DATE: October 29, 2018

MEMORANDUM FOR: BCFP Employee and Labor Relations via CFPB_NTEU_Grievances@cfpb.gov

FROM: Gail Wisely, Jo Battle, Ben Konop and Nelle Rohlich

SUBJECT: Mass Grievance – Equal Employment Opportunity and Employee Rights

NTEU Chapter 335 files this Step Three mass grievance on behalf of all affected employees. NTEU does so in accordance with Article 43, Section 4(A)(4) of the negotiated Collective Bargaining Agreement (CBA) between the NTEU and the Bureau of Consumer Financial Protection (Bureau) (collectively, the parties). NTEU alleges violations of the CBA and any other applicable statutes, regulations, policy, laws or authorities.

I. STATEMENT OF THE GRIEVANCE

In 2017, the parties signed the CBA “with every intention to deal with each other in good faith and to be governed by honesty, reason and mutual respect.”¹ Under the agreement, the Bureau must promote a workplace environment “that is free of discrimination and one which capitalizes on respect, inclusion, dignity and integrity, and values the diversity of its workforce.”² The agreement also requires the Bureau to “recognize and

¹ CBA Preamble, p. 9.
² CBA Article 6, “Equal Employment Opportunity.”
respect the dignity of each employee in the formulation and implementation of personnel policies and practices.”

As set forth below, NTEU alleges the Bureau is violating these CBA provisions. NTEU also alleges the Bureau did not bargain in good faith during mid-term bargaining related to the reorganization of the Office of Fair Lending and Equal Opportunity (OFLEO).

II. FACTS

A. Racist and Sexist Statements by Mr. Blankenstein in Violation of the CBA

On the evening of Wednesday, September 26, 2018, the Washington Post published a story about Eric Blankenstein, the Bureau’s Policy Advisor Director for SEFL, detailing a series of blog posts he wrote which included a racial slur, demeaning statements about women, and unsubstantiated theories that most hate crimes were hoaxes. For example, in one such post Blankenstein posed a hypothetical in which one person calls another person the n-word (spelled out in the post), and then asked whether the person using this offensive racial slur was, in fact, racist or instead merely just an “asshole.” Additionally, he appeared to argue that if abortion is legal men should have the right to make a woman get an abortion if the man determines the pregnancy was a “mistake.” He also derided hate-crime legislation as “making it illegal to have a thought.”

Instead of apologizing for these statements when contacted by the Post, Blankenstein was defiant. He admitted to writing the blog posts, but accused the Post of a “naked exercise in bad faith,” and maintained that he was guilty of nothing more than “governing while conservative.”

B. Response of Bureau Management

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3 CBA Article 3, “Employee Rights.”
Beginning Friday, September 28, 2018, SEFL and Bureau leadership sent several emails related to Mr. Blankenstein’s statements and actions to Bureau staff (see attached Exhibits 1-7). On September 28, the OFLEO Director, Patrice Ficklin, sent an email to SEFL staff in which she explained that a supportive quote attributed to her in the Washington Post story had been obtained under false pretenses by Mr. Blankenstein, without giving her the opportunity to read the blogs that were described as racist in the story. Ficklin wrote, “[w]hat I find appalling . . . is the tone and framing of those views in his blog posts. The tone and framing are deeply disturbing and offensive to me as a woman, African American, advocate for LGBTQ rights, and human being. They are far from civil discourse, and I am disappointed that Eric has not expressed regret about the tone and framing of his remarks made 14 years ago.” She said that, after reading and considering the blogs, she had concluded that the tone and content of Mr. Blankenstein’s statements provided context to earlier statements and decisions he had made in meetings with Ms. Ficklin. Ms. Ficklin requested that the Acting Director pause the proposed reorganization of OFLEO.

Ten minutes after Ms. Ficklin’s email, the Assistant Director of SEFL, Chris D’Angelo, sent a short email in support of Ms. Ficklin. On Monday, October 1, Mr. D’Angelo sent another email saying “the suggestion that a racial slur is intended to do anything other than demean and oppress on the basis of race undermines constructive discourse and is inconsistent with the consumer protection and fair-lending mandates of the Bureau; [t]o that end, I just sent a letter to the Acting Director raising my concerns as well as those raised by so many of you here.” Mr. D’Angelo said he was aware that some staff felt “chilled in their ability to speak out, threatened by the language used in Eric's blog posts, his affirmation of those posts in his public statement, and his failure to denounce those statements or acknowledge their hurtful nature.” Mr. D’Angelo also voiced concerns that employees may feel “threatened or discriminated against.”

