

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

SECURITIES AND EXCHANGE COMMISSION

And

NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 293

Case No. 2023 FSIP 003

ARBITRATORS' OPINION AND DECISION

On October 17, 2022, National Treasury Employees Union, Chapter 293 (Union) filed a request for assistance with the Federal Service Impasses Panel (FSIP or Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Securities and Exchange Commission (SEC or Agency).

Following investigation of the request for assistance, arising from negotiations over a successor collective bargaining agreement (CBA), the Panel determined that the dispute should be resolved through mediation-arbitration with the undersigned, Panel Chairman Martin H. Malin and Panel Member Pamela Schwartz. The parties were informed that if a complete settlement of the issues at impasse were not reached during mediation, we would issue a binding decision to resolve them.

Consistent with the Panel's procedural determination, on January 25 and 27, 2023, we conducted a mediation-arbitration proceeding with representatives of the parties. Prior to the mediation phase, the parties reached voluntary settlements on some issues, but were unable to resolve their dispute over a telework article. Thus, we are required to issue a final decision resolving the parties' dispute in accordance with the Statute and 5 C.F.R. § 2471.11 of the Panel's regulations. In reaching this decision, we have carefully considered the entire record, including the parties pre- and post-hearing documentary evidence and submissions.

BACKGROUND

The Agency is an independent Federal regulatory agency whose mission is to administer and enforce the Federal securities laws intended to protect investors and maintain fair, honest and efficient markets. The Union represents approximately 3,500 professional and non-professional employees stationed in the Agency's Headquarters Office in Washington, D.C. and eleven Regional Offices throughout the country.¹ Typical bargaining-unit positions include: attorney, accountant, examiner, economist and a variety of administrative positions.

The parties' current CBA became effective January 1, 2019, and expired on January 1, 2022. Prior to its expiration, the parties agreed to engage in negotiations for a successor CBA. On March 9, 2022, the parties signed Ground Rules for negotiations of a successor CBA, agreeing that the terms of the parties' current CBA continuing in full force and effect until the parties execute a successor CBA. Their current CBA contains a telework article (Article 11) and a remote telework trial program (Article 51).

The parties began negotiating their successor CBA in April 2022, seeking the assistance of the Federal Mediation and Conciliation Service (FMCS) in September 2022. Unable to reach agreement, FMCS released the parties to the Panel in October 2022.

ISSUES AT IMPASSE

The parties are at impasse over a telework article for their successor CBA, including the types of telework and remote work arrangements and bargaining unit employee participation eligibility.

1. Current Agreement

Under Article 11 of the parties' current agreement, there are five types of telework arrangements. First, bargaining unit employees can apply for *ad hoc* or episodic telework when they can perform their work assignments remotely for a portion of the day or week. Second, bargaining unit employees can apply to work a fixed, set number of telework days in a given week. Up to 25% of each Regional Office, Division, or Office can work "expanded telework" of 3, 4 or 5 telework days per week. All other employees are limited to teleworking two days per week, or

¹ The Union's bargaining unit employees are not compensated under the traditional federal employee pay systems (i.e., General Schedule, Wage-Grade, etc.). Rather, compensation for these employees is provided for under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989). Under FIRREA, certain financial agencies determine their own compensation and benefit levels for their employees, without regard to the limitations of the General Schedule.

fewer. Bargaining unit employees working fixed telework must do so from an approved telework location within 200 miles of their assigned SEC office. The parties agreed to cap the number of employees that could participate at 25% of each Regional Office, Division, or Office.² Third, bargaining unit employees can apply for temporary medical telework, for a period up to 160 hours within a 12-month timeframe, if they or a family member has a documented medical condition. Fourth, disability telework is available as a reasonable accommodation when approved by the Agency's Disability Officer. Fifth, as part of a Continuity of Operations Plan (COOP), *ad hoc* or recurring telework can be performed to ensure that the Agency can continue to perform mission essential functions during a wide range of emergencies.

