



American Federation of Government Employees
National Council of HUD Locals 222

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VIA ELECTRONIC MAIL

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MEMORANDUM Daniel Raymond, Branch Chief
FOR: Employee and Labor Relations, U.S. Department of Housing and Urban
Development
FROM:  Salvatore Viola, Chief Steward, AFGE Council of HUD Locals 222
Through Ashaki Robinson, PhD, President, AFGE Council of HUD
Locals 222
SUBJECT: Unfair Labor Practice-Grievance of the Parties: Unilateral
Implementation of Performance Planning, Bypass of the Exclusive
Representative, and Repudiation of the Extended HUD-AFGE Collective
Bargaining Agreement

Council 222 of HUD Locals (“the Union”) is filing this Unfair Labor Practice-Grievance of the Parties (“ULP-GOP”) in accordance with Article 51, including Sections 51.01(2)-(3) and 51.15 of the extended 2015 HUD-AFGE Collective Bargaining Agreement (“CBA”); the Federal Service Labor-Management Relations Statute at 5 U.S.C. §§ 7103(a)(9), including (B) and (C); 7106(b); 7114(b)(4); 7116, including (a) and (d); 7121(b)(1); and other applicable federal authorities. This ULP-GOP alleges various statutory and contractual violations that require the U.S. Department of Housing and Urban Development’s (“HUD” or “the Department”) adherence to the CBA, which remains binding until 2029, and is therefore exempt from renegotiation and any other agency attempt to alter terms.

I. BACKGROUND

On September 1, 2026, HUD issued a Notice entitled “*Implementation of Changes to 5 CFR Part 430 and HUD Performance Management Policy*” (“HUD Notice”). The HUD Notice purports to renegotiate Articles 30, 31, 32 and 51 of the CBA, which remains in full force and effect until July 23, 2029. It further seeks to negotiate agency-proposed revisions to its Performance Management Policy and CBA-covered performance management system; and take other agency actions to implement the August 26, 2026, amendment revisions to 5 CFR Part 430 (“amendments”) by the Office of Personnel Management (“OPM”).

OPM’s amendments are unrelated to the requirements, procedures and arrangements for unit employees established by the Federal Service Labor-Management Relations Statute at 5 U.S.C. Chapter 71 (“Chapter 71”). OPM’s amendments continue to require agency’s appraisal systems

to, among other things and at a minimum: (1) effectively recognize and reward “*employees whose performance so warrants;*” and (2) assist “*employees in improving unacceptable performance;*” 5 C.F.R. § 430.204(b). OPM also expressly encourages agencies to involve “*employees in developing and implementing their system(s);*” 5 C.F.R. § 430.204(c). These examples illustrate that OPM amendments can indeed be reasonably interpreted in alignment with, rather than in opposition to, the CBA.

Since September 1, 2026, and on multiple occasions thereafter, the Union has submitted various position statements to no avail. Collectively, these have alerted HUD of unfair labor practice violations (“ULP”) to Chapter 71, the CBA, and other authorities stemming from its Notice and implementation actions without: (1) expressly acknowledging that no provision or aspect of the CBA shall be renegotiated until after its 2029 expiration; (2) setting a fair negotiating baseline by curing Notice deficiencies that, on their face, are illegal and/or run afoul federal law and the CBA, including identifying plain aspects of a CBA-covered subject such as “*covered by*” matters exempted for being “*expressly contained;*” “*inseparably bound up with*” and/or “*already bargained*”; (3) establishing negotiation ground rules that are fair and satisfy CBA requirements, including the in-person presence of HUD negotiators and the Union’s recently elected President; (4) producing Notice clarifications before formal negotiations on September 29, 2026; (5) providing Notice-related records and information, justified with particularized need for informed bargaining; (6) bargaining in good faith and prior to implementation, a bypass of the exclusive representative; (7) maintaining the CBA’s Article 49-required status quo; as well as (8) preserving Article 30 covered procedures, to name just a few. These are all ULPs under applicable authorities.

As of October 6, 2026, Union efforts thus far have been fruitless. HUD announced implementation in a September 30th Memorandum (“Implementation Memo”) entitled “*Fiscal Year 2027 Performance Planning Guidance for General Schedule Employees*” which was sent to “All HUD Employees,” despite Union negotiations having begun just the day prior on September 29th. The notice is not a request for comment, but an order to bargaining unit employees (“BUE”) that bypasses the Union. It implements HUD’s Notice while Article 49 bargaining is in process that HUD is claiming to negotiate. This shows that such Notice, and negotiations since September 29th, have been performative.

