



American Federation of Government Employees
National Council of HUD Locals 222

Affiliated with AFL-CIO

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May 13, 2022

MEMORANDUM FOR: Lori Michalski, Chief Human Capital Officer

Sonya Gaither, Director, Employee and Labor Relations Division

D'Andra Hankinson, Deputy Director, Employee and Labor Relations
Division

FROM:

Jerry Gross, Steward, Council 222 of HUD Locals

SUBJECT:

Unfair Labor Practice—Grievance of the Parties: Performance Award
Criteria

In accordance with Article 51, Section 51.15 of the HUD-AFGE Collective Bargaining Agreement (CBA), I am filing this Unfair Labor Practice—Grievance of the Parties (ULP-GOP) on behalf of Council 222 of HUD Locals (the Union) with you. This ULP-GOP concerns the Department of Housing and Urban Development's (the Agency's or HUD's) violation of statutory and contractual provisions, and other violations of Federal law, which require management to negotiate in good faith with a union over a change in working conditions that affect the HUD bargaining unit.

On March 31, 2022, Ryan Donaldson of the HUD Office of General Counsel informed the Union that HUD had instituted a policy of granting performance awards only to employees who completed the full rating cycle (October 1 through September 30). See Exhibit 1. This policy denies well-deserved tangible recognition to employees who earned outstanding or excellent ratings by working for HUD for much of the year. See Exhibit 2. HUD recently used this new policy to deny the well-deserved award for a performance that was rated outstanding to a former HUD employee who left HUD for another federal agency only four business days before the end of the rating cycle.

HUD never notified the Union of this new policy, denying the Union an opportunity to bargain. The Agency committed unfair labor practices by refusing or failing to bargain in good faith with the Union in violation of 5 U.S.C. §§ 7116(a)(1) and (5) over the establishment of a change in personnel policies and conditions of employment. HUD committed unfair labor practices by:

- (1) interfering with, restraining, or coercing any employee in the exercise by the employee of any right under 5 U.S.C. Chapter 71 and
- (2) refusing to consult or negotiate in good faith with a labor organization as required by 5 U.S.C. Chapter 71.

Unfair Labor Practice–Grievance of the Parties: Performance Award Criteria

The Agency also violated the CBA as follows:

(1) Article 31, Section 31.01, which requires HUD to conduct “an Incentive Awards Program, in accordance with this Agreement and HUD Handbook 2195.1, dated May, 2007.” HUD Handbook 2195.1 states on p. 24:

4-3 Performance Award

D. Eligible Employees

Bargaining Unit, and Non-Bargaining Unit employees are eligible for Performance Awards. Performance Awards may be granted only to an employee who has received an Outstanding or Excellent rating.

E. Award Criteria

The award must be made while the contributor is a Government employee. Former employees may receive Performance Awards for contributions made while they were federal employees. However, final determinations to provide such monetary payments to former employees are at the discretion of the Assistant Secretary at the Program Office level and may also be dependant upon the availability of funds. The award must be supported by a written justification documenting the contribution which merits recognition. All recommendations must be completed and submitted in HIHRTS. The general statement used is:

“Cash award based on Outstanding rating for performance cycle ending.”

The reference to “former employees” in the second and third sentences has always meant former *government* employees based on the preceding sentence (“while the contributor is a Government employee”) and the last phrase of that second sentence (“while they were federal employees”).

(2) Article 31, Section 31.03, which requires HUD to meet with the Union “to discuss the award amounts for bargaining unit employees” and to “formulate the annual performance awards for employees fairly.” It also states, “All employees who have received a summary Level 5/Outstanding performance rating for the year shall be eligible for the following [i.e., quality step increase, time off award, or cash award]. Management shall consider employee preference in selecting the award method. Final determination of the award type is made by Management.” The CBA does not provide exceptions to “all employees.”

(3) Article 49, Sections 49.01, 49.02, and 49.03, which require HUD to engage in good faith negotiations, encourage pre-decisional involvement, and require HUD to notify the Union of proposed changes in conditions of employment by providing specified information.

The Union notes that HUD’s guide for separating employees, which advises employees of numerous facts related to separating from HUD such as the loss of accrued but unused comp time, makes no mention of the denial of cash awards for separating employees.

Unfair Labor Practice–Grievance of the Parties: Performance Award Criteria

In accordance with Article 51, Section 51.01 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 Agency's delay of the implementation of the Flexiplace/remote work policy this Grievance procedure 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.

Meeting. The Union is not requesting a meeting with you for resolution pursuant to Section 51.15(2) of the CBA.

