



American Federation of Government Employees
National Council of HUD Locals 222

Affiliated with AFL-CIO

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March 28, 2023

MEMORANDUM FOR: Sonya Gaither, Director, Employee and Labor Relations Division

FROM: Jerry Gross, Midterm Bargaining Committee Co-Chair, AFGE Council
222

SUBJECT: Request for Information: Performance Award Criteria

AFGE Council 222 (the Union) requests that the Department of Housing and Urban Development (HUD or the Agency) provide the information that is listed below pursuant to 5 U.S.C. § 7114(b)(4). This information is related to the Union's unfair labor practice grievance of the parties (ULP-GOP) regarding the Agency's performance award criteria.

Chronology

On May 13, 2022, the Union charged HUD with committing unfair labor practices and violating the HUD-AFGE Collective Bargaining Agreement (CBA) by instituting a policy of granting performance awards only to employees who completed the full rating cycle (October 1 through September 30) without notice to the Union or providing an opportunity to bargain. The requirement is not stated in the HUD policy handbook 2195.1 of July 2015, which only requires that recipients of performance awards must still be federal government employees, nor is it included in the 2015 CBA currently in effect.

On May 18, 2022, the Union filed a request for information (RFI) regarding performance award criteria.

On May 24, 2022, HUD issued a decision on the Union's unfair labor practice grievance of the parties (ULP-GOP) that addressed only the Union's "dissatisfaction" with the Agency's failure to pay a performance award to an employee who had left HUD for another federal agency only four business days before the end of the rating cycle. The response failed to address either the Agency's violation of 5 U.S.C. §§ 7116(a)(1) and (5) or the specific collective bargaining agreement (CBA) violations. Furthermore, HUD sent the decision before responding to the Union's associated request for information, which might have aided not only the Union but also the Agency in developing a more thoughtful response.

On May 31, 2022, the Union amended its ULP-GOP and requested the Agency reconsider its decision.

On June 14, 2022, the Union filed a ULP-GOP over HUD's failure to provide the information requested on May 18.

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On June 17, 2022, the Union invoked arbitration over the May 13 ULP-GOP in order to preserve the Union's rights.

On June 28, 2022, Lori Sealy, Performance Management Division director, advised the Union that she had determined management has not committed any contractual or statutory violations. She also stated that management intended to fully respond to the information request, effectively denying the June 14 ULP-GOP.

On July 7, 2022, the Union re-filed its June 14 ULP-GOP regarding HUD's failure to respond to the May 18 RFI in order to correct a typo in proposed Remedy #6.

On July 12, 2022, the labor relations specialist responsible for this matter, Bobby Allen, advised the Union that she was leaving HUD at the end of that week.

Since then, the only communication from the Agency has been from HUD's attorneys to the Union's attorney to set dates to strike for an arbitrator regarding the May 13 ULP-GOP. The Agency has still not responded to the outstanding request for information.

Request for Information

Although the Union has given the Agency the benefit of the doubt and has held off pursuing its ULP-GOP over the Agency's failure to respond to the RFI, the Union considers it necessary to receive the information requested as arbitration approaches. Therefore, please provide the information identified below pursuant to 5 U.S.C. § 7114(b)(4).

1. All information related to the establishment of the requirement that performance awards are to be granted only to employees who have completed the full rating cycle (October 1 through September 30). This information may include but is not limited to memoranda, correspondence, emails, policy announcements, guidance, and other material that addresses the establishment of the new criterion. The information requested is not related "specifically to the collective bargaining process" so it does not meet the Section 7114(b)(4)(C) exception.

Statement of Particularized Need: The Union requires this information for the following reasons:

(1) [*Why the Union needs the requested information*]: The Union requires the requested information to support its charge that HUD violated the CBA, including but not limited to Article 49, Sections 49.02 and 49.03, and committed unfair labor practices, including but not limited to violations of §§ 7116(a)(1) and (5). The Union also needs the information in order to develop its case for arbitration.