Later that afternoon Mr. Blankenstein and the Bureau’s chief of staff, Kirsten Sutton, sent emails to all Bureau staff. Mr. Blankenstein’s email did not contain the words “apologize” or “sorry,” and he did little more than express “regret” for having used “intentionally provocative language” to
discuss “issues of the day.” And while he said in his email that he had a “visceral, negative reaction” to being confronted with his old writings, he never explained why his initial reaction to being confronted with them was unapologetic defiance, rather than considered reflection and genuine remorse. Ms. Sutton’s email was similarly unhelpful, as it did not acknowledge the situation at all, much less disavow the tone or language in Mr. Blankenstein’s blogs, or express any concern whatsoever for the invidious worldviews the blogs expressed.

On the following day, October 2, Acting Director Mulvaney weighed in on the situation for the first time. He called the situation “a unique circumstance from a management perspective” and promised to “report back soon” while “proceeding with the utmost respect for all those involved.” He ended the email saying, “[P]lease know that the merits of the changes at Fair Lending remain the same today as they did when I announced the reorganization several months ago. I will not be undoing the changes. I recognize this is not the result that some of you may have wanted. But I stand by my decision and we will proceed accordingly.”

His report back came 9 days later, on October 11, in an email that, like the messages from Mr. Blankenstein and Ms. Sutton, only exacerbated the tensions felt by BU staff. In the email, Mr. Mulvaney said he recognized and understood that many Bureau employees “had strong reactions to the articles and the blog posts the articles discussed” but added that he “would never presume to try to change how [concerned Bureau employees] feel.” He said racial discrimination is abhorrent and illegal but added “you can be certain that I value your right to express personal views on your own time” and “I value the healthy exchange of diverse opinions.” He ended the email saying:

Third, be assured I am not going to let any outside group dictate who works here or how I structure or manage the Bureau. Everyone receiving this email represents the Bureau, not those on the outside. We do our work together, and we are either going to choose to do it very well, or we won’t. That is a choice we make together. Our focus must always remain on doing our jobs, enforcing
the law, and working together to do a great job for the American people.

Mr. Mulvaney did not explain who he meant when referencing “outside groups.” BU members had received unsolicited emails from an organization called Allied Progress that were related to Mr. Blankenstein’s statements. The first email, sent on September 27, highlighted Mr. Blankenstein’s racist and sexist writings and invited whistleblower communications about questionable or problematic actions or behavior at the CFPB. Somehow, however, those emails were removed from the BU members’ email accounts without the BU members’ knowledge or consent.

C. Impact on BU Members

In the days immediately following publication of the article, BU members began reaching out to NTEU with concerns about the effect Mr. Blankenstein’s statements were having at the workplace. For example, one member of SEFL’s support staff, who is African-American, said she felt uncomfortable seeing Eric in the office and that “he seemed uncomfortable as well.” Other BU members voiced concerns about prior personnel or work-related decisions Mr. Blankenstein had made, and said the views expressed by Mr. Blankenstein in his blog posts perhaps provided further context to some of these decisions.

Following Mr. Ficklin’s and Mr. D’Angelo’s emails on September 28, bargaining unit (BU) members of the OFLEO office sent a SEFL-wide email expressing their support of Ms. Ficklin. That set off a chain of over a hundred additional emails from SEFL BU members that afternoon and in the days that followed, voicing support for Ms. Ficklin.

The BU members’ emails also expressed concerns about the impact that the story was having on their work experience. For example, one email from a BU member who identified himself as an LGBTQ+ employee said that he could personally attest that “hate crimes are not hoaxes.” He said that Mr. Blankenstein’s claim that “hate crime hoaxes are three times more prevalent than actual hate crimes” could cause actual victims of hate
crimes, which he was when he was younger, to not come forward and report them.

The Bureau’s Black Employee Resource Group, RISE, also sent an email denouncing Mr. Blankenstein’s statements and saying:

[W]e can attest that minority employees across the Bureau are deeply offended by Mr. Blankenstein’s language. We are uncomfortable at the thought of continuing to work under his direction; and have lost all faith in his ability to carry out the Bureau’s enforcement of our fair lending laws in a manner that credibly ensures the protection of people of color, women, and other historically disadvantaged minorities. If the Bureau’s leadership truly believes in our Diversity and Inclusion program, internally and externally, Acting Director Mulvaney will call for Mr. Blankenstein’s immediate resignation from the Bureau.

