SOCIAL SECURITY

February 1, 2019

UMG-C220-19-03

Ms. Sherry Jackson
3rd Vice President
AFGE Council 220
C/o SSA
51 North Elm Street
Waterbury, CT 06702

Ms. Jackson:

This letter responds to the Union-Management Grievance filed by the American Federation of Government Employees (AFGE or Union) against the Social Security Administration (SSA or agency). This grievance was filed pursuant to the provisions set forth in Article 24, Section 10, of the 2012 SSA/AFGE National Agreement. The grievance refers to OUTTS unavailability.

The grievance document was undated but per the Certificate of Service, was sent to my office, via USPS Certified Mail, on January 16, 2019. You stated in your grievance that as the grieving party, you were waiving the meeting or discussion that is required to occur within ten working days of the agency's receipt of the grievance. Accordingly, my decision on this grievance follows.

Issue:

The union charges that the agency is not providing reasonable and reliable availability to the OUTTS system. You stated the OUTTS system continually has "hiccups" which does not allow representatives the ability to request statutory time as needed. You assert the unilateral and more than sporadic unavailability of the OUTTS system constitutes a violation of Article 3 and is an unfair labor practice citing the National Labor Relations Act (NLRA).

Included in your grievance was an information request. In accordance with the Statute, the agency formally responded to that request on January 23, 2019.

Union Position:

You claim that beginning September 2018, the agency failed to provide immediate access to official time following the overturning of Executive Order 13837. In support of this claim, you stated OUTTS availability should have "gone back to status quo." You argue that the agency's (alleged) failure to do so is a violation of the court order.

You also argue that union representatives are being disadvantaged and not treated as similar employees in LMR because LMR does not have to deal with the unreliable OUTTS program in fulfillment of their employment or statutory duties. You hold that by failing to manage the system, SSA managers are holding employees (union representatives) to a completely different set of standards than those who represent the agency. Additionally, you stated this also constitutes a violation of Article 18, as denial of systems access is discriminatory.

You also stated the agency has violated Article 30 Section 7.A. by denying union officials regular access to the system bargained for in the contract. You claim the agency made modifications to the system after the Executive Orders that caused the system to not work as bargained nor has the agency fixed the problems or engaged in bargaining on the issue.

Finally, you assert the agency violated the Statute by making a unilateral change to a term or condition of employment without first bargaining to impasse. In this regard, you stated the union has not waived, explicitly or otherwise, the use of the OUTTS system for requesting official time per the AFGE/SSA National Agreement.

Relief Requested:

Your request for relief consisted of eight specific items. In essence, you are asking that:

- All employees be made whole;
- The agency to make available full use of the OUTTS system as prescribed by the Master Agreement;
- Provide the union with notice and an opportunity to bargain over the agency's unilateral change;
- A posting signed by the Commissioner should a ULP be found;
- Applicable attorney fees;
- Pecuniary and non-pecuniary damages to the maximum allowed by law;
- Any other relief as mutually agreed upon or as ordered by an arbitrator;
- Any other remedy mutually deemed appropriate.

Agency Position:

The union's assertions that the agency failed to provide reasonable and reliable availability to the OUTTS system is without merit. The arguments raised throughout your presentation are largely specious and lacking in specificity.

The agency did not fail to provide OUTTS access when the Executive Orders regarding official time were overturned.

The union contends that beginning September 2018 the agency did not provide immediate access to official time as the Executive Orders had been overturned. You went on to say OUTTS availability should have gone back to status quo ante. Additionally, you stated the agency was required to continue most terms and conditions of employment until the parties reached a new agreement.

The union's position is not grounded in fact. At the outset, I am compelled to note that you have pointed to no specific dates or timeframes where union representatives were unable to access OUTTS or were otherwise unable to request or use Official Time. Nor does the agency have any record of the systems being "down" or unavailable at any point in FY18.

Noting your identified timeframe as "beginning in September 2018" I need to point out that typically, in mid-September, AFGE allocations are made for the following FY. AFGE has requested the initial allocation be 0 hours per fiscal year per authorized representative. AFGE then allocates their desired official time hours, from their bank, to each of their authorized representatives.

In addition, with the changeover from FY18 to FY19, there was a change in Council 220 leadership. Along with that change was a change in OUTTS designees (the AFGE representatives charged with allocating the official time hours who are also responsible for informing OLMER of changes in representatives). If in fact any representative was unable to access OUTTS during this timeframe, it could be because AFGE had not yet informed OLMER that the person was an authorized representative – or that the AFGE OUTTS designee had not yet allocated the hours to the representative. In any event, it was not because OUTTS was unavailable.

With specific regard to the aforementioned Executive Order, we note it was AFGE who made changes to the hours allocated to their representatives (primarily in Council 220). In most instances, AFGE was reducing the available hours presumably to keep usage below the limitations imposed as a corollary of the Executive Order. Further, there were a few occasions where AFGE canceled approved requests. However, there were no programming changes made to OUTTS. Nor was any representative denied access to OUTTS.

Finally, there was no need to "return to status quo ante." The agency made no changes to any terms or conditions of employment necessitating a bargaining obligation.