Article 51 of the parties' current CBA established a remote telework trial program. Under the trial program, a total of 75 bargaining unit employees from four offices, meeting the establish eligibility criteria, could work from a remote official duty station located outside of a 200-mile radius from their assigned SEC office. The trial program launched on June 1, 2019, and continued for the established three-year period. A program review and participant and manager surveys were conducted at completion, with resulting recommendations for the future of the trial program.

2.. The Union's Position

At the conclusion of the mediation phase, the Union provided a final offer, which is in line with its central position that telework opportunities should be maximized so all Agency employees can engage in fulltime telework. Specifically, the Union proposes a telework arrangement based on a frame work they refer to as "Presence with a Purpose."³ Under Presence with a Purpose, it is understood that bargaining unit employees will only be required to report to their assigned SEC office to perform job functions that require an in-person presence. That is, bargaining unit employees may have job functions that require them to be in the office for ten days in a row, but the same employee may not have work that requires them to be in the office at all for the subsequent ten days.

Presence with a Purpose affords the Agency full discretion to deny any telework request. Bargaining unit employees, when required, would be able to quickly travel to their assigned SEC office, as evidenced by the fact that 84% of bargaining unit employees completing the Union's telework survey self-reported to have a round-trip commuting time of three hours or less. However, the Agency,

² The parties agreed to not cap participation of expanded telework within the Division of Corporation Finance.

³ The Union's Presence with a Purpose is patterned after a similar arrangement in place at Financial Industry Regulatory Authority (FINRA), a private not-for-profit corporation with a similar mission and functions as the SEC.

which has the same discretion under the parties' current CBA, has provided no evidence that bargaining unit employees working expanded telework have needed to report to their assigned SEC office frequently, or that any costs associated with such travel had been an issue. Moreover, many bargaining unit employees report to a manager who is not located in the same assigned SEC office, making their very presence in the office largely arbitrary.

Rather, if the Agency permits additional bargaining unit employees to work maximized telework schedules, as provided for in Presence with a Purpose, it will save money because the Agency will be paying fewer travel subsidies as bargaining unit employees commute to their assigned SEC offices less frequently. And, according to the Union, with fewer employees in the SEC offices, the Agency's need for office space will be greatly reduced, resulting in major additional monetary savings.

Adopting the Union's proposal will be a continuation of the SEC's three-year actual experience with Presence with a Purpose during the COVID-19 pandemic. Based on the irrefutable and empirical evidence from the past three years, the SEC's pivot to 100% telework has been highly successful with no negative impact on work quality or productivity. Such success, especially in light of the Agency's failure to provide any evidence that the Presence with a Purpose regime caused any problems over the past three years, is the strongest evidence in support of permanently adopting Presence with a Purpose.

The Union proposes that all bargaining unit employees intending to telework at a location within forty miles from their assigned SEC office, be eligible to work up to ten days of telework each biweekly pay period (i.e., "10-0 schedule"). As the Agency is under "no legal obligation" under the Federal Travel Regulations to reimburse bargaining unit employees for local travel (i.e., travel that occurs within fifty miles of their assigned SEC office), or count such travel as duty time, the Agency's concern over possible travel expenses under the Union's proposal is misplaced. (See generally Federal Travel Regulations 41 CFR § 300-1.1 *et seq*). The parties' current CBA does not require treating local travel in the generous manner the Agency has opted to adopt. Accordingly, the Agency could prevent any potential financial impact by amending its local travel policy to exclude travel expenses and duty time obligations.

Bargaining unit employees intending to telework from a location greater than forty miles, but less than 200 miles, from their assigned SEC office, should be able to work up to eight days of telework per pay period (i.e., "8-2 schedule"). Additionally, the Union's proposed Expanded Telework Trial Program, will allow up to 50% of these bargaining unit employees to work a 10-0 schedule for a two-year trial period. After two years, the Agency and Union will assess the actual cost of the trial, and decide whether to make it permanent and available to all bargaining

unit employees. As these employees will likely need to come into the office infrequently, the Agency should grant such requests because the associated travel costs with these bargaining unit employees being called into the office will not be significant.

