American Federation of Government Employees
National Council of HUD Locals 222

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MEMORANDUM FOR: Lori Michalski, HUD Chief Human Capital Officer
Sonya Gaither, HUD Director of Employee & Labor Relations

FROM: Salvatore T. Viola, President
AFGE National Council of HUD Locals No. 222

SUBJECT: Unfair Labor Practices (ULPs) and Collective Bargaining Agreement (CBA) Violations Grievance of the Parties Concerning Preemptive Exclusion for Remote Work Eligibility

Subject Matter and Scope of Grievance

Pursuant to Article 51, Sections 51.01(2), 51.01(3), 51.04, and 51.15 of the 2015 HUD-AFGE 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)[1], and 5 U.S.C. § 7116(d)[2], I am filing this Unfair Labor Practice (ULP) Grievance of the Parties (GOP) against the Department of Housing and Urban Development (HUD, the Department, the Agency, or Management) on behalf of AFGE National Council of HUD Locals No. 222 (AFGE Council 222 or the Union) and affected AFGE bargaining unit employees concerning the Department's preemptive exclusions that broad groups of AFGE bargaining unit employees who constitute the vast majority of the bargaining unit are ineligible for remote work without appropriate consideration

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

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

of the employees' duties, assignments, and functions and without addressing how those determinations would specifically affect the Department's business needs.

This GOP expressly excludes any individual employee who already filed or files an individual grievance beginning on May 24, 2024, after the Office of Chief Human Capital Officer (OCHCO) sent an email on that same day entitled "Flexiplace Updates" stating: "Nothing precludes employees from submitting a request for a different Flexiplace option (i.e., telework, remote work) than the one identified in the notification letter." OCHCO sent this May 24, 2022 "Flexiplace Updates" email after I held a meeting with HUD Deputy Secretary, Adrianne Todman, on May 23, 2022, in which I informed the Deputy Secretary that the letters, memoranda and emails that the vast majority of AFGE bargaining unit employees began receiving on May 18, 2022, that their positions were only eligible for routine telework were in repudiation and violation of National Supplement 33 on the Flexiplace Policy. Supplement 33 is attached as Exhibit 1. Deputy Secretary Todman agreed with me that all employees should be allowed to apply for remote work; thus, on May 24, 2022, OCHCO sent the "Flexiplace Updates" email allowing all employees to apply for remote work. Attached as Exhibit 2. This GOP also expressly excludes the small minority of bargaining unit employees in the Departmental Enforcement Center and Single Family Housing Quality Assurance Division who are properly allowed to work remotely.

The Union's present ULP-GOP concerns the Department's general policies and actions that violate and repudiate the Parties' agreements, resulting in Unfair Labor Practices (ULPs), as well as violations of Supplements 33 and 34 and the HUD-AFGE Agreement (Agreement, collective bargaining agreement, or CBA) for any affected AFGE bargaining unit employees who were denied the opportunity to work remotely and who did not and/or do not file individual grievances. After OCHCO's May 24, 2024 "Flexiplace Updates" email, in bad faith HUD went through the motions of allowing AFGE bargaining unit employees to apply for remote work, however, all Program Offices except the small organizations of the Departmental Enforcement Center and Single Family Housing Quality Assurance Division[3], again cited the preemptive exclusion that the vast majority of AFGE bargaining unit employees' positions were not eligible for remote work and were only eligible for routine telework as previously determined and communicated by letters, memoranda, and emails beginning on May 18, 2022. *See* attached Exhibit 3 for samples of the denial reasons given in the Department's DocuSign Flexiplace application system.

Potential Threshold Issues

The scope of this GOP only covers affected AFGE bargaining-unit employees who received denials of their most recent Flexiplace remote work applications beginning on May 24, 2022, and who did not and/or do not file individual grievances. Flexiplace applications may be submitted at any time in accordance with Section 23 of Supplement 33. (*See* Exhibit 1) Employees and the Union may file a grievance within 45 days on any matter relating to the employment of any employee or any violation, misinterpretation, or misapplication of any provision of the HUD-

[3] The Departmental Enforcement Center and Single Family Housing Quality Assurance Division had already determined that their employees would be allowed to work remotely prior to OCHCO's March 24, 2022 "Flexiplace Updates" email.