HUD’s rigid, surface level and bad faith stance, both before leading up to and throughout negotiations, has entrenched an openly defiant anti-CBA implementation posture that is effectively predetermining the outcome of any Union effort to address it. This has compromised the integrity of bargaining by reducing it to a mere formality, or futile check-the-box process. By effectively nullifying the Union’s representational duties, HUD has created an imminent threat to collectively bargained and contractually secured rights.

Additionally, the Department's actions thus far, are plainly ultra vires (*"an invalid exercise of authority"*), and directly contravene various OPM written instructions to federal agencies. To name just a few, these include:

1. OPM's February 12, 2026, "Frequently Asked Questions Executive Order 14251: 'Exclusions from Federal Labor Management Relations Programs'" instructing to not *"terminate any CBAs until the conclusion of litigation or further guidance from OPM directing such termination. Agencies should review relevant case law and consult with their General Counsels regarding next steps with any existing CBAs;"*
2. OPM's July 24, 2026, Memorandum "Collective Bargaining Guidance Concerning the Final Rule on Performance Appraisal for General Schedule, Prevailing Rate, and Certain Other Employees" ("OPM's July 2026 Memorandum") warning that *"it is an unfair labor practice for an agency to enforce a rule or regulation that conflicts with a CBA provision that was in effect before the date the rule or regulation was prescribed . . . for the duration of the existing agreement;"*
3. OPM's July 2026 Memorandum instructing agencies to *"evaluate and determine whether provisions within CBAs existing at the time the final rule was prescribed conflict with the changes to 5 CFR part 430, subpart B. Such conflicts may arise where CBA provisions, for example, prohibit the distribution of summary rating levels or authorize grievances over ratings of record. Agencies may not effectuate those changes in the final rule where they conflict with specific provisions of a CBA. Once the term of the CBA expires, the conflicting provision no longer shields the parties from the governmentwide regulation, and the regulation applies in full,"* while further noting that only *"if an agency CBA rolls over without being renegotiated, the rolled-over CBA is considered a new agreement that does not bar the implementation of previously issued government-wide regulations. In such cases government-wide regulations take effect by operation of law on the date the term of the prior agreement concluded and the rolled-over CBA took effect;"*
4. OPM's July 2026 Memorandum instructing to *"evaluate whether pending grievances or arbitrations over ratings of record remain arbitrable consistent with the final rule. For those grievances or arbitrations that were initiated under a CBA that includes a provision in effect before the final rule that explicitly authorizes grievances over ratings of record, they may continue to proceed through grievance-arbitration up until the point the term of the CBA expires. Once the term of the CBA expires, agencies should assert that the dispute is no longer arbitrable;"*
5. OPM's July 2026, Performance Management Officer Manual ("OPM's 2026 Manual") instructing to message that *"Employee Rights Remain Unchanged"* because they *"retain all rights provided under applicable law, regulation, agency policy, and collective bargaining agreements;"*

6. OPM's 2026 Manual itemizing "*Common Implementation Pitfalls*" as including "*Ignoring Existing Contract Language,*" so agencies need review CBAs "*before implementation decisions are finalized,*"
7. OPM's July 2026 "Template for Executive Branch Agency Policies on Performance Appraisal Changes for General Schedule, Prevailing Rate, and Certain Other Employees" instructing to "*carefully consider whether a union proposal is negotiable*" when "*fulfilling any collective bargaining obligations,*" and to include the following verbiage in agency policies: "*The provisions of this policy shall apply to General Schedule, Prevailing Rate, and Certain Other Employees, but do not supersede requirements contained in a collective bargaining agreement that remains applicable to such employees;*" and
8. OPM's September 21, 2026, Memorandum "FY 2026 Standardized Distribution of Rating Levels and FY 2026 Performance Awards Guidance for Federal Employees" advising that "*[w]here a CBA contains a provision that conflicts with OPM's rule removing the prohibition on forced distributions, the CBA provision will continue to be operative until the term of the CBA ends. . . . In these situations, agencies should not include the appropriate bargaining unit employee population in its application of the standardized distribution and should follow any negotiated procedures and agency policies when assigning ratings to these bargaining unit employees.*"

HUD is also failing to account for directly pertinent ongoing litigation by the Union's National, such as *AFGE, et al. v. U.S. Office of Personnel Management, et al.*, No. 3:26-cv-08835 (N.D. Cal.), which outcome shall directly and indirectly bear on the matters in HUD's Notice and implementation actions, as well as the Union's current bargaining attempts.