In addition to the fixed telework schedules outlined above, the Union seeks a maximized *ad hoc* telework arrangement allowing bargaining unit employees to work additional telework days, when they would normally be scheduled to go into their assigned SEC office, but have no work-related reason to do so. Affording this flexibility further supports the Presence with a Purpose approach and will meet bargaining unit employees' expectations for increased telework upon return from the COVID-19 pandemic.

The SEC has an attrition problem. See Union Ex. 2. The Union observes that the Agency is often competing with large law firms and other high paying employers in recruiting and retaining personnel. The Union maintains that the availability of expanded telework will be an asset to the Agency in recruiting and retaining qualified employees.

The Union proposes a telework stipend for bargaining unit employees to defray additional expenses associated with teleworking in addition to maintaining *status quo* language from the parties' current CBA that requires the SEC to reimburse any additional telework related expenses.⁴ Specifically, bargaining unit employees would be entitled up to \$1,000 each year to pay for telework-related expenditures such as high-speed internet access fees and necessary equipment (e.g., replacement desk chairs, sit/stand desks, document shredders, etc.). The Union notes the need for the existing reimbursement language, in addition to the stipend that will be heavily taxed as income, because such expenditures can often exceed \$1,000 in a given year. Moreover, under 12 U.S.C. § 1833(a), made applicable to SEC by 5 U.S.C. § 4802(d), the SEC is required to "seek to maintain comparability regarding compensation and benefits" with other FIRREA agencies. One such comparable agency is the Federal Deposit Insurance Corporation (FDIC), which affords their bargaining unit employees a \$1,000 annual telework stipend.

The Union also proposes allowing all bargaining unit employees the opportunity to participate in the Remote Telework Program and work 100% telework from a location greater than 200 miles from a bargaining unit employee's assigned SEC office. The Remote Telework Trial Program (the Trial Program) under the parties' current CBA has been a "success" based on the program's review, including staff and manager survey results. (Union Exhibit 14). Of the forty-six participants, some never had an occasion to return to their assigned SEC office

⁴ Article 11, Section 15, Part G of the parties' current CBA states that the Agency will, "...reimburse a teleworker for appropriate and authorized expenses... as provided for by law and regulations."

during the Trial Program. The Union argues that its Remote Telework Program is superior because it makes the program available to all bargaining unit employees, whereas the Agency “effectively eviscerates the Program by making it available only to participants that have “specialized skillsets” or who occupy a position that is “difficult to fill.”⁵ To limit the Remote Telework Program as the Agency proposes, ignores the success of the recent trial and undercuts the Agency’s interests in reducing attrition, saving on transit subsidy costs, and reducing the Agency’s carbon footprint.

Adopting the Agency’s proposal would “greatly reduce” bargaining unit employees’ rights to request expanded telework, as afforded in the parties’ current CBA. Bargaining unit employees should not have their telework rights reduced by the Panel appointed by President Biden, who the Union characterizes as very pro-telework. Of particular concern, the Union opposes the Agency’s proposal to include an overly broad list of duties that are not suitable for telework, and may only be accomplished by bargaining unit employees working at their assigned SEC offices. Such a list would be a change from the parties’ *status quo* as the current CBA only contains a list of work that may be suitable for telework. The Agency has made no argument in support of changing the *status quo*. Rather, the Agency has never identified any issues that have arisen in absence of such a list. Moreover, under Presence with a Purpose, the Agency would continue to have major discretion over deeming work as “necessary” to be completed at an SEC office. The inclusion of such language would likely lead to disagreements over its enforcement, leading to protracted grievances and arbitration. The Union, as an alternative to Presence with a Purpose, proposes its own streamlined list of work that is not suitable for telework.

