need to move forward with a new policy that would be in compliance with the Equal Employment Opportunity Commission's ("EEOC") requirements by holding meetings with the Union on September 10, 2021, September 20, 2021 and April 7, 2022 and issuing a written explanation and an invitation to meet on April 18, 2022 (Attachment 3). Management even presented draft proposals to the Union attempting to incorporate the significant provisions from Supplement 18 that could be translated to the new policy (Attachment 3).

The Union's reliance on the covered-by doctrine is erroneous. The covered-by doctrine is a defense to a claim that a party violated its statutory obligation to bargain. *United States Bureau of Prisons*, 67 FLRA 442, 449 (2014). A party accused of unlawful failure to bargain can assert the defense to argue it was not obligated to bargain because it has already bargained over the subject at issue. *Soc. Sec. Admin. and AFGE*, 64 FLRA 199, 202 (2009). Here, the Union is not accused of unlawful failure to bargain and thus the covered-by doctrine is inapplicable. *See AFGE and United States Dept. of Energy*, 64 FLRA 532, 533 (2010) (noting the doctrine "applies **only** in cases alleging an unlawful refusal to bargain") (emphasis added). In fact, the Union is the party who refused to bargain (September 1, 2021 and April 22, 2022 memos from AFGE, Attachment 1). As the Union correctly pointed out, it is a ULP to insist on bargaining over a "covered by" matter to impasse. However, the Union's reference to *Social Security Administration, Baltimore and Social Security Administration, Seattle Region, 64 FLRA 17 (2009)* is not applicable because the agency did not insist on bargaining over this to the point of impasse. Instead, after the Union's refusal to bargain, Management proceeded with implementation.

The Union also claims that the agency failed to offer an opportunity to negotiate over bullying, hostile work environment, and other forms of harassment, as required by Supplement 18. However, in its memorandum issued on April 18, 2022, Management explained that the new AHP was a holistic policy that also encompassed bullying, hostile work environment and other forms of harassment, and offered an opportunity to bargain, stating in part "we remain available to negotiate the impact and implementation of this policy, particularly as it relates to bullying and hostile work environment given that these items are not addressed in the prior policy or Supplement 18, with the understanding that this will all be housed under one policy and one umbrella" (Attachment 3). Because the Union would not bargain over the new AHP, management implemented the policy on July 21, 2022.

2. Supplement 18 does not apply to the current AHP

In 2017, the parties met and negotiated the impact and implementation of an anti-harassment policy, and Supplement 18 was the result. Subsequently, the agency became aware that the draft policy would not meet the requirements of the EEOC. That draft policy was never formally implemented, and the Union was notified of this. A new more robust policy that addressed the agency's deficiencies as articulated by the EEOC was developed and later approved by the EEOC. Management issued a notice and opportunity to bargain over the impact and implementation of the new AHP, but the Union refused to bargain, claiming that the agency was bound by Supplement 18.

However, the Subject line and Scope of Supplement 18 confirms that the purpose of Supplement 18 was the "Implementation of Anti-Harassment Policy", meaning specifically the 2017 policy that was referenced throughout the supplement. There are at least 25 references to the Anti-harassment policy or "this policy" throughout the supplement, and Section 37 of Supplement 18 specifically states "This supplement will be used in addition to the policy, in cases where conflict arise, the supplement shall supersede." Moreover, Section 32 says, "The Anti-Harassment Policy will be amended to be in compliance with the intent of this supplement, see AHP Draft Sections 2.3(d) and 3.5(b)." Supplement 18's reference to specific sections of the 2017 policy demonstrates it applied only to that policy, and not subsequent policies. Because Supplement 18 was negotiated to apply to a specific policy, it does not carry over or apply to subsequent Anti-Harassment Policies such as the new AHP that was developed years later. As such, Management rejects the Union's claims that Supplement 18 applies to the new AHP.

3. Several of the claims in the grievance are untimely.

Article 51, Section 51.15 of the CBA requires that the Union file a Grievance of the Parties 45 days from the date the party "became aware or should have become aware of the matter being grieved". Many of the GOP's claims are untimely.

AFGE claims the agency's refusal to accept Supplement 18 as governing the implementation of the AHP constituted a ULP. The Union was advised that the agency was not implementing the anti-harassment policy negotiated in Supplement 18 through

discussions between AFGE and Katherine Hannah back in 2017, and on June 18, 2019 through email from ELR Specialist Yvette White to Mark Matulef, AFGE 476 Chief Steward (Attachment 4). After the agency sought to bargain over the new AHP, the Union refused, arguing the new AHP is covered by Supplement 18 and demanded the agency modify the new AHP to comply with Supplement 18. On April 18, 2022, the agency stated to the Union, "We understand your position is that the new AHP is covered by Supplement 18. We respectfully disagree with that position. We would like to bargain over impact and implementation of the new AHP and agree to a new Supplement that will apply to the new AHP." (Attachment 3). Thus, the Union knew more than 45 days before filing the GOP on June 21, 2021, that the agency did not accept Supplement 18 as governing the implementation of the AHP. The claim is therefore untimely.