(2) [*How its use of the information relates to the Union's representational responsibilities*]: The Union will use the information as evidence in support of its grievance regarding HUD's unfair labor practices and violations of the collective bargaining agreement, laws, and regulation. The Union needs the information to assess when and to what extent HUD violated its contractual and statutory obligations, to protect the bargaining unit's rights as negotiated under the parties' collective bargaining

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agreement, to meet its preponderance of evidence burden of proof in anticipation of arbitration, and, as appropriate, to evaluate possible settlement terms. Bargaining unit employees have been financially hurt by the Agency's new policy and may continue to be harmed in the future.

2. A list of any and all bargaining unit employees throughout HUD who began work in their rated position after October 1 of the relevant fiscal year and received a performance award for that rating cycle. For each fiscal year rating cycle, please provide the following information for each employee:

- a. Name.
- b. Position.
- c. Office and geographic location.
- d. Date employee began work in the rated position.
- e. Date employee ended work in the rated position that year (if other than September 30).
- f. Type of award (e.g., cash or time off).
- g. Amount of any cash award.

Statement of Particularized Need: The Union requires this information for the following reasons:

(1) [*Why the Union needs the requested information*]: The Union requires the requested information to support its charge that HUD has violated the CBA, including but not limited to Article 49, Sections 49.02 and 49.03, and committed unfair labor practices, including but not limited to violations of §§ 7116(a)(1) and (5). The Union also needs the requested information in order to determine whether HUD failed to treat employees fairly and equitably as required by CBA Article 6, Section 6.01, and whether HUD violated any other provisions of the CBA and the Labor-Management Statute.

(2) [*How its use of the information relates to the Union's representational responsibilities*]: The Union will use the information as evidence in support of its grievance regarding HUD's unfair labor practices and violations of the collective bargaining agreement, laws, and regulation. The Union needs the information to assess when and to what extent HUD violated its contractual and statutory obligations, to protect the bargaining unit's rights as negotiated under the parties' collective bargaining agreement, to meet its preponderance of evidence burden of proof in anticipation of arbitration, and, as appropriate, to evaluate possible settlement terms. Bargaining unit employees have been financially hurt by the Agency's new policy and may continue to be harmed in the future. All of the elements requested are needed to identify specific individuals who may have worked less than the full rating period but still received performance awards, and to identify any trends.

3. A list of any and all bargaining unit employees who began work in their rated position after October 1 of the fiscal year who received a rating of fully successful or higher and did not receive a performance award for that rating cycle. For each fiscal year rating cycle, please provide the following information for each employee:

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- a. Name.
- b. Position.
- c. Office and geographic location.
- d. Date employee began work in the rated position.
- e. Date employee ended work in the rated position that year (if other than September 30).
- f. Reason (if any) for not granting award.

Statement of Particularized Need: The Union requires this information for the following reasons:

(1) [*Why the Union needs the requested information*]: The Union requires the requested information to support its charge that HUD has violated the CBA, including but not limited to Article 49, Sections 49.02 and 49.03, and committed unfair labor practices, including but not limited to violations of §§ 7116(a)(1) and (5). The Union also needs the requested information in order to determine whether HUD failed to treat employees fairly and equitably as required by CBA Article 6, Section 6.01, and whether HUD violated any other provisions of the CBA and the Labor-Management Statute.

(2) [*How its use of the information relates to the Union's representational responsibilities*]: The Union will use the information as evidence in support of its grievance regarding HUD's unfair labor practices and violations of the collective bargaining agreement, laws, and regulation. The Union needs the information to assess when and to what extent HUD violated its contractual and statutory obligations, to protect the bargaining unit's rights as negotiated under the parties' collective bargaining agreement, to meet its preponderance of evidence burden of proof in anticipation of arbitration, and, as appropriate, to evaluate possible settlement terms. Bargaining unit employees have been financially hurt by the Agency's new policy and may continue to be harmed in the future. All of the elements requested are needed to identify specific individuals who may have worked less than the full rating period but still received performance awards, and to identify any trends.