Finally, the Union objects to the Agency’s proposed biweekly “Community Days” as they would arbitrarily compel all bargaining unit employees to report to their assigned SEC offices. The Union sees no purpose to Community Days other than to foster socializing among employees. The Union proposes that one Community Day each quarter would be sufficient to afford all bargaining unit employees a chance to meet and socialize with other employees.

3. The Agency’s Position

At the conclusion of the mediation phase, the Agency provided a final offer in support of its interest in having limited regular in-office work. The Agency proposes to maximize telework while maintaining the benefits of regular in-office work, including increased productivity and collaboration, in support of the SEC’s mission. To accomplish this, the Agency proposes all bargaining unit employees be afforded the opportunity to apply to telework up to an 8-2 schedule. The 8-2 schedule is a

⁵ We note that the Agency’s final offer does not limit participation in the manner described by the Union.

significant expansion of telework opportunities, as under the parties' current CBA, only 25% of bargaining unit employees are eligible to telework more than 2 days per week.

The Agency asserts that the Office of Personnel Management (OPM) requires agencies to establish an employee's official worksite, using the employee's regular and recurring schedule. A teleworking employee's official worksite can be at the agency's location, as long as that employee reports to the location on a regular basis (i.e., at least twice per pay period). If a teleworking employee does not regularly report to the agency's location (i.e., less than two times per pay period), then the agency must adjust the employee's official worksite to the employee's telework location. An employee's official worksite is used to determine the appropriate locality pay, and is used in determining the distance from the official site to the agency's location for purposes of travel reimbursement. Thus, the Agency can only use bargaining unit employees' assigned SEC offices as their official worksite, if the employees report to that office at least twice per pay period, as they would under the proposed 8-2 schedule.

Richard Bamber, Branch Chief, Account Analysis Branch, Office of Financial Management testified to the Agency's obligation under the Federal Travel Regulations and the SEC's local travel policy. Mr. Bamber testified that, under the Federal Travel Regulations, the Agency must reimburse full travel expenses (transportation, lodging, and per diem when applicable) to employees required, within the course of their duties, to travel more than fifty miles from their official worksite.

Mr. Bamber also testified that the Agency is required under the Federal Travel Regulations to maintain a local travel policy. Under the SEC's local travel policy, which Mr. Bamber oversees, it must reimburse an employee's transportation for any travel within forty miles from an employee's official worksite and count such travel time as duty time. Mr. Bamber testified that for bargaining unit employees working 9-1 or 10-0 schedules, the Agency would have to pay for each trip they make into their assigned SEC offices, either under the Federal Travel Regulations (over fifty miles) or the SEC's local travel policy (within forty miles). In addition to the financial obligation of such arrangements, the Agency would be required to count such employees' travel into their assigned SEC offices as duty time, resulting in a drastic reduction in productivity.

The parties' current CBA permits bargaining unit employees to work a 9-1 schedule and waive any transportation expenses for travel to their assigned SEC office. However, the Agency has since determined that employees cannot legally waive such expenses. The Agency proposes grandfathering into the successor CBA, any existing 9-1 and 10-0 schedules, as established under the parties' current CBA, but does not want to be responsible for paying for other bargaining unit employees'

travel expenses when they report to their assigned SEC offices. As such, the Agency has specifically proposed the 8-2 schedules to keep assigned SEC offices as bargaining unit employees' official duty stations, in accordance with 5 C.F.R. § 531.605.

