



American Federation of Government Employees
National Council of HUD Locals 222

Affiliated with AFL-CIO

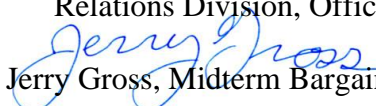
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Salvatore T. Viola
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July 7, 2022

MEMORANDUM FOR: Lori Michalski, Chief Human Capital Officer
Sonya Gaither, Director of Employee & Labor Relations, Office of
the Chief Human Capital Officer
Bobby Allen, Human Resources Specialist, Employee & Labor
Relations Division, Office of the Chief Human Capital Officer

FROM: 
Jerry Gross, Midterm Bargaining Chair, AFGE Council 222

SUBJECT: Unfair Labor Practice Grievance of the Parties: Performance
Award Criteria—Failure to Provide Information Requested
Pursuant to 5 U.S.C. § 7114(b)(4) (Amended)

AFGE Council 222 filed the original ULP-GOP on June 14, 2022. This amended ULP-GOP corrects a typographical error in Remedy #6. Additionally, this amended ULP-GOP notes that HUD denied the original ULP-GOP on June 28, 2022. **That denial, signed by Lori Sealy, failed to address a single issue raised in this ULP-GOP. The Union, therefore, requests that HUD review this ULP-GOP again before we reach the deadline for invoking arbitration.** The only changes below from our June 14 ULP-GOP are in Remedy #6 and the addition of HUD's June 28 response as an attachment; all other language below remains the same.

Pursuant to Article 51, Sections 51.01(2), 51.01(3), 51.04, and 51.15 of the 2015 HUD-AFGE Collective Bargaining Agreement (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), and 5 U.S.C. § 7116(d), I am filing this Unfair Labor Practice Grievance of the Parties (ULP-GOP) against the Department of Housing and Urban Development (HUD or the Department) on behalf of AFGE National Council 222 of HUD Locals (Council 222 or Union) concerning the Department's failure to provide information requested by the Union pursuant to 5 U.S.C. § 7114(b)(4).

Background

On May 18, 2022, the Union filed a request for information (RFI) related to HUD's performance award criteria (Attachment 1). The RFI is in support of the Union's May 13, 2022, ULP-GOP over the Department's failure to notify the Union and afford an opportunity to bargain when it established a new policy of granting performance awards only to employees who completed the full rating cycle (October 1 through September 30) (Attachment 2).

On May 24, 2022, HUD denied the Union's ULP-GOP (Attachment 3). In accordance with CBA Article 52, Section 52.02, that denial 25-day period during which the Union may invoke

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arbitration. The deadline thus is Monday, June 20, 2022, as the 25th day would have fallen on the previous Saturday.

On May 24, 2022, HUD also requested an extension of two weeks for the RFI. The Union did not grant the request because the requested information is needed not only to determine the extent to which HUD violated the CBA and the Statute but also to assess whether to invoke arbitration.

On May 31, 2022, the Union requested HUD to reconsider its denial as HUD's response failed to address either the Department's violation of 5 U.S.C. §§ 7116(a)(1) and (5) or the specific CBA violations. In that memorandum, the Union also amended its ULP-GOP and reminded the Department that it had not responded to the Union's RFI (Attachment 4). HUD separately reminded the Department that the Union did not grant any extension for the RFI, and that the Union expected a response by June 1, as stated in the RFI.

To date, HUD has not provided any information requested on May 18 (even though the two-week extension requested but not granted has lapsed) nor has the Department responded to either of the Union's May 31 communications, including the amended ULP-GOP.

Unfair Labor Practices

HUD has committed unfair labor practices by violating the Federal Service Labor-Management Relations Statute, 5 U.S.C. Chapter 71 (the Labor-Management Statute), including but not limited to the following:

1. HUD violated 5 U.S.C. § 7116(a)(1) by interfering with, restraining, or coercing any employee in the exercise by the employee of any right under this chapter.
2. HUD violated 5 U.S.C. § 7116(a)(5) by failing to negotiate in good faith by not providing information requested under 5 U.S.C. § 7114(b)(4).
3. HUD violated 5 U.S.C. § 7116(a)(8) by otherwise failing or refusing to comply with any provision of this chapter, including but not limited to failing to provide information requested under 5 U.S.C. § 7114(b)(4).