Remedies. To resolve this Unfair Labor Practice Grievance of the Parties, the Union requests the following equitable relief remedies from HUD management:

- (1) Retraction of the policy regarding separated employees until the Agency has met its notice and bargaining obligations;
- (2) Immediate processing of all awards for bargaining unit employees who received a final rating of record for Fiscal Year 2021 but who did not receive a cash award because they left HUD before the end of the Fiscal Year;
- (3) 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.
- (4) Send an Unfair Labor Practice (ULP) email posting to all AFGE bargaining-unit employees in the national consolidated bargaining unit and post a hardcopy statement on all bulletin boards at all HUD Offices represented by AFGE Council 222 that HUD will meet all its notice and bargaining obligations in compliance with the Federal Labor-Management Statute and the provisions in the HUD-AFGE Agreement cited in this Grievance. 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 the Union's attorneys' fees should the Union have to invoke and pursue Arbitration for denial of this Grievance pursuant to the Back Pay Act of 1966 at 5 U.S.C. § 5596(b)(1)(A)(ii) if any bargaining unit employee loses any pay, allowances, or differentials due to the Agency's implementation of this new policy. 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.

Unfair Labor Practice–Grievance of the Parties: Performance Award Criteria

- (6) Any other remedy available to the fullest extent of the law, rule, regulation, collective bargaining agreement (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 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 compliance with the Statute and the HUD-AFGE Agreement provisions cited above. Alternatively, should an arbitrator award my remedies requested above and the Agency files exception(s) with the Federal Labor Relations Authority (FLRA), the Union requests that the FLRA reconsider its existing case law precedent in DOJ and revert back to the abrogation test for arbitrators' authority 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)].

In accordance with Article 51, Section 51.15(3) of the CBA, your written response is required within thirty days of receipt of this grievance.

Attachments:

Exhibit 1. Ryan Donaldson email of March 31, 2022.

Exhibit 2. OCHCO Performance Award Guidance, undated.

RE: Status of OCIO Performance Case

Donaldson, Ryan E <Ryan.E.Donaldson@hud.gov>

Thu 3/31/2022 12:13 PM

To: Gross, Jerry <jerry.gross@hud.gov>; Gaither, Sonya A <Sonya.A.Gaither@hud.gov>; Fox, James M <James.M.Fox@hud.gov>; Hankinson, D'andra A <Dandra.A.Hankinson@hud.gov>

Cc: Carter, Cynthia F <Cynthia.F.Carter@hud.gov>; Javier Soto <javier.soto@afge.org>

📎 1 attachments (153 KB)

Performance Award Guidance.pdf;

Good afternoon Jerry,

My apologies, I am still working with OCIO and PMO on a daily basis to get the updated FY22 plans finalized so that notices can be sent. I was hoping that would be done no later than yesterday, and I'm still pushing to get this done by the end of this week, if at all possible.

On the performance awards for separated employees, OCIO submitted the names of all three of these employees in response to the data call and all payments have gone out already via check (through the mail). However, regarding ██████████, OCHCO has advised that he was not eligible for a performance award payment. Since his performance rating was high enough to qualify, I was looking further into the reason for his ineligibility, before I responded to you.

██████████ left HUD prior to the end of the performance period, and apparently separated employees are only eligible to receive performance awards if they have completed the full rating cycle, through September 30, 2021. **OCHCO provided the attached guidance documents and informed me that this eligibility requirement is followed each year.** I was unaware of this distinction on employees who separated from HUD before or after 9/30/21, and I truly apologize that I did not realize this sooner.

Thank you,

Ryan E. Donaldson

Trial Attorney, Personnel Law Division

U.S. Department of Housing and Urban Development

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Performance Award Guidance

Employee Performance Award Preference

The supervisor shall consult with the employee to determine his or her award preference (i.e, Cash or Time-Off In Lieu of Cash) before making the final award type selection in InCompass. Employees receiving a rating below Fully Successful will not be eligible for an award. Employees receiving a rating of Fully Successful will be eligible for a Time-Off award.

Note: The performance award type cannot be changed after the award has been paid out to the employee.

Awards Funding and Processing

Barring unforeseen circumstances, performance award payout for the **FY 2021** rating cycle will be made in the second quarter of **FY 2022**. The **FY 2021** Rating Cycle Performance Awards, Quality Step Increase Funding and Processing Guidance will be issued after the **FY 2022** budget is approved by Congress.

Separated Employee Performance Awards

Only employees that have completed the full rating cycle (**October 1, 2020 through September 30, 2021**) will be eligible to receive a performance award during the awards process. These employees must also be included in the roll-up process. Program Offices will have until **November 15, 2021**, to enter separated employee's final rating into the system.

Award Eligibility

The 2021 Appropriations Act, Sec. 226. states: None of the funds provided in this Act or any other Act may be used for awards, including performance, special act, or spot, for any employee of the Department of Housing and Urban Development subject to administrative discipline (including suspension from work), in this fiscal year, but this prohibition shall not be effective prior to the effective date of any such administrative discipline or after any final decision over-turning such discipline.

This provision remains in effect during any Continuing Resolutions (CR), assuming the CR includes standard language which contains the terms and conditions of the prior year appropriation during the Continuing Resolutions.