II. FACTS

9. On July 23, 2015, the Union and the Department executed the CBA, and on December 18, 2024, extended its duration through July 23, 2029. It remains binding until such date. The extension is a bargained continuation of an existing agreement, and hence not an automatic rollover.
10. On August 26, 2026, OPM amended 5 CFR Part 430 under authorities 5 U.S.C. 2301, Chapter 43 and 5307(d).
11. HUD sent a Notice to the Union on September 1, 2026, describing its belief "*that changes to the CBA may be made when required by Government-wide regulation*" per Article 1 and Section 53.02. Therefore, the Department proposed to modify CBA Articles 30, 31, 32, and 51; to negotiate agency-proposed revisions to its Performance Management Policy; and take other agency actions.

12. On September 1st, the Union raised concerns on “*the substantive design, legal requirements, and implementation decisions underlying HUD’s revised Performance Management Program.*” HUD was asked to clarify by September 11th “*from the offices responsible for the policy and the decisions the notice purports to implement*” to provide proposed changes’ bases; produce documents and other information pursuant to 5 U.S.C. § 7114(b)(4); and its “*position as to which changes it considers legally required and which reflect HUD policy or discretion.*” The Union expressed needing this “*to determine the scope of any timely bargaining obligation under Article 49,*” and emphasized its request was neither a demand to bargain nor “*consent to reopen, amend, or modify Articles 30, 31, 32, or 51,*” which would separately and timely be invoked “*only as to those proposed changes for which a present bargaining obligation exists. The [Union] does not consent to bargain over matters already covered by the CBA.*”
13. In a September 10th Union Memorandum (“Union Memorandum”) HUD was reminded that its September 1st request remained outstanding, and notified of the following Notice deficiencies: (a) policy or past practices per Article 49.03(4)(a); (b) nature, scope and rationale per Article 49.03(4)(b); (c) proposed new policy or practice per Article 49.03(4)(c); and (d) proposed implementation date per Article 49.03(4)(d). The Union reminded that CBA-covered matters are governed by “*existing negotiated language . . . unless the Department establishes that the provision can no longer lawfully remain in effect or the parties mutually agree to modify it,*” the Union would not reopen “*Articles 30, 31, 32, or 51, in whole or in part, merely to conform the CBA to policy choices made by HUD.*” The Union closed with specific curing requests for bargaining to proceed.
14. Thirteen days later on September 14, 2026, HUD acknowledged the Union’s September 1st email, and rejected its clarification requests. It stated that “[t]he September 1st notice identifies the provisions the Department proposes to modify, the nature and purpose of the proposed changes, and the framework and timing for implementation. The Mid Term Bargaining process outlined in Article 49 provides the appropriate forum for the parties to address.” HUD insisted on management’s plans to “*comply with any applicable requirements concerning OPM approval or other agency approvals where required,*” and that management did not share the Union’s “*characterization that the proposed changes may be categorically treated as matters already covered by the Agreement and therefore insulated from bargaining or implementation.*”
15. On September 16, 2026, the Union timely submitted its Demand to Bargain the HUD Notice (“Union Demand”) under the CBA and Chapter 71. Under protest, the Union Demand advised that: (a) prior objections were preserved; (b) that the September 10th noted deficiencies had not been cured; (c) the CBA continued in effect through July 23, 2029, including covered matters in Articles 30, 31, 32, 51 and 13; and (d) its intent to bargain over new matters or changed conditions not covered by the CBA, including: (i) Article 49.03(4)(c) omissions, such as the failure to identify “*OPM-issued distribution,*

the percentages, the aggregate level, or how it will be applied to bargaining-unit employees;” (ii) HUD’s Policy creating a Performance Accountability Review Board and program-office calibration for changing official-recommended ratings; (iii) conversions of the existing five-level Article 30 system to a lawful replacement pattern not to be applied to the FY2026 appraisal year; (iv) employee requests for reconsideration of ratings of record; (v) implementation timing, notice, and training on uncovered practices under § 7106(b)(2); (vi) demand to bargain uncovered procedures while cautioning that “October 1, 2026, is not an agreed implementation date” and that “[n]o FY 2026 mid-year change has been properly noticed under Article 49.03(4)(d);” and (vii) seeking § 7106(b)(3) arrangements for adversely affected BUEs, including ratings, awards or within-grade determinations, when altered by a new distribution or new review body. The Union Demand preliminarily submitted eleven (11) uncovered matters’ proposals; noted that the existing CBA and status quo were preserved; and cautioned that the “[u]nilateral implementation from a deficient Article 49 notice, or enforcement of a new regulation that conflicts with the Agreement while the Agreement remains in effect, would violate Article 49 and 5 U.S.C. § 7116(a)(1), (a)(5), and (a)(7).”