AFGE Agreement, law, rule or regulation that affect conditions of employment in accordance with Article 51, Sections 51.01, 51.06(1), 51.13 and 51.15(1) of the CBA and the Federal Service Labor-Management Relations Statute (Statute) at 5 U.S.C. § 7103(a)(9)(B) and (C). Employees and the Union may also file a continuing violation grievance at any time pursuant to Article 51, Section 51.06(1) of the Agreement.[4] Therefore, Article 51, Section 51.05(15) of the HUD-AFGE Agreement for grievance exclusion does not apply as this GOP expressly excludes from the scope any employees who filed and/or files individual grievances.

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

> CBP's management's rights arbitrability exceptions are misplaced because they ignore applicable Authority precedent. The Authority has consistently held that the management's rights provisions of Section 7106 of the Statute do not provide a basis for finding grievances non-arbitrable. *See*, e.g., *United States Depot of the Navy, Pac. Missile Test Ctr., Point Mugu, Cal.*, 43 FLRA 157, 159 (1991); *United States Information Agency*, 32 FLRA 739, 748-49 (1988); *Newark Air Force Station*, 30 FLRA 616, 631-35 (1987) (*Newark*); *Marine Corps Logistics Support*

[4] Elkouri and Elkouri's <u>How Arbitration Works</u> (Edited by Kenneth May, Arlington, VA: Bloomberg BNA Books, Seventh Edition, 2012), states the following regarding continuing violations:

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

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

> *Base, Pac., Barstow, Cal.*, 3 FLRA 397, 398-99 (1980) (*Barstow*). As the Authority stated in *Newark*: The proper phase of the arbitration proceeding in which to determine the impact or application of Section 7106 is not at the outset so as to preclude by law an arbitrator from having jurisdiction over the matter. Rather, the determination as to the impact or application of Section 7106 is to be made in connection with the arbitrator's consideration of the substantive issue presented by the grievance and any possible remedy. *Newark*, 30 FLRA at 634. See also *Barstow*, 3 FLRA at 399 (nothing in Section 7106 precludes an arbitrator from reaching the merits of a grievance alleging violations of provisions of the collective bargaining agreement). Consequently, insofar as CBP's exceptions contend that the grievance in this case is not arbitrable based on management's rights under Section 7106 of the Statute, the exceptions do not provide a basis for finding the award deficient.

Recent FLRA case law confirmed that bargaining-unit employees may file grievances concerning violations of law and procedures or appropriate arrangements in collective bargaining agreements negotiated pursuant to the Statute at 5 U.S.C. Section 7106(b)(2) and (3). An arbitrator has the authority to find a violation of law or collective bargaining agreement provision and award a remedy even if they affect management's rights as long as the remedy reasonably and proportionally relates to the violation, and the violation interpretation does not excessively interfere with management's rights under 5 U.S.C. Section 7106(a). *See U.S. Department of Justice (DOJ), Federal Bureau of Prisons (FBP) and American Federation of Federal Employees (AFGE), Local 817, Council of Prison Locals #33*, 70 FLRA 398 (February 22, 2018). In the instant GOP, the Union is trying to hold the Department accountable for complying with the Federal Service Labor-Management Relations Statute (Statute) due to its bad faith, surface bargaining and repudiation in violation of 5 U.S.C. § 7116(a)(1) and (5) and the procedure and appropriate arrangement provisions in Supplement 33 and the HUD-AFGE Agreement negotiated pursuant to 5 U.S.C. § 7106(b)(2) and (3) of the Statute cited in this Grievance of the Parties.