The Agency additionally seeks to maximize in-office collaboration by limiting remote work. The proposal for a Remote Telework Program, grandfathers into the successor CBA, those employees participating in the Remote Telework Trial Program, under the parties current CBA. The Agency also expands remote work opportunities to all employees in the Office of Financial Management, the Office of Acquisitions, and the Disclosure Review Program of the Division of Corporation Finance, thus, increasing the total remote work-eligible employees to 344 from the Remote Telework Trial Program's cap of 75. The Agency also creates an avenue for additional bargaining unit employees to be identified by adding that new bargaining unit employees can join the Remote Telework Program, "when it is in the best interest of the Employer to do so." Bargaining unit employees may express their interest in remote work to their supervisors, but it is at the discretion of the Division or Office Director whether to petition the Chief Operating Officer for approval.

The Agency, similar to the Union, proposes providing a yearly stipend to teleworking bargaining unit employees. However, the Agency's stipend would reimburse bargaining unit employees for up to \$375 each year and would effectively replace the parties' *status quo* language requiring the SEC to reimburse any and all telework related expenses. The Agency believes that a yearly stipend of \$375 is sufficient as it has agreed to continue to provide teleworking bargaining unit employees with any needed office supplies and printer cartridges in addition to the proposed stipend.⁶ Additionally, the Agency notes that the Union's proposed \$1,000 stipend is not comparable to other FIRREA agencies as only two of the seven other agencies provide any telework stipend, and both limit the stipend to full-time teleworkers.

The Agency also proposes including a list of tasks that are more effectively accomplished in the office. This list would be in addition to the list of suitable tasks for teleworking in the parties' current CBA. Having such a list would avoid significant labor strife by establishing a shared understanding of efficient and effective tasks.

The Agency does not agree with the Union's categorization that the past three years of 100% telework have not affected the Agency or its mission. Due to the COVID-19 pandemic, the Agency had no choice but to enter into 100% telework.

⁶ The Agency has provided all bargaining unit employees with the same \$335 telework stipend on three occasions during 100% telework under the pandemic, totaling \$1,005 since March 2020.

Doing so negatively affected the SEC's culture, productivity, and fulfillment of the SEC's mission. While the Agency successfully maintained its operations during the emergency, it has determined that many tasks, which could be done virtually, are in fact more effectively performed in-person.

The Agency opposes the Union's characterizations of the SEC's performance during the COVID-19 pandemic, including that productivity was not affected when the SEC moved to 100% telework. First, the Agency presented evidence from witness Melissa Hodgman, Associate Director with the Division of Enforcement (ENF), which accounts for approximately one-third of the SEC's employees. Ms. Hodgman testified to the negative impact she observed within the Division's work as a result of remotely obtaining witness testimony and investigative interviews. By not being present for such proceedings, she noted, ENF's ability to make credibility determinations was limited. Ms. Hodgman also testified that she was concerned that performing those duties remotely would jeopardize confidential materials and allow opposing counsel to engage in undetected witness coaching (e.g., one is not likely to observe on a WebEx screen an attorney kicking a witness under the table). Agency witness Charles Koretke, Staff Accountant and former Managing Executive, with the Division of Examinations (EXAMS), the SEC's second largest component, testified to the quality of EXAMS during 100% telework. Mr. Koretke claimed quality suffered because examinations were limited to "correspondence exams," rather than in-person examinations at a registrant's office; the latter are more effective because they do not give registrants time to craft responses to the SEC's inquiries.

Regarding the Union's claims that 100% telework did not affect the SEC's work quality, Agency witnesses Ms. Hodgman and Mr. Koretke both testified to the contrary. Ms. Hodgman testified that ENF productivity decreased when the Agency moved to 100% telework, as evidenced by a significant decline in per capita production since 2020 (Agency Exhibit 34), thus, refuting the validity of Union Exhibit 9 and testimony from Union Witness, ENF Senior Attorney, Drew O'Brien. Mr. Koretke also testified that EXAMS was less productive since the Agency moved to 100% telework. Mr. Koretke explained that the Union's claims that the Agency was more productive and efficient under 100% telework used 2019, a year in which there was a thirty-day lapse in appropriations, as a baseline to compare the productivity of employees working full years in 2020 and 2021, thus, refuting Union Exhibit 8 and testimony from Union Witness, EXAMS Senior Securities Compliance, Paul Anderson,

The Agency objects to the Union's proposal of Presence with a Purpose. Specifically, the SEC's mission, not employee preference, should influence when it is appropriate for a bargaining unit employee to go to their assigned SEC office. That is, Presence with a Purpose is set up to rely on bargaining unit employees'

judgement as to which tasks they perform are necessary to complete in-person or are appropriate to complete remotely.