16. Also on September 16, 2026, the Union notified HUD of its bargaining team per CBA Sections 49.05 and 49.06, while of the following requirements: (a) travel and per diem to Federal Travel Regulations and CBA Articles 23 and 49.05; (b) official time and duty time for travel, preparation, table time, and any impasse per CBA Article 49.05(3); and (c) bargaining and separate caucus rooms; and computers, photocopiers, and other office equipment per CBA Articles 48 and 49.06(b).
 - a. Various exchanges ensued for a total overall count of seventeen (17) emails: nine (9) from the Union, and eight (8) from HUD.
 - b. Eventually five (5) days later on September 21, 2026, bargaining ground rules were reached under protest, with the following Union-noted objections: (a) recently elected President Dr. Robinson remains a negotiating team member; while facility access back-and-forth would not continue, management’s characterization of said issues as “*final*” did not amount to a designation change; (b) no mutual agreement for virtual negotiations was reached, since “*Article 49.05 permits video or telephonic bargaining only by mutual agreement;*” (c) negotiation access to virtual equipment in any room was declined, since the Union team would “*be physically present at the negotiating table at Headquarters,*” and “[a]n ‘accommodation’ offered by Management is not mutual agreement under Article 49.05 and does not convert these negotiations into a virtual or hybrid session;” (d) travel and per diem for Union negotiators “*remain Management’s obligation under Article 49.05;*” (e) “*Article 49.05 places Union negotiators on duty time for all time spent participating in negotiations, including related preparation and duties during negotiations. That time does not count against Article 47 official-time allocations;*” (f) “*claimed entitlement to overtime, compensatory time, or other compensation under applicable law, the FTR, or the*

CBA” were not waived, and Management’s limitation was not accepted as an Article 49.05 modification; (g) the Union Memorandum remained; and (h) while HUD’s September 14th response was noted, it was “*not accepted as curing the deficiencies the [Union] identified in the September 1 Article 49 notice.*”

17. On September 17, 2026, the Union submitted a “*Request for Information under 5 U.S.C. § 7114(b)(4) - September 1, 2026 Performance Management Notice*” (“Union RFI”). The Union RFI distinguished HUD’s separate obligation to cure deficiencies in the Union Memorandum, and sought various “*records and electronically maintained data needed to evaluate HUD’s proposed changes, distinguish requirements imposed by OPM from choices made by HUD, formulate and revise proposals concerning uncovered matters, bargain procedures and appropriate arrangements, assess the effects on bargaining-unit employees, and carry out its representational responsibilities.*” It clarified HUD was not being asked “*to create a new legal opinion, position statement, chart, model, or other record that does not already exist.*”
18. Also on September 17th, HUD responded (“RFI response”) claiming: (a) refusals to provide “*information concerning which changes are required by 5 CFR part 430 and which changes are discretionary;*” (b) OPM submissions, review, or approval materials were unavailable; (c) “*Summary Rating Pattern B for implementation beginning with the FY27 performance appraisal period*” had been selected for being “*consistent with the applicable requirements of 5 CFR Part 430, OPM requirements, and the revised HUD Performance Management Policy;*” (d) the “*FY27 performance appraisal period begins October 1, 2026[, so t]he new three-level summary rating structure will apply beginning with the FY27 performance appraisal period;*” (e) HUD would “*not convert FY26 ratings into the new three-level rating structure;*” (f) HUD would “*implement its performance management program consistent with applicable law, Government-wide regulation, OPM requirements, and HUD policy*” and would not “*use the information-request process as a means of negotiating;*” (g) review, calibration, and other rating-change documentation were unavailable; (h) historical performance-management data for FY23, FY24, and FY25 would be compiled and provided once “*reasonably extracted and reviewed for accuracy and appropriate disclosure;*” (i) projections, modeling, or prospective data were unavailable; and (j) HUD’s current “*Performance Management Policy does not establish a separate informal reconsideration process for a final Rating of Record of the type described in the [Union’s] request. The policy does contain provisions concerning clarification or reconsideration of performance elements and standards and reconsideration of certain written progress-review feedback. . . . Accordingly, the Department has not identified an existing HUD policy, procedure, form, template, or implementation document.*”
19. On September 30th, HUD issued its Implementation Memo. It cited OPM’s July 2026 Memorandum as a basis for the following “**Key Changes:**” (a) “**Performance**

Management Policy To ensure alignment with OPM . . . HUD has implemented . . . beginning FY 2027” a transition “from a 5-tier summary level performance system to a 3-tier summary level performance system” and “[e]liminated the requirement for the Reviewing Official to sign-off on the . . . performance plan;” (b) **“Performance Management System** Effective October 1, 2026, HUD will transition to USA Performance (USAP) . . . Recorded training sessions for supervisors, employees, and Administrative Officers are forthcoming;” (c) **Performance Plan Composition** . . . will be comprised of five critical elements that are equally weighted: two (2) Program Office/mission-focused/measurable goals, and three (3) HUD-wide, universal elements” of which only the first two (2) Program Office ones need “conform to the S.M.A.R.T. standards” in CBA Section 30.06, since the other three (3) HUD-wide elements, which equally apply to BUEs and non-BUEs including “supervisory employees, reinforce the employee’s responsibility to take full ownership for their work and outcomes,” pursuant to new “FY 2027 GS Supervisory and Non-Supervisory Universal Elements, and the FY 2027 GS Performance Management Framework” (emphases in original).