AFGE also claims the agency's refusal to post Supplement 18 on HUD@work is a ULP. The Union has full access to HUD@work, and should have been aware that the Supplement was never posted shortly after the supplement was negotiated in 2017, and certainly more than 45 days before this GOP was filed on July 21, 2022. In fact, the Union knew as of September 1, 2021, that the Supplement was never posted because it stated in its response to Management's invitation to bargain that, "HUD also failed to include Supplement 18 on the HUD@Work AFGE/HUD Agreements page" (Attachment 1). Therefore, the claim is untimely because it was filed more than ten months later.

AFGE claims the agency violated Section 49.06(k) of the CBA because it refused to accept that Supplement 18 became an integral part of the parties' agreement. Similarly, AFGE argues the agency violated Section 49.06(n) by refusing to honor and comply with Supplement 18 and refusing to accept that it became enforceable upon signature. For the same reason as stated above, the Union knew on April 18, 2022, by the latest, that the agency was not applying Supplement 18 to the new AHP. The claims are therefore untimely because they were filed more than 45 days later.

AFGE claims the agency violated Sections 53.05-07. Regarding Section 53,05, the Union argues it "repeatedly advised the Agency that we do not agree to renegotiate Supplement 18, and the Agency has refused to accept that response, as indicated by its refusal to post Supplement 18." Regarding Sections 53.06 and 53.07, AFGE argues the agency violated those provisions when it failed to post Supplement 18 on HUD@work and failed to provide a copy of it to new employees within ten days of employment. As stated above, however, the Union knew well beyond 45 days prior to the filing of the GOP that the agency was seeking to negotiate a new Supplement and that the agency had not posted Supplement 18 to HUD@work nor distributed it to new employees. Accordingly, the claims are untimely.

In the GOP and amended GOP, AFGE claims the agency violated Sections 4, 16, and 35 of Supplement 18 in multiple ways. The Union claims the agency failed to negotiate procedures for bullying and hostile work environment within one year of signing Supplement 18. The supplement was signed on or around January 11, 2018 (Attachment 1). The Union therefore knew or should have known one year later, on or around January 11, 2019, that the Agency failed this requirement. In fact, the Union admitted in its April

22, 2021, response to the agency that it knew HUD failed to satisfy this requirement (Attachment 1). The claim, which was filed more than 45 days later, is therefore untimely.

AFGE also claimed the agency failed to provide the contact information for utilizing the anti-harassment policy on HUD@work. The Union cited this matter in its September 1, 2021, response to the agency (Attachment 1). The claim is untimely because the Union was aware of the matter being grieved several months before filing the grievance.

4. ***Article 49, Sections 49.02 and 49.03(4) allow the Agency to create new or revised policies and engage in mid-term bargaining with the Union over those new or revised policies at any time***

Sections 49.02 and 49.03(4) of the CBA specifically allow the agency to initiate a new policy at any time during the life of the agreement. The plain language of Section 49.03(4) clearly contemplates management issuing notice and the parties engaging in mid-term bargaining over new policies, without regard to prior existing supplements. There are no stipulations that the new policy must be in accordance with negotiated agreements over former similar policies. This section in fact waives any right that the Union may otherwise have to claim that a new policy is "covered by" an older policy's negotiated agreement. In fact, subsection 49.03(4)(a) clearly specifies that there may be an existing policy covering the same subject matter, yet Management is expressly authorized under Section 49.03(4) to issue notice to the Union, identify the changes from the old policy to the new policy, and engage in full mid-term bargaining with the Union over the new or revised policy, with no reference to "covered by" restrictions. This language is essential to allow the agency to introduce new policy updates that are necessary for operations, best reflect the mission and responsibilities of the Department, and most appropriately serve the needs of the agency and its employees.

To interpret this language otherwise would tie management's hands to only be able to introduce a new policy every few years simultaneously with term bargaining. It would not be reasonable to construe the language to mean management is barred from initiating new policies for several years, and this does not comport with the past practice of the parties. Management has issued notice during mid-term bargaining for many policies in the past, including the Space Management Handbook, for example, and the parties have negotiated successfully over these new policies, irrespective of supplements or articles that may have previously been bargained for those older policies.

While the agency has made an effort to apply Supplement 18 to the new policy, to refuse to negotiate and require us to follow Supplement 18 in its entirety with no deviation would unreasonably tie our hands and prevent us from negotiating the policy changes clearly authorized for bargaining under Section 49.03(4). The Union has refused to negotiate any revisions to Supplement 18 based on the new policy, and has included in its GOP issues as minor as proposed changes to the titles and functions of non-bargaining unit positions. Therefore, it is clear under the Union's interpretation, Management would in effect be constrained from providing any substantive changes to a policy during the life

of the contract, which repudiates what Section 49.03(4) clearly authorizes for mid-term bargaining under the parties' CBA.