Should the Department argue that the number of telework days that employees are allowed to work excessively interferes with its management's rights in 5 U.S.C. § 7106(a), please be advised that the Washington, D.C. Circuit Court of Appeals in *National Treasury Employees Union (NTEU) v. Federal Labor Relations Authority (FLRA)*, 20-1148 (Washington, D.C. Circuit Court of Appeals: June 22, 2021) overturned and remanded the Federal Labor Relations Authority's decision in *NTEU and U.S. Department of Agriculture, Food and Nutrition Service*, 71 FLRA 703 (April 21, 2020) (*NTEU*) that the union's proposal to expand the number of days of telework was non-negotiable and interfered with management's rights in 5 U.S.C. § 7106(a). Even the FLRA in *NTEU* ruled that the plain wording of the Telework Enhancement Act of 2010 did not provide agencies sole and exclusive discretion to determine telework policies. *See NTEU and U.S. Department of Agriculture, Food and Nutrition Service*, 71 FLRA 703, 704-705 (April 21, 2020).

In accordance with U.S. Supreme Court case law precedent on procedural and substantive arbitrability from over sixty years ago in the Steel-workers Trilogy of 1960,[5] while it has been modified somewhat since then, the basic and long-standing tenet of the U.S. Supreme Court still being followed by arbitrators is that doubts concerning the arbitrability of a dispute concerning interpretation of negotiated CBA procedural language should be resolved in favor of arbitration. This doctrine of presumptive arbitrability standard continues to prevail.

Unfair Labor Practices (ULPs)

Through its actions, the Department committed multiple Unfair Labor Practices (ULPs) in violation of 5 U.S.C. § 7116(a)(1) and (5) by engaging in bad-faith, surface bargaining and repudiating and violating multiple provisions of National Supplement 33, Implementation of the Department of Housing and Urban Development's (HUD's) Proposed Flexiplace Policy (April 12, 2022), attached as Exhibit 1. The Department's negotiators executed National Supplement 33 knowing that Management had no intention of approving the vast majority of employees for remote work and immediately repudiated and violated multiple provisions of National Supplement 33 as explained below. By its repudiation of National Supplement 33, the Department also violated and repudiated the Parties' CBA at Article 6, Section 6.01.

Under 5 U.S.C. § 7116(a)(5), the Department is prohibited from refusing to consult or negotiate in good faith with a labor organization as required by 5 U.S.C. Chapter 71; the violation of subsection (5) is an automatic violation of subsection (1), which prohibits the Department's interference with, restraint of, or coercion of any employee in the exercise of any right under Chapter 71. By refusing to honor the Parties' agreement to National Supplement 33, and the associated violation of CBA Section 6.01, the Department repudiated those agreements. Repudiating a labor agreement violates 5 U.S.C. § 7116(a)(1) and (5).

The Department clearly and obviously violated Sections 14 and 34 of National Supplement 33, two provisions that go to the heart of the Supplement. The same is true of CBA Article 6, Section 6.01. Furthermore, the Department's violations were not one-time or occasional violations but rather wholesale rejections of those provisions. The Department's actions thus meet the Federal Labor Relations Authority's two-pronged test for analyzing repudiation allegations, in which it examines: 1) the nature and scope of the alleged breach of an agreement (was the breach clear and patent?); and 2) the nature of the agreement provision allegedly breached (did the provision go to the heart of the parties' agreement?). *Department of the Air Force, 375th Mission Support Squadron, Scott AFB*, 51 FLRA 858 (1996).

National Supplement 33, Section 14, states:

> Eligibility. All HUD positions and employees should normally be eligible to participate in a Flexiplace arrangement in accordance with Agency Policy, applicable regulations, and the CBA. HUD shall include eligibility information in all position vacancy announcements. The Parties agree that Flexiplace eligibility is based on objective,

[5] *See United Steelworkers v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steel-workers v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960); *United Steel-workers v. Enterprise Wheel & Car Corporation*, 363 U.S. 593 (1960); and, progeny.