- a. The Union became aware of the Implementation Memo on October 1, 2026. The violation is continuing.
20. On October 3, 2026, the Union’s Chief Negotiator and Steward (“Chief”) informed HUD of having been in negotiation, along with his team, “since Tuesday, September 29, on the Department’s new performance-appraisal system. . . . We are approaching the fifth day. Management has made no counterproposals” due to an insistence to “not release the Union team until bargaining is completed” whilst subjecting the Union to “repeated questions.” The Chief noted that “[h]olding the team until bargaining is completed, while refusing to counter, is a purposeful delay,” and questioned HUD’s negotiator’s “stability to handle these negotiations. His manner is overzealous. . . . continuous conduct raises a concern that the sessions are being used as his personal over- fixation to adversely affect employees’ careers, including those of Union officials, rather than to reach agreement that is fair and equitable to both parties.” Said behaviors were noted as not seemingly showing “a chief negotiator who is steady, prepared, and bargaining in good faith. I am requesting that OCHCO investigate this consistent instability.” Various statutory and CBA related requirements were listed, such as CBA Sections 49.01, 49.06 and 49.08, as well as 5 U.S.C. §§ 7114(b), including (1)-(3); 7116(a), including (1) and (5); and related implementing regulations at 5 C.F.R. part 2423, with charges being expressly reserved by the Union. The Chief further asked for HUD’s written confirmation of its assigned negotiator’s authorization “to reach agreement or to assign a chief negotiator who is, to direct Management to submit counters, and to stop holding the Union team on already answered questions.”

The Union reserves the right to raise any other factual information or patterning indicative of violations of the CBA, applicable laws, rules and/or regulations.

III. LEGAL BASES

Statutory Requirements, and Case Law

21. 5 U.S.C. § 4302 requires agencies to: establish and administer performance appraisal systems based on communicated performance standards and critical elements; conduct periodic evaluations against those standards; use appraisals in personnel decisions; assist employees in improving unacceptable performance; and provide an opportunity to demonstrate acceptable performance before taking a reassignment, reduction in grade, or removal based on continuing unacceptable performance.

Regardless of agency changes by OPM or HUD, Chapter 43 continues to require an opportunity to demonstrate acceptable performance before performance-based actions are initiated. HUD actions, such as its Implementation Memo, may try to disregard or circumvent these statutory requirements but, without a valid legal authority, cannot alter the applicability of governing law or related requirements.

The Federal Service Labor-Management Relations Statute codifies the following unfair labor practices, while delineating corresponding rights and obligations, at 5 U.S.C. §§

22. 7106(b)(2) and (3): the obligation to bargain over procedures that management will observe when exercising their statutory rights, subject to bargaining appropriate arrangements for adversely affected employees by said exercise.

HUD's Implementation Memo initiated the exercise and implementation of managerial rights while Union bargaining of statutorily required arrangements had barely just begun. By proceeding to implement prematurely before meaningfully completing the statutorily-protected and mandated process, HUD acted outside the confines of the law.

This conclusion tracks with case law, such as *Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150 (D.C. Cir. 1994), which established that “[t]he nonnegotiability of management rights enumerated in subsection (a) is expressly ‘[s]ubject to subsection (b),’ and subsection (b) concomitantly provides that ‘[n]othing in this section shall preclude any agency and any labor organization from negotiating’ matters enumerated in subsection (b). 5 U.S.C. § 7106(a) & (b). In that sense, we have already decided that Sec. 7106(b) is indisputably an exception to Sec. 7106(a).”

23. 7114(a)(1): vests the exclusive representative of BUEs with the authority to act for them, and negotiate CBAs covering all such; while 7114(b) defines specific components of the duty to negotiate in good faith, such as a sincere resolve to reach agreement; reasonable meeting times and convenient meeting places as frequently as necessary, and to avoid unnecessary delays; and furnishing the exclusive Union representative with qualifying information needed for full and proper discussion, understanding, meaningful representation and bargaining.

The Union is the exclusive representative. HUD's Implementation Memo directing the bargaining unit to establish new plans, under new guidance and by a date certain, while CBA Article 49 bargaining is ongoing and yet to be completed, is not only a unilateral change, but also a bypass of the exclusive representative.