4. A list of any and all bargaining unit employees who left their rated position before September 30 of the fiscal year and who received a performance award for that rating cycle. For each fiscal year rating cycle, please provide the following information for each employee:

- a. Name.
- b. Position.
- c. Office and geographic location.
- d. Date employee began work in the rated position that year (if other than October 1).
- e. Date employee ended work in the rated position that year.
- f. Type of award (e.g., cash or time off).
- g. Amount of any cash award.

Statement of Particularized Need: The Union requires this information for the following reasons:

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(1) [*Why the Union needs the requested information*]: The Union requires the requested information to support its charge that HUD has violated the CBA, including but not limited to Article 49, Sections 49.02 and 49.03, and committed unfair labor practices, including but not limited to violations of §§ 7116(a)(1) and (5). The Union also needs the requested information in order to determine whether HUD failed to treat employees fairly and equitably as required by CBA Article 6, Section 6.01, and whether HUD violated any other provisions of the CBA and the Labor-Management Statute.

(2) [*How its use of the information relates to the Union's representational responsibilities*]: The Union will use the information as evidence in support of its grievance regarding HUD's unfair labor practices and violations of the collective bargaining agreement, laws, and regulation. The Union needs the information to assess when and to what extent HUD violated its contractual and statutory obligations, to protect the bargaining unit's rights as negotiated under the parties' collective bargaining agreement, to meet its preponderance of evidence burden of proof in anticipation of arbitration, and, as appropriate, to evaluate possible settlement terms. Bargaining unit employees have been financially hurt by the Agency's new policy and may continue to be harmed in the future. All of the elements requested are needed to identify specific individuals who may have worked less than the full rating period but still received performance awards, and to identify any trends.

5. A list of any and all bargaining unit employees who left their rated position before September 30 of the fiscal year who received a rating of fully successful or higher and did not receive a performance award for that rating cycle. For each fiscal year rating cycle, please provide the following information for each employee:

- a. Name.
- b. Position.
- c. Office and geographic location.
- d. Date employee began work in the rated position that year (if other than October 1).
- e. Date employee ended work in the rated position that year.
- f. Reason (if any) for not granting award.

Statement of Particularized Need: The Union requires this information for the following reasons:

(1) [*Why the Union needs the requested information*]: The Union requires the requested information to support its charge that HUD has violated the CBA, including but not limited to Article 49, Sections 49.02 and 49.03, and committed unfair labor practices, including but not limited to violations of §§ 7116(a)(1) and (5). The Union also needs the requested information in order to determine whether HUD failed to treat employees fairly and equitably as required by CBA Article 6, Section 6.01, and whether HUD violated any other provisions of the CBA and the Labor-Management Statute.

(2) [*How its use of the information relates to the Union's representational responsibilities*]: The Union will use the information as evidence in support of its

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grievance regarding HUD's unfair labor practices and violations of the collective bargaining agreement, laws, and regulation. The Union needs the information to assess when and to what extent HUD violated its contractual and statutory obligations, to protect the bargaining unit's rights as negotiated under the parties' collective bargaining agreement, to meet its preponderance of evidence burden of proof in anticipation of arbitration, and, as appropriate, to evaluate possible settlement terms. Bargaining unit employees have been financially hurt by the Agency's new policy and may continue to be harmed in the future. All of the elements requested are needed to identify specific individuals who may have worked less than the full rating period but still received performance awards, and to identify any trends.

6. A list of any and all bargaining unit employees who left their rated position before September 30 of the fiscal year but who did not receive a performance rating for that rating cycle. For each fiscal year rating cycle, please provide the following information for each employee:

- a. Name.
- b. Position.
- c. Office and geographic location.
- d. Date employee began work in the rated position that year (if other than October 1).
- e. Date employee ended work in the rated position that year.
- f. Reason (if any) for not providing rating.

Statement of Particularized Need: The Union requires this information for the following reasons:

(1) [*Why the Union needs the requested information*]: The Union requires the requested information to support its charge that HUD has violated the CBA, including but not limited to Article 49, Sections 49.02 and 49.03, and committed unfair labor practices, including but not limited to violations of §§ 7116(a)(1) and (5). The Union also needs the requested information in order to determine whether HUD failed to treat employees fairly and equitably as required by CBA Article 6, Section 6.01, and whether HUD violated any other provisions of the CBA and the Labor-Management Statute.