> equitable guidelines, function-based criteria, and shall not be arbitrary and capricious. HUD shall notify current employees of their eligibility status upon their application for a Flexiplace arrangement. If an employee is determined to be ineligible, Management shall, at the time the determination is made, provide the employee in writing with the reason(s) for ineligibility.

Section 14 is clearly a core element of National Supplement 33, as any agreement about Flexiplace policies—i.e., those policies that govern remote work and telework—would have at its heart the guidelines for employee eligibility to participate. There is no point to negotiating an agreement about the policy if employees are ineligible to participate.

National Supplement 33, Section 34, says:

> Basis for Denial, Modification, or Termination of Remote Work Arrangement. Any decision by Management to deny, modify, or terminate a remote work arrangement must be based on business needs, misconduct, or performance, not arbitrary or capricious reasons. Management shall provide the denial/modification/termination and the reason for the action in writing. Management shall not terminate, modify, or deny a remote work arrangement as a form of punishment or managerial personal preference.

Like Section 14, Section 34 is a provision regarding the basis for management actions related to employee remote work arrangements; it is at the heart of the agreement related to implementing remote work within the Department. Without such a provision, management actions based on irrelevant, arbitrary, or capricious reasons or on managers' preferences would negate the point of the agreement, rendering much, if not all, of the rest of the Supplement moot.

Similarly, Article 6, Section 6.01, is at the heart of the Parties' CBA. Section 6.01 provides, "Employees shall be treated fairly and equitably in the administration of this Agreement and in policies and practices concerning conditions of employment." Fair and equitable treatment of employees is a critical element of the Parties' CBA; it is the basis on which all other provisions are built. Rejection of this provision essentially rejects all other negotiated employee rights.

On or about May 18, 2022, Management began distributing letters, memoranda, and emails to the vast majority of AFGE bargaining unit employees informing them that Management had determined that their positions were eligible for only routine telework. The Department sent these notices to all the employees of entire organizations or Program Offices, such as all Public and Indian Housing Operations employees, all Multifamily Housing employees, all Community Planning and Development employees, etc. The determinations used boilerplate language provided by the Office of the Chief Human Capital Officer (OCHCO), which was the organization primarily responsible for negotiating the National Supplement 33, Flexiplace Policy. The boilerplate language in the letters sent to bargaining unit personnel states:

> We are excited to move HUD forward under the new Flexiplace Program, which provides expanded options for workplace flexibilities. Upon completion of an initial assessment of the positions within our program office, we have determined that your position is eligible for the option of: routine telework. This is the maximum flexibility your position is

> eligible for at this time. We will continue to assess our business needs and functions of positions on an ongoing basis to determine if a different level of flexibility should be authorized in the future.

The letters, memoranda, and emails uniformly offered "the option of: routine telework" and—with rare exceptions—did not offer the option of remote work. One organization openly declared in an email, "We did not designate any . . . positions for remote work." The Union has heard of only two small organizations that may have declared its employees eligible for remote work.

By providing a template that gave managers a means of generating wholesale denials of remote work eligibility, OCHCO and the Department repudiated Supplement 33, Sections 14 and 34, and CBA Article 6, Section 6.01. OCHCO chose not to direct managers to make their decisions about individual employees' requests to participate in remote work based on objective, function-based criteria related to each employee's duties and assignments and on actual business needs rather than on managerial preferences, and to provide employees with the reason(s) they are ineligible for remote work. In short, OCHCO ignored the very language that it had just negotiated and to which it had agreed in Supplement 33. OCHCO's delivery of improper guidance to managers in contravention of Supplement 33 also violated CBA Section 6.01 because the organization-wide denials of remote work eligibility treat employees inequitably and unfairly by interfering with their rights under the Parties' agreements.

The Department's guidance to managers also demonstrates that the Department engaged in surface bargaining over remote work with no real intent to implement it Department-wide in order to gain the Union's agreement to the implementation of space sharing policies. Many of the preemptive eligibility letters informed employees that they may be subject to space sharing rather than having permanently assigned workstations in HUD offices:

> Please keep in mind that in the future, those employees reporting to a HUD office 6 or more days per pay period will be entitled to a dedicated office space, but those reporting to a HUD office 5 or fewer days a pay period may need to participate in a shared workspace arrangement like hoteling or hot desking. This will be implemented incrementally in most locations and after completing negotiations with our Union partners.