An agency unlawfully bypasses the exclusive representative when it communicates directly with BUEs concerning a condition of employment that is the subject of negotiations thereby undercutting the union's bargaining role. *Dep't of the Navy, Naval Aviation Depot, Cherry Point, N.C.*, 36 FLRA 709 (1990). Here, HUD's Implementation Notice instructs employees to review "key changes" and build plans by October 30th. That is a direct dealing with BUEs on specific subjects of ongoing negotiations.

Furthermore, when the nine (9) ground rules exchanges from September 16th to September 21st are considered jointly with the bargaining conduct described in the Chief's October 3rd report to HUD, these demonstrate a persistent pattern of unnecessarily prolonging and impeding meaningful bargaining. For instance, Management imposed restrictive ground rules with conditions affecting which Union representatives could, and could not, participate in person; how bargaining would occur; and where the Union team should be physically present, to name just a few. Yet at the same time, HUD created a bargaining arrangement for its negotiator to participate 100% virtually, along with most supportive staff, with only one person without decision-making authorities physically present during the September 30th to October 2nd sessions.

These restrictions were imposed without providing CBA-compliant alternatives that would have permitted the Union's designated representatives to participate on acceptable terms. The same conduct type continued until the Chief's October 3rd report, with HUD actions such as keeping the Union team present without making counterproposals; repeatedly inquiring into future legal strategy representational questions which in good faith the Chief and his team repeatedly answered, despite not having to; and making them incur additional prolonged travel/time burdens, while away from their homes and loved ones.

24. 7116(a)(1) and (5): prohibits interfering with, restraining, or coercing employees in the exercise of statutorily protected rights, or refusing to consult or negotiate in good faith with the exclusive representative as per statutory requirements.

Before implementing a change in employment conditions, agencies must provide the Union with notice that is sufficiently specific and definitive to provide reasonable opportunity to bargain, including information concerning the scope, nature, certainty, and timing of the proposed change, *USACE, Memphis Dist.*, 53 FLRA 79 (1997). Additionally, an agency is deemed to violate 7116(a)(1) and (5) if it unilaterally implements a change in employment conditions affecting BUEs without first providing Union opportunity to bargain over change aspects within its duty to bargain, *U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848 (1999).

25. 7116(a)(7): an agency cannot enforce any rule or regulation that conflicts with a CBA that was in effect before the date of said rule or regulation was prescribed, unless the rule or regulation implements 5 U.S.C. § 2302.

As noted above, OPM has repeatedly instructed agencies to not effectuate regulatory or policy changes that conflict with CBAs until after their terms expire (at least eight (8) times between February and October 2026, if not more). Here, the contract bar is statutory, and OPM agrees. This means HUD's actions are *ultra vires* as well as an arbitrary and capricious tantamount to an irresponsible wielding of agency powers.

Case law supports this conclusion. For instance, *DoD v. AFGE, Local 3529*, 37 FLRA 1218 interpreted "7116(a)(7) to provide that preexisting collective bargaining agreement provisions are to govern for the express term of the collective bargaining agreement of which they are a part, but that provisions of a renewed agreement do not operate to override Government-wide regulations existing on the effective date of the new term of the collective bargaining agreement."

26. 7117(a)(1): limits the duty to bargain as not extending to matters inconsistent with Federal law, or Government-wide rule or regulation. That limitation, however, does not eliminate exclusive representatives' consultation rights over Government-wide rules or regulations that substantively change employment conditions.

This limit bars HUD from implementing and enforcing the new rule, especially when in conflict with CBA terms that predate the rule. In this instance, such triggers implementation deferral until July 23, 2029, when the CBA shall cease to control.

27. 7121(a)(1): requires that CBAs provide negotiated grievance procedures for covered matters, and that such be the exclusive administrative procedure for resolving grievances, subject to enumerated limitations in 7121, and other applicable law.

During the term of a preexisting CBA, a Government-wide rule may not be invoked to unilaterally strip ratings of record from negotiated grievance procedures, since any conflicting CBA provision is preserved throughout the agreement's duration. Yet HUD's Notice and Implementation Memo strive to do otherwise.