HUD violated 5 U.S.C. § 7116(a)(1), (5), and (8) by failing to provide the information that the Union initially requested on May 18, 2022, pursuant to 5 U.S.C. § 7114(b)(4).

Under 5 U.S.C. § 7114(b)(4), HUD is required to furnish to the Union "data which is normally maintained by the Agency in the regular course of business" and "reasonably available." In *Department of Justice, U.S. Immigration and Naturalization Service (INS), U.S. Border Patrol El Paso, Texas and AFGE National Border Patrol Council*, 40 FLRA 792, 804–805 (1991), the FLRA found that information was reasonably available even if the agency had to give the union 10,000 or more documents. The FLRA also 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

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records within an agency's control. *Department of Air Force, Sacramento Air Logistics Center, and AFGE, Local 1857*, 37 FLRA 987 (October 15, 1990).

The Union had requested the information be provided by June 1, 2022, so that the Union would have sufficient time to evaluate the evidence and meet the deadline to invoke arbitration if HUD denied the Union's May 13, 2022, ULP-GOP. It is an Unfair Labor Practice in violation of 5 U.S.C. § 7116(a)(1), (5) and (8) to fail to furnish in a timely manner information requested under 5 U.S.C. § 7114(b)(4) to effectuate the purposes and policies of the Statute by enabling the Union to meet its representational responsibilities. *Bureau of Prisons, Lewisburg Penitentiary and AFGE Local 148*, 11 FLRA 639, 642 (1983); *Department of Transportation, Federal Aviation Administration and National Air Traffic Controllers Association Local 171*, 57 FLRA 604, 606–607 (2001) (*NATC*); *see also Department of Defense Dependent Schools and North Germany Area Council, Overseas Education Association*, 19 FLRA 790, 791–792 (1985). In *NATC*, the FLRA found, despite the union submitting an information request only five days before the arbitration hearing and the agency providing the information on the day of the hearing, that the agency had committed an unfair labor practice by failing to provide requested documents promptly as it was untimely for the union to meet its representational responsibilities. 57 FLRA 607.

Request for Extension to Invoke Arbitration

As HUD has not furnished the documentation requested under 5 U.S.C. § 7114(b)(4) in a timely fashion, then the Union requests an extension of the 25-day deadline to invoke arbitration until at least 25 days after HUD provides the information requested.

Meeting

AFGE Council 222 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.

Remedies Requested

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

- (1) Immediate disbursement of the appropriate Outstanding performance cash award for [REDACTED], who remains a federal employee.
- (2) Rescission of HUD's policy that "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."
- (3) Provision of proper notice and an opportunity to bargain in accordance with Article 49 before implementation of any such policy.

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- (4) An Unfair Labor Practice (ULP) email posting to all AFGE 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 Department will not repudiate National Supplement 33 for remote work eligibility and implementation. 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) 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.
- (6) Payment of 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 AFGE 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..
- (7) Any other remedy available to the fullest extent of the law, rule, regulation, HUD-AFGE Agreement, 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.

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). *U.S. Department of Justice, Federal Bureau of Prisons and American Federation of Federal Employees, Local 817, Council of Prison Locals #33*, 70 FLRA 398 (2018) (*DOJ*). The remedies requested above are reasonably and proportionally related to the Supplement 33, HUD-AFGE Agreement, and statutory violations and repudiation cited above, and do not excessively interfere with the management rights provisions in 5 U.S.C. § 7106(a). The remedies merely seek Management's compliance with the HUD-AFGE Agreement, and statutory provisions identified in this Grievance of the Parties. Alternatively, should an arbitrator award the Union's remedies requested above and the Department 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 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 and American Federation of Government Employees, Council 238*, 65 FLRA 113 (2010)], and re-establish the

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broader discretion of arbitrators to fashion remedies even if it affects management's rights
[*Federal Deposit Insurance Corporation and National Treasury Employees Union, Chapter 273*,
65 FLRA 102 (2010)].