The Union consistently objected to concepts such as hoteling and hot desking since the Department's initial implementation of telework in 2010; the Parties' 2015 CBA specifically prohibited the implementation of space sharing policies. Before National Supplements 33, 34, and 35 went into effect, employees who teleworked three days per week, like all other personnel, were entitled to have a permanently assigned workstation or office. *See* attached National Supplement 34: Amendments to Article 18 (Telework) as Exhibit 4 and National Supplement 35: Amendments to Article 57 (Space Management) as Exhibit 5. The only way that the Union would be willing to discuss a "covered by" policy was in exchange for the Department's agreement to implement on a permanent basis the remote work in which employees had engaged for over two years during the COVID-19 pandemic. The inclusion of the reference to space sharing in the blanket denial notices indicates that the Department's goal in the Parties' Flexiplace negotiations addressing remote work and expanded telework was to reduce employee

access to HUD office space, a topic that the Department raised during the remote work discussions.

In order to reach agreement on Supplement 33, the Department required the Union to also negotiate National Supplement 34, Amendments to Article 18, Telework, in the 2015 AFGE-HUD Collective Bargaining Agreement, and National Supplement 35, Amendments to Article 57, Space Management, in the 2015 AFGE-HUD Collective Bargaining Agreement. Both Supplements 34 and 35 addressed topics that were "covered by" the Parties' CBA. It is an Unfair Labor Practice to insist on bargaining to impasse a matter already covered by a collective bargaining agreement. *See Social Security Administration, Baltimore and Social Security Administration, Seattle Region*, *and AFGE Local 3937*, 64 FLRA 17 (2009). At the Department's insistence, Supplements 34 and 35 were negotiated and executed at the same time and by the same negotiators as Supplement 33. National Supplement 35 addressed the Parties' preliminary agreements regarding space sharing, including the policy that any bargaining unit employee who is not working in the office at least six days per pay period—e.g., those who telework three days a week—will be subject to space sharing arrangements. The Union would not have given up the long-established policy of each employee having a permanently assigned workstation or office without the assurance that it would gain a greater employee benefit. This was especially true given employee concerns about contracting disease through contact with frequently touched surfaces such as shared telephones and desks; the Union understood that concerned employees would be able to avoid illness by working remotely. The Department's subsequent wholesale rejection of remote work for almost its entire employee body indicates that the Department bargained in bad faith during the Parties' Flexiplace negotiations. The Department will reduce office space by enforcing space sharing for employees who telework three days a week but will not permit employees to work remotely in actuality.

The boilerplate used to inform employees that they are eligible only for routine telework did not apply objective, function-based criteria or provide specific reasons based on actual business needs to deny eligibility for remote work. The use of identical language across HUD offices shows that the Department failed to consider the specific positions, duties, and assignments of individual employees. A preemptive exclusion of eligibility for remote work for large groups of employees without consideration of individual employees' duties and situations is, by its very nature, arbitrary and capricious. This is especially true after HUD employees successfully performed their duties, responsibilities, and assignments from their remote (home) worksites since March of 2020 due to the COVID-19 pandemic. The broad, nearly universal preemptive exclusion of bargaining unit employee eligibility for remote work is arbitrary and capricious, violates and repudiates Supplement 33 and the HUD-AFGE Agreement, and demonstrates that the Department engaged in bad-faith bargaining over National Supplement 33 with no intent to implement remote work for the AFGE bargaining unit employees.

In accordance with Article 51, Section 51.01(2) and (3) of the HUD-AFGE Agreement and the Federal Service Labor-Management Relations Statute at 5 U.S.C. § 7103(a)(9)(B) and (C), AFGE Council 222 reserves the right to grieve and raise any violation, misinterpretation, or misapplication of any provision of the HUD-AFGE Agreement, law, rule or regulation concerning AFGE bargaining-unit employees' eligibility and ability to work remotely in this Grievance of the Parties and/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.