HUD is taking this a step further. In its Notice and Implementation Memo, it attempts to expand beyond clear regulatory language in OPM's 2026 amendments while simultaneously insisting it is hamstrung from straying from those same requirements. For example, HUD documents adopt a "*ratings of record*" definition that extends beyond OPM's amendment (establishing that "*the performance rating prepared at the end of an appraisal period for performance of agency-assigned duties over the entire period and the assignment of a summary level within a pattern (as specified in § 430.208(d)), or (2) in accordance with § 531.404(a)(1) of this chapter. These constitute official ratings of record referenced in this chapter,*" 5 C.F.R. § 430.203). The definitional version in HUD's Notice and Implementation Memo, however, expands "*ratings of record*" by also subsuming summary rating levels, ratings assigned to individual critical elements, supporting narratives, written justifications and/or their substance. This reveals how HUD is neither genuinely nor strictly confining itself to complying with OPM's amendments. Its true aim is to whittle down the CBA's negotiated grievance procedure. OPM's amendments just happen to be a good pretext for advancing its overbroad and unreasonably restrictive agenda.

The Back Pay Act at 5 U.S.C. § 5596: provides the make-whole remedy for an unjustified or unwarranted personnel action that results in the withdrawal or reduction of pay, allowances, or differentials, along with interest and attorney fees.

Some additional case law that is dispositive of the instant matter includes,

28. *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004 (1993): establishes the framework for determining whether a matter is “*covered by*” an existing CBA. This starts with examining the express language of a CBA to determine whether it reasonably encompasses the disputed subject; an exact textual match is not required. If a matter is not expressly covered, an “*inseparably bound up with*” and therefore plainly an aspect of a subject expressly covered by a CBA will still yield coverage protections. In said instances, an agency has no obligation to bargain further during the term of the CBA concerning said matter; and
29. *Dep't of Def., Warner Robins Air Logistics Ctr.*, 40 FLRA 1211 (1991): establishing that a breach amounts to a repudiation of the CBA rising to the level of an unfair labor practice if: (a) there is a clear and patent breach; and (b) the breached provision goes to the heart of the parties' agreement.

The Binding CBA

30. Section 1.01(4): establishing “*Management and the Union agree that, in regard to the bargaining unit, they will not do anything by custom or practice that will contravene or violate this Agreement. The parties recognize that changes may be made to this Agreement when required by law, Government-wide regulation, or other appropriate authority outside the Department, such as the Comptroller General.*”

The second sentence may possibly permit certain changes, provided such remain within the first sentence's parameters, which forbid any custom or practice that contravene or violate the CBA.

31. Section 4.01: restricting the administration of CBA covered matters to “*existing and future laws, existing Government-wide regulations, and existing and future decisions of outside authorities*” with recognition of “*the importance of pre-decisional involvement to the fullest extent practical without regard to whether those matters are negotiable subjects.*”

This restricts proposed changes to those compelled or authorized by CBA-enumerated external authorities, some which include “*existing and future,*” and others like the “*Government- wide regulations*” at issue here, which expressly limited to “*existing*” only. It follows that a change cannot be justified by one-party unilateral determinations that a post-CBA regulatory change might be desirable, or perceived as appropriate.

32. Section 49.01: defining “*rights and obligations . . . regarding Mid-term Bargaining [which] shall be in accordance with 5 USC Chapter 71 and this Agreement. . . . the Union and the Department (the parties) shall engage in negotiations during the term . . . in good faith in order to facilitate negotiations.*” Parties are again “*encouraged to engage in pre-decisional involvement prior to formal presentation of proposals for changes to personnel policies, practices, and/or working conditions under this Article,*” without being “*deemed to waive either party's statutory rights.*”

The first sentence imposes a hierarchical framework that governs Mid-term Bargaining. Chapter 71 is at the top tier, retaining preeminence over “*changes to personnel policies, practices, and/or working conditions,*” with the CBA controlling in a second tier. It follows that policies, practices and work condition changes rank after, while remaining subordinate to both.

The second sentence encourages pre-decisional engagements before formal change proposals, while preserving the preeminence of statutory rights. This language supports an interpretation that the formal bargaining rights and obligations of Chapter 71, and the CBA, can neither be substituted, waived or otherwise exempted.

33. Section 49.02: establishing, for Mid-Term Changes, that “*Management shall transmit to the Union its proposed changes If feasible, management will provide advance written notice at least 30 days prior to the proposed implementation date, of any change Management may implement as soon as the bargaining obligations are satisfied, even if the 30 day timeframe has not been exhausted.*”

This Section distinguishes between the 30 day advance notice timeframe, and parties’ bargaining obligations whereby, after bargaining obligations are satisfied, Management may then implement proposed changes notwithstanding the 30 day period.

Contractually, the provision does not authorize implementation simply because 30 days elapsed, which reading would render bargaining obligations meaningless while impermissibly making of the notice period an automatic implementation deadline. A substantial body of law supports this, and defined pre-implementation mandates before changes in employment conditions are effectuated, including good-faith bargaining, impact-and-implementation bargaining, *status quo* pending bargaining completion, and other efforts such as referring unresolved negotiability and/or bargaining disputes for resolution. *See e.g.,* 5 U.S.C. §§ 7103(a), including (4) and (12), and 7114(a)-(b), as well as *FDA v. FLRA*, 526 U.S. 86 (1999) and *U.S. Dep’t of Justice, INS*, 55 FLRA 892 (1999). These are unmet by HUD.