(2) [*How its use of the information relates to the Union's representational responsibilities*]: The Union will use the information as evidence in support of its grievance regarding HUD's unfair labor practices and violations of the collective bargaining agreement, laws, and regulation. The Union needs the information to assess when and to what extent HUD violated its contractual and statutory obligations, to protect the bargaining unit's rights as negotiated under the parties' collective bargaining agreement, to meet its preponderance of evidence burden of proof in anticipation of arbitration, and, as appropriate, to evaluate possible settlement terms. Bargaining unit employees have been financially hurt by the Agency's new policy and may continue to be harmed in the future. All of the elements requested are needed to identify specific individuals who may have worked less than the full rating period but still received performance awards, and to identify any trends.

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Period Covered

For items 2–6, please provide the requested information for the rating periods covered by Fiscal Years 2019, 2020, 2021, and 2022.

Deadline to Provide Requested Information

Please provide the requested information **no later than April 28, 2023**. The Agency has had a nearly identical request for almost 11 months, and thus has had ample time to compile the information requested. The Union requires time to analyze the data, and determine if more information is warranted, before preparing for arbitration.

Governing Statutes and Case Law

Requirement to provide data: 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.” The Union “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.” *National Labor Relations Board and National Labor Relations Board Union Local 6*, 38 FLRA 506 (November 28, 1990).

The Federal Labor Relations Authority (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). According to FLRA case law, information requested under 5 U.S.C. § 7114(b)(4) is not limited to documentation and can be in the form of describing information. See *U.S. Veterans Administration and AFGE Local 3314*, 28 FLRA 260, 261 (July 29, 1987).

Particularized need: For a § 7114(b)(4) information request, a union is not required in its statement of 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).

Furthermore, the Union hopes that HUD does not resort to its usual assertion that “The union has failed to establish a particularized need for the above information.” The Union has clearly articulated why the Union needs the requested information and how its use of the information relates to the Union’s representational responsibilities. As the Authority has stated: “We reject the argument that a union has failed to articulate its need with requisite specificity, where . . . 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.” *Department of Veterans Affairs, Veterans Affairs Medical Center, Decatur, Ga. and NFFE, Local 2102*, 71 FLRA 428, 430 (2019).

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Timeliness of response: 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 AFGC 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). In *Department of Transportation, Federal Aviation Administration and National Air Traffic Controllers Association Local 171*, 57 FLRA 604 (2001), even though the union had submitted its 5 U.S.C. § 7114(b)(4) information request only five days before the arbitration hearing and the agency provided the information on the day of the arbitration hearing, the FLRA found that the agency committed an unfair labor practice as its response was untimely for the union to meet its representational responsibilities.

Disclosure of management documents: The FLRA 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.” The court concurred in *NLRB v. FLRA*, 952 F.2d 523 (1992), holding that “where ‘guidance,’ ‘advice,’ ‘counsel’ or ‘training’ concerns agency action . . . and the information is requested in connection with a grievance over that action, the union may well meet the particularized-need standard where the union has a grievable complaint covering the information. . . . Another instance in which ‘guidance,’ ‘advice,’ ‘counsel’ or ‘training’ for management might be disclosable under § 7114(b)(4)(B) is when the disputed document creates a grievable action.

The FLRA reiterated its 1990 decision 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.”

The information requested in item 1 is not related “specifically to the collective bargaining process” so it does not meet the Section 7114(b)(4)(C) exception.

Personal information: 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. The information requested in items 2–6 is therefore disclosable.

Period covered: When the Union first submitted this information request in May 2022, the Union requested three years of information. As a year has gone by without a response, the Union has added the most recent complete year (2022) to the request. Pursuant to 5 CFR § 550.804(e)(2), the statute of limitations for back pay claims is six years. Thus, the Union's

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request for four years of information requested in items 2–6 is reasonable, as it is well within the six-year time limit.

Finally, you are reminded of your obligation to inform the Union explicitly if any requested information does not exist.