<u>There were no violations of Article 3, Section 2.A. or of Article 18.</u>

The union cites to the language in Article 3 Section 2.A., "all employees will be treated fairly and equitably in all aspects of personnel management." You claim union representatives are being disadvantaged and not treated as similar employees in LMR because LMR does not have to deal with the unreliable OUTTS system to fulfill their employment or statutory duties.

The reference to Article 3 Section 2.A. is inappropriate. First, your citation was incomplete. You failed to include the general non-discrimination clause which states "and without regard to political affiliation, race, color, religion, national origin, sex, sexual orientation, gender identity, genetic information, marital status, age, parental status or disabling condition . . ." That language modifies the clause you cite and points specifically to the protected classes under Title VII or other Statutory authorities. What is specifically not included is union representation.

More importantly, the citation refers explicitly to *personnel management*. Use of Official Time and more specifically, the matter being grieved (i.e., the agency's failure to provide regular and reliable availability to OUTTS) is not an aspect of personnel management.

Your comparison of union representatives to "similar employees in LMR" is fatuous. There is no similarity. You are partially correct in pointing out that LMR staff do not have to deal with OUTTS in fulfillment of their employment responsibilities. Unlike union representatives, LMR staff do not need to request to be excused from the performing the duties of their position to engage in representational activity. Their full time job responsibilities necessarily includes the administration and enforcement of our Collective Bargaining Agreements as well as agency (and Federal Sector) personnel policies and practices. Some LMR staff however are required to work with the OUTTS program as expert staff in OLMER or the Regional Offices to accomplish their duties in managing official time usage.

There were no violations of Article 18. You have presented no evidence nor pointed to any occasion establishing that any union representative was denied access to OUTTS or prevented from using official time.

There were no violations of Article 30, Section 7.A.

Here the union claims the agency violated the referenced section of the contract by failing to provide an equivalent electronic reporting system while "outages" occurred. You state the contract was violated as the agency "clearly made modifications after the Executive Orders" that caused the system not to work as bargained. In addition, you assert the agency failed to fix the problems or bargain to impasse on the issue.

The union's contentions are wholly without merit. As noted above, there were no instances or periods of time when OUTTS was down, unavailable, or where users were otherwise unable to access the system. Nor have you pointed to any period of unavailability or any specific instance where an authorized representative was unable to access OUTTS or use official time due to OUTTS being unavailable.

Moreover, even if there were instances when users could not access OUTTS, no representative would have been prevented from requesting or using official time simply due to a systems issue. Any representative who needs (or needed) to use time can to make use of the "paper process" and complete an SSA-75-R and submit it to the approving official. A copy of the Form is available on the OUTTS website for exactly this purpose. As well, a practical alternative in any time sensitive case would be to make a verbal request of their supervisor to be released from regular duty to perform representational activity. OUTTS could have always be updated after the fact.

There were no modifications made to OUTTS because of the Executive Orders or the revocation of said Orders. As noted, the system continued to work throughout FY 18. Other than routine maintenance, as with any automated system, there was nothing to fix. Finally, and because the agency made no changes, there was nothing to bargain.

The agency did not violate the Federal Service Labor-Management Relations Statute.

The union maintains the agency violated the Statute (citing incorrectly, the National Labor Relations Act or NLRA) by making a unilateral change in a term or condition of employment without first bargaining to impasse over the relevant term. You go on to say the union did not waive its right to bargain over the changes citing the agency's burden of showing the union's waiver was "explicitly stated, clear and unmistakable. Finally, you cited two Court cases in support of your position and reminded me that the 2012 Contract remains in effect until a new agreement in negotiated.

In short, your position here is irrational. As the agency's Chief Executive responsible for the administration of the labor relations program and all of our Collective Bargaining Agreements, I am well aware of our obligations to provide Notice of proposed changes to conditions of employment affecting bargaining unit employees and affording the union of their right to bargain the impact and implementation of such changes.

Your assertion that the agency violated provisions of the NLRA is also improper. Labor relations in the federal sector is governed by the Federal Service Labor-Management Relations Statute, codified at 5 U.S.C. Chapter 71. While you assert the agency made a unilateral change, you fail to identify exactly what changed. I can only conclude based on the other arguments you raised

that you are alleging the agency made a unilateral change to the OUTTS program and failed to provide appropriate Notice and opportunity to bargain. Without intending to be redundant, your assertion is patently false. There were no changes made to the OUTTS program. Nor has the agency made any claims that the union has waived any of their rights, explicitly or otherwise.

Finally, as the agency's Chief Spokesperson in the term negotiations for the past four National Agreements, I am well aware of what is in effect and what is not.

Decision:

After giving careful consideration to the assertions promulgated in your grievance, I cannot find merit to your grievance or sufficient cause or evidence to grant the relief you seek. You pointed to no instance when OUTTS was unavailable. Neither have you established that the agency made any changes to OUTTS or any other condition of employment necessitating Notice and a bargaining obligation.

In conclusion, you did not present any evidence or plausible argument to show the agency violated any provision of the National Agreement or committed an Unfair Labor Practice. Therefore, my decision in this regard is entirely unfavorable and your grievance is denied. You have the right to proceed in accordance with Article 24 of the SSA/AFGE National Agreement.

If you have any questions about this response, please contact Jeff Landes, at (215)-597-4006.

Sincerely,

/s/

Ralph Patinella
Associate Commissioner
Office of Labor-Management and
Employee Relations