In response to the emails sent by Mr. Blankenstein, Ms. Sutton, and Mr. Mulvaney, many BU members reported feeling even more upset and also confused. Several African-American BU members said they found Mr. Blankenstein’s original blog statements to be insensitive, dismissive and outright racist, but then also felt his recent responses to the statements were equally concerning because at no time did he repudiate the content of the statements. One African-American BU member said, as someone who has been called the “n-word,” they could personally attest to its dehumanizing impact and also that Mr. Blankenstein’s denial of racism in the first place and refusal to repudiate his earlier words, is offensive.

Others voiced concerns about Mr. Mulvaney’s statements about BU members voicing their personal views on “their own time.” BU members said this statement is ambiguous and made them very uncomfortable. Mr. Mulvaney is either saying he condones Mr. Blankenstein’s statements as long as they take place outside the office, or he is advising the BU not to discuss their concerns about the situation at work.

BU members say these emails from senior leadership have had a chilling effect on the office and have acted only to reinforce what has been
described by BU members as a hostile environment. Several BU members said that they read Ms. Sutton’s email as an attempt to preempt SEFL staff from expressing their concerns about the tone and language Mr. Blankenstein had used. Further, the failure to address this issue immediately and decisively, has demonstrated a failure of leadership and a failure to recognize the importance of repudiating Mr. Blankenstein’s statements in order to restore an environment appropriate for the workplace. To the contrary, it appears that Ms. Sutton and Director Mulvaney have sought to defend Mr. Blankenstein rather than to remedy the situation in the best interest of the BU. These attempts, as well as the questionable circumstances under which Ms. Ficklin’s quotes were obtained raise ethical concerns related to the use of public office for personal benefit.\(^5\)

BU members have stated that they do not feel comfortable meeting with Mr. Blankenstein. Mid-management, who has been tasked with the difficult role of mitigating the effects of the situation, have met and made themselves available to BU members and have heard their concerns about working with Mr. Blankenstein. Those managers have proposed possible workarounds, however, available alternatives only further stigmatize members of a protected class (e.g. those members simply do not attend meetings where others do). Such alternatives stand to divide the BU, damage morale, and impair the Bureau’s ability to retain personnel that the Bureau has already invested in, suggesting that the only practical solution is to remove Mr. Blankenstein.

In addition, BU members of OFLEO have raised concerns regarding the reorganization of the office. Director Mulvaney and Mr. Blankenstein have ordered the OFLEO to be dismantled. Under the reorganization, a very small OFLEO office will be moved from being its own independent office under SEFL to instead report directly to Mr. Mulvaney. The majority of the current OFLEO staff will be subsumed into other SEFL offices that do not focus on fair-lending enforcement or supervisory matters. It appears that fair-lending enforcement and supervision will therefore end or no longer be prioritized; to the extent any work does continue, it will be led and

\(^5\) See Ethical Conduct for Employees of the Executive Branch, 5 CFR § 2635.702(a).
supervised by Mr. Blankenstein. During mid-term bargaining it was never disclosed that Mr. Blankenstein, who oversees SEFL and played a significant role in the OFLEO reorganization, believes overt acts of racism are not inherently racist and that the majority of hate crimes are hoaxes.

III. ARGUMENT

NTEU believes the Bureau is in violation of the CBA in two ways. First, the writings and the Bureau’s failure to meaningfully address them has created a hostile workplace that does not “capitalize on respect, inclusion, dignity and integrity” in violation of Article 6 of the CBA.

As a senior management official, Mr. Blankenstein has a heightened obligation to ensure the workplace is one of inclusion and respect. To be sure, had Mr. Blankenstein made his blog statements at the workplace, they could easily be viewed as actionable harassment. His words violate the Director’s Anti-Harassment Policy Statement, which describes “using slurs or epithets” as offensive conduct that the Bureau would not tolerate of its own employees or the employees of regulated entities.

Under a totality of the circumstances, Mr. Blankenstein’s statements and refusal to disavow them in a meaningful way creates, at a minimum, an environment that appears to be exclusionary. Objectively, it is difficult to think of any word more malicious or inflammatory than the word he used and, although he said he has some regrets, he never affirmatively said he believes use of that word is, in fact, racist. According to webster.com, “[t]he word now ranks as almost certainly the most offensive and inflammatory racial slur in English, a term expressive of hatred and bigotry. Its self-referential uses by and among black people are not

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6 See, e.g., Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (C.A.7 (Wis.),1993) (Perhaps no single act can more quickly “alter the conditions of employment and create an abusive working environment,” than the use of an unambiguously racial epithet such as the “n-word” by a supervisor...) (citations omitted). Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 577, 404 (C.A.D.C.,2013) (This single incident [of using the “n-word”] might well have been sufficient to establish a hostile work environment).