Supplements 33 and 34 and HUD-AFGE Agreement Violations

On or about May 18, 2022, employees began receiving email communications with letters and memoranda stating that Management determined that their positions were only eligible for routine telework. Only one of which the Union is aware of that provided any reason at all before the employees were even allowed to apply for remote work. (*See* email of Ethan D. Handelman, Deputy Assistant Secretary of Multifamily Housing, attached as Exhibit 6)

Notice the boilerplate language used for most of the determinations in the May 18, 2022, memoranda cited above in the ULP section: "Upon completion of an initial assessment of the positions within our program office, we have determined that your position is eligible for the option of: routine telework. This is the maximum flexibility your position is eligible for at this time." Management did not even bother to give a reason for excluding positions from remote work, which violated Sections 14 and 34 of National Supplement 33.

National Supplement 33, Section 14, states, "**All HUD positions and employees should normally be eligible** to participate in a Flexiplace arrangement in accordance with Agency Policy, applicable regulations, and the CBA . . . The Parties agree that Flexiplace eligibility is based on objective, equitable guidelines, function-based criteria, and shall not be arbitrary and capricious . . . If an employee is determined to be ineligible, Management shall, at the time the determination is made, provide the employee in writing with the reason(s) for ineligibility" (emphasis added).

National Supplement 33, Section 34, says, "Any decision by Management to deny, modify, or terminate a remote work arrangement must be based on business needs, misconduct, or performance, not arbitrary or capricious reasons. Management shall provide the denial/modification/termination and the reason for the action in writing."

Only the communication of Ethan D. Handelman, Deputy Assistant Secretary of Multifamily Housing, in Exhibit 6 provided any reason at all for denial of eligibility for remote work: "We did not designate any Multifamily positions for remote work, because we concluded that regular in-person collaboration, site visits, and meetings for building and sustaining relationships are essential to our duties." Even these reasons provided violated Sections 14 and 34 of National Supplement 33. Site visits are unrelated to whether an employee works remotely or at a HUD office and are therefore irrelevant to a Flexiplace request. If an employee needs to make site visits, she or he could (and ordinarily would) depart from the remote work duty station to go directly to the third-party's site (e.g., a state or local government agency, nonprofit organization, public housing authority, or bank) without first reporting to a HUD office. Mr. Handelman and Management failed to identify any specific task, duty, or assignment that can be performed only in the HUD office. Mr. Handelman and Management also failed to present any evidence or justification to support their claim that in-person collaboration and meetings provide better or more efficient and effective means of accomplishing work than using available technology, such as Microsoft Teams, to meet and collaborate as occurred for over two years during the

Coronavirus pandemic since March of 2020 when the Department authorized mandatory and maximum telework for employees to work at home on a full-time basis. Management's claim also contravenes National Supplement 34, Section 5, amending Article 18, Section 18.04 of the HUD-AFGE Agreement. Subsection (9) provides, "Communication levels and the methods of communication between employees and supervisors are expected to remain the same whether an employee is working in the office or teleworking." (*See* Exhibit 4 for National Supplement 34) Thus, decisions regarding in-office and remote work or telework should not be based on communications.

Employees are able to communicate equally effectively with other personnel and customers regardless of whether it is by phone, virtual meetings, or in person. HUD employees interact with others by email and/or telephone whether they are in the HUD office or working from an alternative or remote worksite. HUD is a passthrough agency receiving Congressional appropriations to provide funding to banks for mortgage insurance, grants for state and local governments, public housing authorities, and nonprofit organizations, etc. HUD employees do not meet daily at HUD offices with representatives and staff of HUD-funded entities such as banks, state and local governments, public housing authorities, and nonprofit organizations. The communications between HUD employees and representatives and staff of HUD-funded entities are normally on a daily basis by letter, phone, and email. The very little interaction that HUD employees have with walk-in customers directly from the general public is handled by the HUD Office of Field Policy Management (FPM) whose receptionist staff provide referral phone numbers and addresses for HUD-funded entities such as banks, state and local governments, public housing authorities, and nonprofit organizations, etc.