5. The Agency did not repudiate Supplement 18

As outlined in Section 2 above, Supplement 18 was negotiated specifically to apply to a prior policy, therefore since the prior policy was never formally implemented, Supplement 18 is no longer applicable, and the agency cannot repudiate Supplement 18. Notwithstanding this argument, the legal requirements have also not been met to repudiate Supplement 18.

The Union claims in its amended GOP that the agency's official launch of the AHP violated various provisions of Supplement 18 in a manner that demonstrated repudiation. The agency, however, did not commit a clear and patent breach of Supplement 18 that went to the heart of the agreement.

The Union correctly points out that in order to repudiate an agreement, there must be a "clear and patent breach" that goes to the "heart of the agreement". Management did not post Supplement 18 on HUD@work in an effort to avoid confusion for employees given the fact that Supplement 18 did not apply, since the policy on which Supplement 18 was based was never formally implemented. Notwithstanding this argument, Management never expressly stated that it did not intend to comply with the "entire agreement", as AFGE stated in its GOP. In fact, in Management's proposal to the Union issued on April 18, 2022, Management recommended that the majority of the provisions from Supplement 18 carry over into a new negotiated Supplement for the new AHP (Attachment 3). Additionally, Supplement 18 does not require posting on HUD@work. Therefore, the agency did not commit a clear and patent breach of Supplement 18 that went to the heart of the agreement when it failed to post it.

6. Management did not violate Articles 49 and 53 of the CBA

AFGE claims that Management specifically violated Article 49, Sections 49.06(k) and (n) of the CBA, which state that negotiated Supplements become an integral part of the CBA and are enforceable upon signature, however, "enforceable" does not equate to "applicable". As stated above in Section 2, had the agency implemented the policy over which Supplement 18 was negotiated, Supplement 18 would be enforced. However, that policy was never formally implemented, therefore Supplement 18 also was not implemented and does not apply.

AFGE also claims that Management violated Article 53, Sections 53.05-07 regarding the reopening and distribution of Supplement 18. Section 53.05 states that the parties must mutually agree to reopen any section of the CBA. However, the parties are not reopening Supplement 18, the agency is issuing notice of a new policy which is allowed under Section 49.03(4) (See Section 4 above). The agency is clearly authorized by Section 49.03(4) to issue notice, offer an opportunity to bargain, and implement a new policy

even if that policy is similar in scope to a previous policy that was negotiated during the life of the agreement, with no restrictions from the terms of previous supplements or requirement for mutual agreement to allow for this new policy. Section 53.06 requires that any amendments become a part of the Collective Bargaining Agreement; given that this is not an amendment, this section does not appear to be applicable. Section 53.07(1) requires that Management distribute an electronic copy of the Agreement and all supplements to each employee by the effective date of the CBA, which was accomplished by the agency back in 2015 through posting on HUD@work. Section 53.07(1) also requires that new employees be provided with a copy within ten (10) days of employment. The intent of this language is that new employees be provided with a copy *of the CBA* within 10 days, which is accessible to new employees on HUD@work. While Supplement 18 is not included on HUD@work, the primary intent of the parties to provide electronic access to the CBA for existing employees and new hires has been met.

Based on the information outlined above, the agency denies the allegations made in the GOP. The agency reserves the right to make further arguments in its defense of this GOP should this matter go to arbitration.

Remedies

Notwithstanding the above objections, it should be noted that many of the requested remedies outlined under Remedy 3 of the Union's GOP can be met or have already been met as outlined below.

Per the Union's request, contact information and other relevant documents for accessing the AHP have been made available on HUD@work for all employees and will be accessible through the A to Z link, and within the HUD Learning Management System in the InCompass platform. HUD will also agree to provide the Union with quarterly aggregate statistical reporting data containing number of harassment complaints made by bargaining unit employees, upon request. Anti-harassment training has always been offered to management and employees via the annual mandatory *Workplace Harassment Prevention for Federal Employees 2.0 module*, and will continue to be provided for management and employees. Additionally, the agency has continued to offer an opportunity for the Union to bargain over the impact and implementation of the new AHP, including an opportunity to bargain over bullying, hostile work environment, and other forms of harassment that are not based on protected classes.

If the Union is not satisfied with this decision, it may invoke arbitration in accordance with the provisions of Article 52 of the CBA. If arbitration is invoked, please notify Sonya Gaither, Director, Employee and Labor Relations Division at sonya.a.gaither@hud.gov.

Attachments

1. July 21, 2022 AFGE Grievance of the Parties
2. July 28, 2022 AFGE Grievance of the Parties – Addendum
3. April 18, 2022 Email from Ginger Burnett to AFGE
4. June 18, 2019 Email from Yvette White to AFGE