Attachments

1. Union's May 18, 2022, Request for Information: Performance Award Criteria.
2. Union's May 13, 2022, ULP-GOP: Performance Award Criteria.
3. HUD's May 24, 2022, Decision on Unfair Labor Practice Grievance (re: Performance Award Criteria).
4. Union's May 31, 2022, Reconsideration of Union's Unfair Labor Practice—Grievance of the Parties: Performance Award Criteria (Amended)
5. HUD's June 28, 2022, Decision on Unfair Labor Practice Grievance (re: Performance Award Criteria & Request for Information)



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May 18, 2022

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

On May 13, 2022, AFGE Council 222 (the Union) charged the Department of Housing and Urban Development (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 was it mentioned at the time the 2015 CBA was bargained and signed.

The Union requests that HUD provide the information identified below pursuant to 5 U.S.C. § 7114(b)(4). 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 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).

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 correspondence, emails, policy announcements, and other material that addresses the establishment of the new criterion.

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

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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 requires the information in order to evaluate whether to pursue arbitration, if necessary. Please be advised that 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).

(2) [*How its use of the information relates to the Union's representational responsibilities*]: The Union will use the information as evidence to support its Grievance of the Parties regarding OGC'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 obligations, to determine how to support and pursue its grievance, and, if necessary, to assess whether to arbitrate or settle the grievance. The Union also needs the documentation requested to meet its preponderance of evidence burden of proof that HUD OGC management in fact violated the Federal Service Labor-Management Relations Statute and the HUD-AFGE collective bargaining agreement as alleged in the Grievance of the Parties and possibly in arbitration.

2. For the FY 2021, FY 2020, and FY 2019 rating cycles, 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, title, grade.
- b. Office and geographic location.
- c. Date employee began work in the rated position.
- d. Type of award (e.g., cash or time off), and amount of award.

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.

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 employees are being treated fairly and equitably as required by CBA Article 6, Section 6.01, and whether any other

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provisions of the CBA and the Labor-Management Statute were violated. Please be advised that 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).

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3. For the FY 2021, FY 2020, and FY 2019 rating cycles, 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:

- a. Name, title, grade.
- b. Office and geographic location.
- c. Date employee began work in the rated position.
- d. Reason given (if any) for not granting award.

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and equitably as required by CBA Article 6, Section 6.01, and whether any other provisions of the CBA and the Labor-Management Statute were violated. Please be advised that 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).

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4. For the FY 2021, FY 2020, and FY 2019 rating cycles, a list of any and all employees who began work in their rated position after October 1 of the fiscal year who did not receive a rating for that rating cycle. For each fiscal year rating cycle, please provide the following information for each employee:

- a. Name, title, grade.
- b. Office and geographic location.
- c. Date employee began work in the rated position.
- d. Reason given (if any) for not issuing a rating.

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5. For the FY 2021, FY 2020, and FY 2019 rating cycles, a list of any and all bargaining unit employees who left their rated position before September 30 of the fiscal year 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, title, grade.
- b. Office and geographic location.
- c. Date employee left the rated position.
- d. Performance rating.
- e. Type of award (e.g., cash or time off), and amount of award.

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including but not limited to violations of §§ 7116(a)(1) and (5). The Union also needs the requested information in order to determine whether employees are being treated fairly and equitably as required by CBA Article 6, Section 6.01, and whether any other provisions of the CBA and the Labor-Management Statute were violated. Please be advised that 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).

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6. For the FY 2021, FY 2020, and FY 2019 rating cycles, a list of any and all bargaining unit employees who left their rated position before September 30 of the fiscal year 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, title, grade.
- b. Office and geographic location.
- c. Date employee left the rated position.
- d. Reason given (if any) for not issuing a rating.

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.

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- e. Name, title, grade.
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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 employees are being treated fairly and equitably as required by CBA Article 6, Section 6.01, and whether any other provisions of the CBA and the Labor-Management Statute were violated. Please be advised that 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).