The Agency also objects to Presence with a Purpose, a model used in the private sector, because bargaining unit employees would set their own schedules rather than committing to a fixed telework schedule. A variable telework schedule, under Presence with a Purpose, is contrary to OPM's telework framework, which uses regular and recurring schedules to determine a bargaining unit employee's official worksite. Such inconsistencies would subject the SEC to audits, congressional inquiries, and render it unable to provide OPM with accurate telework schedules, as required under the Telework Enhancement Act. Presence with a Purpose would also create an administrative burden on managers, requiring them to complete an independent analysis for each proposed telework schedule.

Presence with a Purpose would result in the SEC paying unnecessary travel expenses and result in reduced productive work time. Without a regular and recurring telework schedule, Presence with a Purpose would result in the Agency designating bargaining unit employees' telework locations as their official worksite. Then, any time a bargaining unit employee needed to complete a task at an assigned SEC office, the Agency would be responsible for transportation, and the commute to the SEC office would occur while on duty time. The Agency's 8-2 schedule would avoid both the financial and productivity issues created by Presence with a Purpose.

The Union's proposal maintains the arbitrary 200-mile radius restriction for where bargaining unit employees can live to be eligible for telework. However, the Agency's 8-2 schedule removes this restriction and instead allows bargaining unit employees the freedom to live where they want within the contiguous United States. In addition to giving bargaining unit employees autonomy, it also provides predictability, which Presence with a Purpose cannot.

The Agency's proposal provides for regular in-office work, which will increase collaboration in support of the SEC's mission. Ms. Hodgman and Mr. Koretke testified that bargaining unit employees in ENF and EXAMS are required to collaborate. The Agency's proposed "Community Days" would create recurring and regular opportunities for such collaboration. Even some of the Union's evidence supports the Agency's desire for such opportunities. Specifically, Union President Greg Gilman testified that he attends Labor Management Relations Committee meetings in-person for "the interactions." Also, Union Steward Paul Anderson testified to the importance for new employees to attend in-person onsite Exams with their peers.

The Agency objects to the Union's indiscriminate expansion of the Remote Work Trial Program. Due to the COVID-19 pandemic, the Remote Work Trial

Program operated for less than a year before the entire SEC started 100% telework in March 2020. Accordingly, the parties are not able to measure the success of the Trial Program without a baseline; that is, there was no control group and it would therefore be imprudent to expand the program to the entire Agency.

The Agency also objects to the Union's claim that the SEC has a recruitment and retention problem. On the contrary, the SEC has one of the lowest attrition rates among FIRREA agencies and has even attempted to encourage employee turnover by offering Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Payments (VSIP).

CONCLUSIONS

After carefully reviewing the arguments and evidence presented during the mediation-arbitration proceeding, for the reasons set forth below, we will impose a modified version of the Agency's final offer to resolve this dispute. As the parties' proposals are largely based on fundamentally different telework arrangements (i.e., 8-2 schedule versus Presence with a Purpose), we will begin with our rationale on this issue. Then, any provisions or modifications ordered under a different rationale are noted on a section-by-section basis.

Telework Arrangement

The parties agree that telework should be increased from the arrangements under their current CBA. However, they disagree as to how much of an increase is appropriate. This was evident in the two completely different visions the parties have for telework. The Union envisions bargaining unit employees in the office only when it is necessary under Presence with a Purpose, but the Agency wants to regularly see bargaining unit employees work in the office with the 8-2 schedule. Despite significant differences between the parties' proposed telework arrangements, both parties identified maximizing telework opportunities for bargaining unit employees as a primary interest.