7 See Director’s Anti-Harassment Policy Statement at 2-3 (defining “offensive conduct” to include the use of racial slurs or epithets and stating “harassment prohibited under Bureau policy includes (but is not limited to) . . . uttering offensive racial epithets”).
always intended or taken as offensive (although many object to those uses as well), but its use by a person who is not black to refer to a black person can only be regarded as a deliberate expression of contemptuous racism” (emphasis added).8

Subjectively, BU members have stated that they personally feel his use of the term and refusal to disavow the context and tone surrounding it was offensive. The fact that these statements were made years ago doesn’t matter, and the law doesn’t require that employees be the direct subjects of such derogatory comments for there to be a hostile work environment. These words are now very much alive here at the office and they carry weight for many on a personal level.

Mr. Blankenstein’s stated position – which he does not appear to have disavowed – is that a white person using the word is simply an “asshole” but not, as Websters avers “expressing contemptuous racism.” Mr. Mulvaney seems to dismiss any impact such views would have on the workplace because they are personal opinions, expressed as discourse on private time, however, BU members disagree and believe that having a person in charge of personnel at SEFL who has made statements that could be construed as racist, misogynistic and bigoted is problematic for people of color, women, gays and others. BU members feel the SEFL work environment has been made hostile with these events and Bureau leadership has not adequately addressed the factors creating this environment.

The Bureau’s response to Mr. Blankenstein’s words failed to mitigate the circumstances and, in fact, heightened the sense of hostility. Several BU members said they “physically cringed” reading the email sent from Ms. Sutton and many others said they felt deflated and unhopeful after reading Director Mulvaney’s emails. A hostile environment like this is detrimental to the health and sense of safety of staff and can detract from employees' job performance, discourage employees from remaining on the job, or potentially keep them from advancing in their careers.

Second, these statements also violate the CBA’s mandate that the Bureau “recognize and respect the dignity of each employee in the formulation and implementation of personnel policies and practices” under Article 3 of the CBA. Following the article that cited Mr. Blankenstein’s statements and the Bureau’s refusal to disavow the statements, BU members have raised concerns with NTEU about whether prior personnel and work related decisions were, in fact, made with a recognition of respect and dignity of employees. For example, BU members have noted that many if not all of the proposed “reorganizations,” including OFLEO, relate either to work that involves fair-lending or offices with disproportionate minority staff or minority leadership.

In his capacity as the Policy Assistant Director for the Bureau’s Division of Supervision, Enforcement, and Fair Lending, Mr. Blankenstein oversees the work of hundreds of employees and makes critical decisions regarding their work, including whether temporary appointments can convert to permanent positions and whether, as a matter of Bureau policy, staff will be permitted to pursue investigations and potential enforcement actions against companies that violate fair-lending and other federal consumer financial laws.

Blankenstein’s statements also call into question whether the Bureau has bargained in good faith over the OFLEO reorganization. Although the Bureau has maintained that this reorganization will not impact the Bureau’s obligation to conduct regulatory and enforcement work with respect to federal fair-lending laws, under the OFLEO reorganization, staff previously dedicated to fair-lending work are being reassigned to offices that are not dedicated to such work and nothing in the reorganization says they will continue their fair-lending work. Because of Mr. Blankenstein’s supervisory role in SEFL, these facts are especially problematic.

IV. Remedy Requested

As set out above, the Bureau has violated the CBA’s explicit mandate to promote a workplace environment “that is free of discrimination and one which capitalizes on respect, inclusion, dignity and integrity, and values
the diversity of its workforce.”\textsuperscript{9} The CBA also requires the Bureau to “recognize and respect the dignity of each employee in the formulation and implementation of personnel policies and practices.”\textsuperscript{10} Mr. Blankenstein’s statements and lack of apology clearly violates this specific mandate of the CBA. Mr. Blankenstien’s behavior has caused harm to BU members in violation of the CBA. In fact, this harm has been acknowledged and ostensibly confirmed in writing by career Bureau management officials. Accordingly, NTEU demands Mr. Blankenstein be immediately removed from any supervisory role over BU members; that the re-organization of OFLEO be halted until new bargaining takes place; and all other relief justified.

\textsuperscript{9} CBA Article 6, “Equal Employment Opportunity.”
\textsuperscript{10} CBA Article 3, “Employee Rights.”