34. Section 49.03: establishing definitional parameters for “*notices of proposed Management mid-term changes,*” including that “*requests for further information by the Union shall not delay the commencement of negotiations.*” Further specifying disclosure requirements at sub-clause (4) for circumstances entailing a “*Change in a Policy or Past Practice*” which consist of: “*(a) Copy or statement of the current policy or past practice; (b) The nature, scope, and rationale for the proposed change; (c) A copy or statement of the proposed new policy or practice; and (d) The proposed implementation date.*”

35. Section 53.05: containing a provision entitled “***Reopening Clause***” establishing that, during the term of the CBA, any party “*may propose negotiations to re-open, amend, or modify this Agreement. Such negotiations may only be conducted by mutual agreement of the parties, and in accordance with Article 49 Midterm Bargaining provisions.*”

This Section permits any party to propose reopening to amend or modify the CBA, but not unconditionally. The “*may only be conducted by mutual agreement*” phrase disallows compelling even if Article 49 is met. In other words, actual bargaining is expressly conditioned, or dependent on, parties’ mutual agreement as well as Article 49 fulfillment.

HUD’s various actions since September 1st have persistently and increasingly shown a pattern of selectively choosing and misconstruing these CBA provisions in an attempt to unilaterally impose an unlawful agenda. For example, at times in the HUD Notice, September 14th email and RFI Response, the Department chooses to interpret the word “*may*” in CBA provisions as having shall/must effects while simultaneously applying the word “*shall*” in others as a “*may*.” This is but a ploy to circumvent “*mutual agreement*,” and other CBA conditions and restrictions deemed inconvenient. It is not only inconsistent with the plain meaning and interpretation of the CBA that has governed both Parties since 2015, but also with applicable laws and, most notably, with the very OPM directives HUD invokes as it tries to manufacture a façade of authority for otherwise unsubstantiated actions.

The Department cannot selectively invoke OPM guidance and CBA aspects when convenient, while simultaneously discounting their substantive limitations, conditions and clarifications. This selective, piecemeal and agenda-driven sophistry is impermissible for unilaterally attempting to circumvent and/or materially alter negotiated terms as a means of imposing changes lacking legal basis, under the guise of hermeneutic-interpretive analysis.

The Union reserves the right to raise any other violation of the Agreement, law, rule, or regulation.

IV. REMEDIES

The Union requests that the Department:

36. Cease and desist from implementing the Implementation Memo, including but not limited to requiring BUEs to establish FY 2027 plans under any procedure other than CBA Article 30, unless and until Article 49 bargaining is completed by agreement, or a Federal Service Impasses Panel decision.
37. Rescind the Implementation Memo, any follow-up instruction on USA Performance access, and any other directive not contained in Article 30.

38. Restore the *status quo ante*. For example, plans already opened or signed under the Implementation Memo must be rescinded. No employee shall be held to a standard, element, or deadline that Article 30 does not contain.
39. Notify all BUEs that FY 2027 planning will proceed under Article 30 until bargaining is completed, and remind that the Union is the exclusive representative on changes under discussion.
40. Bargain in good faith under Article 49 over any proposed change before implementation, and implement only agreed-upon terms while any negotiability dispute is unresolved, per Article 49.07.
41. Make whole any BUE harmed by a plan, standard, or personnel action taken under the Implementation Memo, including rescission of the plan and reconstruction of the record.
42. Post a notice physically and electronically for sixty (60) days, signed by the Chief Human Capital Officer stating that HUD will not implement changes in performance planning before bargaining obligations are satisfied and will not bypass the Union.
43. Pay reasonable attorney fees and other costs if this grievance proceeds to arbitration and the Union prevails, as well as grant official time under Article 47 for processing this grievance.

Any other remedy an arbitrator finds appropriate to restore the status quo and to make the parties whole.

V. REQUEST TO MEET

The Union requests that the Department:

44. Under Section 51.15(2), meet with the Union within twenty (20) days of this grievance to discuss informal resolution. Please contact the undersigned to set the date.
45. Under Section 51.15(3), a written response stating the Department's position is due within thirty (30) days of receipt. If the response is not satisfactory, the Union will refer the matter to arbitration under Article 52.

The Union does not waive any pending Article 49 proposal, any negotiability position, or any grievance already filed over FY 2025 and/or FY 2026 ratings.