Management's arbitrary and capricious pre-emptive exclusion of employees' eligibility for remote work also demonstrates management's unwillingness to treat remote workers the same as in-office personnel in violation of National Supplement 33, Section 10, and the Telework Enhancement Act of 2010 at 5 U.S.C. § 6503(a)(3). Section 10 provides, "Similar to 5 U.S.C. § 6503(a)(3), Management shall ensure that all participants in Flexiplace programs shall be treated the same as non-participating (in-office) employees for purposes of . . . work requirements or other acts involving managerial discretion." *See* Exhibit 1, page 3. That provision envisions the ability of employees to perform work remotely and on an equal basis with any in-office personnel absent any showing of specific duties that can only be performed in a HUD office. Additionally, the pre-emptive exclusion failed to consider adjusting any of the duties, if such adjustment were necessary, to allow employees to participate in remote work, in violation of Supplement 33, Section 16. *See* Exhibit 1, page 4.

The boilerplate exclusion of eligibility for remote work and eligibility for only routine telework without providing any reason why employees cannot work remotely failed to consider individual employee requests and the specific position, duties, and assignments of employees. By ignoring individual employee circumstances, HUD violated the provisions of National Supplement 33, Implementation of the Department of Housing and Urban Development's (HUD's) Proposed Flexiplace Policy, to the HUD-AFGE Collective Bargaining Agreement, including, but not limited to Sections 14, and 34, etc. Section 14 of National Supplement 33, contrary to HUD's actions, starts with a presumption of eligibility for all positions and employees and requires decisions about ineligibility to be made based on individual situations: "**All HUD positions and**

employees should normally be eligible to participate in a Flexiplace arrangement in accordance with Agency Policy, applicable regulations, and the CBA . . . The Parties agree that Flexiplace eligibility is based on objective, equitable guidelines, function-based criteria, and shall not be arbitrary and capricious… If an employee is determined to be ineligible, Management shall, at the time the determination is made, provide the employee in writing with the reason(s) for ineligibility." (emphasis added) A pre-determined exclusion of eligibility for remote work by position without consideration of individual employees' duties and situations is, by its very nature, arbitrary and capricious. This is especially true after HUD employees have been successfully working remotely for over two years during the COVID-19 pandemic.

The boilerplate exclusion of eligibility for remote work and determination of eligibility for only routine telework without providing any reason why employees cannot work remotely violates Supplement 33, Section 14, which requires that eligibility decisions be based on "objective, equitable guidelines, function-based criteria, and shall not be arbitrary and capricious," and Section 34, which states, "Any decision by Management to deny, modify, or terminate a remote work arrangement must be based on business needs, misconduct, or performance, not arbitrary or capricious reasons. Management shall provide the denial/modification/termination and the reason for the action in writing." Management's decisions failed to identify the agency's business needs specific to each employee's position and the functions they perform that can only be carried out in a HUD office. Therefore, Management's decision was vague, subjective, and not based on objective, equitable guidelines, and function-based criteria.

HUD employees' ability to continue carrying out the mission of the Agency during the Coronavirus pandemic by employees successfully performing their duties, responsibilities, and assignments from their remote (home) worksites for over two years since March of 2020 demonstrates that Management's pre-emptive exclusion of almost all AFGE bargaining-unit positions from eligibility for remote work is arbitrary and capricious in violation of Supplement 33 and the HUD-AFGE Agreement.