(2) [*How its use of the information relates to the Union's representational responsibilities*]: The Union will use the information as evidence to support its Grievance of the Parties regarding OGC's unfair labor practices and violations of the collective bargaining agreement, laws, and regulation, and to determine whether to expand that grievance beyond what has been stated above. This information will be used to assess the extent to which HUD violated its contractual obligations, to determine how to support and pursue that grievance, and, if necessary, to assess whether to arbitrate or settle that grievance. The Union will also use the information to determine which, if any, past or present bargaining unit employees have been affected by HUD's new policy. The Union also needs the documentation requested to meet its preponderance of evidence burden of proof that HUD OGC management in fact violated the Federal Service Labor-Management Relations Statute and the HUD-AFGE collective bargaining agreement as alleged in the Grievance of the Parties and possibly in arbitration.

Deadline to Provide Requested Information: Please provide the requested information no later than June 1, 2022. The Union notes that it is an Unfair Labor Practice in violation of 5 U.S.C. §§ 7116(a)(1), (5) and (8) not to timely furnish documentation in response to an information request under 5 U.S.C. § 7114(b)(4), which the FLRA defines as timely to meet the Union's representational responsibilities. *See Bureau of Prisons, Lewisburg Penitentiary and AFGE Local 148*, 11 FLRA 639 (1983); *Department of Defense Dependent Schools and North Germany Area Council, Overseas Education Association*, 19 FLRA 790 (1985); and *Department of Transportation, Federal Aviation Administration and National Air Traffic Controllers Association Local 171*, 57 FLRA 604 (2001). Please be advised that in *Department of Transportation, Federal Aviation Administration and National Air Traffic Controllers Association Local 171*, 57 FLRA 604 (2001), the **FLRA found that the agency committed an Unfair Labor Practice even though the union submitted the information request under 5 U.S.C. § 7114(b)(4) only five days prior to the arbitration hearing and the agency provided the information on the day of the arbitration hearing as it was untimely for the union to meet its representational responsibilities.**

As a reminder, the Federal Labor Relations Authority held in *National Labor Relations Board*, 38 FLRA 506, 523 (1990) (NLRB), *aff'd sub nom. NLRB v. FLRA*, 952 F.2d 523 (D.C. Cir. 1992), that § 7114(b)(4)(C) "does not exempt from disclosure guidance, advice, or counsel to

Request for Information: Performance Award Criteria

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 FLRA reiterated that position in *Department of the Army, Army Corps of Engineers, Portland District, Portland, Oregon and United Power Trades Union*, 60 FLRA 413, 416 (2004), again stating explicitly that “Section 7114(b)(4)(C) does not exempt from disclosure guidance, advice, or counsel to management officials concerning the conditions of employment of bargaining unit employees.”

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).

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



American Federation of Government Employees
National Council of HUD Locals 222

Affiliated with AFL-CIO

451 7th Street, SW, Suite 3142
Washington, DC 20410

Salvatore T. Viola
President

Phone: (917) 607-1474
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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
451 7th St., SW, Rm. 2124
Washington, DC 20410
Phone: (202) 402-3655
Ryan.E.Donaldson@hud.gov

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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.




U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-3000

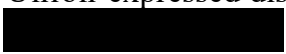
Office of the Chief Human Capital Officer

DATE: May 24, 2022

MEMORANDUM FOR: Jerry Gross
Steward
AFGE Local 476

FROM: 
Lori Sealy, Director
Performance Management Division
Office of the Chief Human Capital Officer

SUBJECT: Decision on Unfair Labor Practice Grievance
(re: Performance Award Criteria)

This memorandum concerns the negotiated grievance received filed by the American Federation of Government Employees (AFGE) Local 476 on May 13, 2022. In the grievance, the Union expressed dissatisfaction with management's failure to pay a separated employee, , a performance award for work performed during the fiscal year (FY) 2021.

The Union declined to meet with management to discuss informal resolution of the grievance. As such, I have reviewed the grievance and relevant documents provided to support the grievance and have decided on this grievance based on the information provided.

In accordance with HUD Handbook 2195.1: Incentive Awards Policy and Procedures and 5 CFR 451: Awards, a former employee **may** receive a performance award; management is not required to pay separated employees performance awards. Agency policy and federal regulation grant management discretion on whether to pay performance awards to separating employees. Management has set forth that performance awards will only be paid to separated employees who have completed the full rating cycle (October 1 through September 30).