By denying the vast majority of AFGE bargaining-unit employees the opportunity to work remotely, Management also is being disrespectful, not fair nor equitable, not constructive, not cooperative, not collaborative, undermining employee morale, and denying AFGE bargaining-unit employees the opportunity to formulate and implement personnel policies and practices regarding their conditions of employment. Therefore, these are violations of the Preamble and Article 6, Sections 6.01 and 6.05 of the HUD-AFGE Agreement. HUD is depriving employees of high quality communication between managers and employees, and improvement of the work environment and conditions to create a workplace of the future further violating the HUD-AFGE Agreement at Article 59, Sections 59.01 and 59.03.

In accordance with Article 51, Section 51.01(2) and (3) of the HUD-AFGE Agreement and the Federal Service Labor-Management Relations Statute at 5 U.S.C. § 7103(a)(9)(B) and (C), AFGE Council 222 reserves the right to grieve and raise any violation, misinterpretation, or misapplication of any provision of the HUD-AFGE Agreement, law, rule or regulation concerning AFGE bargaining-unit employees' eligibility and ability to work remotely in this Grievance of the Parties and/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

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 consideration (or reconsideration) and approval of AFGE bargaining-unit employees' requests for remote work in accordance with National Supplement 33, and a written response within the timeframes specified by and in accordance with the provisions of Supplement 33. That the arbitrator retain jurisdiction for implementation of the remedies for review and approval of employees' remote work applications in accordance with National Supplement 33.

(2) Adjustment of AFGE bargaining-unit employees' duties to allow for participation in remote work pursuant to Section 16 of National Supplement 33, if applicable and appropriate.

(3) In accordance with Supplement 33, Section 29, immediate approval of AFGE bargaining-unit employees for 8 days per pay period of telework pending approval of employees' remote work requests.

(4) Management shall send 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 as a result of Management's failure to allow employees to work remotely. Please be advised that employees' loss of annual, sick leave or other forms of leave due to denial of remote work is recoverable and qualifies for attorneys' fees as leave is considered a pay, allowances, or differentials under the Back Pay Act of 1966 in accordance with U.S. Office of Personnel Management (OPM) definition regulations at 5 CFR § 550.803 (Subpart H-Back Pay). "*Pay, allowances, and differentials* means pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment."

(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 it affects management's rights as long as the remedy reasonably and proportionally relates to the violation, and the violation interpretation does not excessively interfere with management's rights under 5 U.S.C. Section 7106(a). *See U.S. Department of Justice (DOJ), Federal Bureau of Prisons (FBP) and American Federation of Federal Employees (AFGE), Local 817, Council of Prison Locals #33*, 70 FLRA 398 (February 22, 2018) (*DOJ*). The remedies requested above are reasonably and proportionally related to the Supplements 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 Supplement 33, 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), AFGE Council 222 requests that the FLRA reconsider its existing case law precedent in *DOJ* and revert back to the abrogation test for arbitrators' authority to fashion remedies to enforce appropriate-arrangement provisions negotiated pursuant to 5 U.S.C. § 7106(b)(3) even if it affects management's rights at § 7106(a) [*Environmental Protection Agency (EPA) and American Federation of Government Employees (AFGE), Council 238*, 65 FLRA 113 (September 29, 2010)], and re-establish the broader discretion of arbitrators to fashion remedies even if it affects management's rights [*Federal Deposit Insurance Corporation (FDIC) and National Treasury Employees Union (NTEU), Chapter 273*, 65 FLRA 102 (September 29, 2010)].

Attachments:

Exhibit 1: Supplement 33, Implementation of the Department of Housing and Urban Development's (HUD's) Proposed Flexiplace Policy

Exhibit 2: May 24, 2022, Office of Chief Human Capital Officer (OCHC) "Flexiplace Updates" email

Exhibit 3: Sample of employee denials of remote work in HUD's DocuSign Flexiplace application system

Exhibit 4: National Supplement 34: Amendments to Article 18 (Telework).

Exhibit 5: National Supplement 35: Amendments to Article 57 (Space Management)

Exhibit 6: May 18, 2022, email of Ethan D. Handelman, Deputy Assistant Secretary of Multifamily Housing

cc: AFGE Council 222 Executive Board and Stewards
AFGE Local Presidents at HUD