I have determined management has not committed any contractual or statutory violations. Therefore, I hereby deny your grievance and requested reliefs.

Should you disagree with this decision, the Union may advance the grievance to the arbitration level, in accordance with the procedures outlined in Article 52 of the HUD/AFGE Agreement.



American Federation of Government Employees Attachment 4
National Council of HUD Locals 222

Affiliated with AFL-CIO

451 7th Street, SW, Suite 3142
Washington, DC 20410

Salvatore T. Viola
President

Phone: (917) 607-1474
E-mail: salafge@outlook.com

May 31, 2022

MEMORANDUM FOR: Lori Michalski, Chief Human Capital Officer

Nhien T. Nguyen, Chief Performance Officer

FROM: Jerry Gross, Midterm Bargaining Co-Chair, Council 222 of HUD Locals

SUBJECT: Reconsideration of Union's Unfair Labor Practice—Grievance of the Parties:
Performance Award Criteria (Amended)

On May 13, 2022, AFGE Council 222 of HUD Locals (the Union) filed the Unfair Labor Practice—Grievance of the Parties (ULP-GOP) concerning 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 May 24, 2022, HUD issued a decision on the Union's 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.

Although HUD already issued a decision, the Union is amending our ULP-GOP by adding the following contract violation to the three named in the ULP-GOP:

(4) Article 6, Section 6.01, which requires HUD to treat employees "fairly and equitably . . . in policies and practices concerning conditions of employment." While the Agency refused to pay a performance award to one employee who did not work for four business days of the rating cycle, the Union has reason to believe that HUD has paid performance awards to employees who began work at HUD after the start of the rating cycle. HUD thus failed to be fair and equitable in applying its new policy that employees must "have completed the full rating cycle (October 1, 2020 through September 30, 2021)" to receive performance awards—in addition failing to notify the Union and provide an opportunity to bargain before the implementation of that policy.

As noted in our May 13 ULP-GOP, no provision in Article 51 or Article 52 of the Agreement prohibits changes to the alleged violations of the collective bargaining agreement, law, rule, or regulation.

These are serious matters that the Union is willing to pursue as necessary. The Union therefore requests that you reconsider your May 24 response to the Union's ULP-GOP as amended. I would appreciate a reply by June 7, 2022.



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-3000

Office of the Chief Human Capital Officer

DATE: June 28, 2022

MEMORANDUM FOR: Jerry Gross
Steward
AFGE Local 476

FROM: Lori Sealy, Director
Performance Management Division
Office of the Chief Human Capital Officer

SUBJECT: Decision on Unfair Labor Practice Grievance
(re: Performance Award Criteria & Request for Information)

This memorandum concerns the negotiated grievance received filed by the American Federation of Government Employees (AFGE) Local 476 on June 14, 2022. In the grievance, the Union expressed dissatisfaction with management's failure to pay a separated employee, [REDACTED], a performance award for work performed during the fiscal year (FY) 2021 and failure to respond to the Union's information request, submitted on May 18, 2022 and amended grievance filed on May 31, 2022.

The Union declined to meet with management to discuss informal resolution of the grievance. As such, I have reviewed the grievance and relevant documents provided to support the grievance and have decided on this grievance based on the information provided.

As stated in our prior grievance response, and in accordance with HUD Handbook 2195.1: Incentive Awards Policy and Procedures and 5 CFR 451: Awards, a former employee **may** receive a performance award; management is not required to pay separated employees performance awards. Agency policy and federal regulation grant management discretion on whether to pay performance awards to separating employees. Management has set forth that performance awards will only be paid to separated employees who have completed the full rating cycle (October 1 through September 30).

I have determined management has not committed any contractual or statutory violations. Therefore, I hereby deny this portion of your grievance and requested relief.

Regarding the Union's claim that management failed to properly respond to the Union's request for information, management intends to fully respond to the information request. Management understands the union's concern about being able to timely invoke arbitration, if

desired, and agree the timeline to file for arbitration shall begin on the first day after receipt of the information response.

Should you disagree with this decision, the Union may advance the grievance to the arbitration level, in accordance with the procedures outlined in Article 52 of the HUD/AFGE Agreement.