Unfortunately, the record developed by the parties is far from ideal, making choosing between Presence with a Purpose and the 8-2 schedule difficult. Much of the Union's data is presented in conclusory fashion and fails to recognize what is at issue here is the difference between the 8-2 and 10-0 schedules. We are left with no quantification of the Union's claim that Presence with a Purpose will result in a significant financial advantage for the SEC.

Similarly, the Agency claims excessive cost resulting from employees who live greater than 50 miles from their assigned SEC offices being eligible for travel reimbursement, and in some cases per diem, while potentially commuting during their regular work hours. But, other than anecdotal evidence, the Agency has not

provided a precise prediction of how often employees would have to travel under a Presence with a Purpose or a cost estimate.

Nevertheless, we must decide between these two distinct telework arrangements, relying on the evidence of record available to us rather than the record we would have preferred. We find, based on the evidence, that the 8-2 schedule meets a key interest shared by both parties to maximize telework for bargaining unit employees. We, however, cannot find, based on the record of evidence in this case, that Presence with a Purpose is a practical telework arrangement for this bargaining unit. Accordingly, we will order the parties to adopt the Agency's proposed 8-2 schedule.

Mr. Bamber testified that, whether under the Federal Travel Regulations or the SEC's local travel policy, when a bargaining unit employee's official worksite becomes their telework location, the Agency is responsible for that employee's travel to and from their assigned SEC office. Under the SEC's local travel policy, such travel would be on duty time. Mr. Bamber's testimony was clear that an employee's telework location serving as their official worksite would trigger these expenses and work time.

Agency Witness Katherine McHale, Telework Program Manager, Legal and Policy Office, Office of Human Resources confirmed Mr. Bamber's testimony regarding travel reimbursement and work time. Ms. McHale also explained that the Agency had determined that employees cannot waive such travel costs, which is the practice under the parties' current CBA for bargaining unit employees on 9-1 and 10-0 schedules.

The Union has gone into great detail regarding the concept of Presence with a Purpose, but the record is unclear as to how exactly Presence with a Purpose would operate and at what cost. The Union argues that its proposal will save the Agency significant amounts of money by reducing the number of Agency subsidized commutes and the Agency's need for office space. But the Union was not clear as to what it was comparing its proposal to. The appropriate comparison is to the Agency's last best offer, the 8-2 schedule. The Union has not quantified the added cost savings resulting from bargaining unit employees telecommuting 9 to 10 days per pay period as opposed to 8, and we see no reason to assume they will be substantial. Indeed, we doubt that the Agency will need less office space under Presence with a Purpose than under 8-2.

Working with record evidence presented to us we find it likely Presence with a Purpose will have a significant impact on productive use of employee work time. The Union conducted a survey of bargaining unit employees in Fall 2022 (Union Exhibit 7), that among other things asked bargaining unit employees to report their roundtrip travel times into their assigned SEC offices. The Union referenced this

particular information from the survey in support of its claim that since approximately 84% of respondents have a commute of three hours or less, they could quickly report to their assigned SEC office when required. But, with a telework site as their official duty site, when reporting to their assigned SEC offices, bargaining unit employees could spend a significant portion of their workdays commuting.

Using the same data that the Union referenced, we were able to create a rough estimate of the resulting impact on bargaining unit employees' workdays, if they were required to report to their assigned SEC office from their official work site (i.e., approved telework location).⁷ For example, 39.95% of respondents, representing the most popular response, indicated their round-trip travel time into their assigned SEC office was between 1-2 hours. Assuming these respondents telework from a location within a 40 miles radius of their assigned SEC office (i.e., local travel) and using a standard eight-hour day, these employees would be left with 87.5% - 75% of their workday to seemingly complete 100% of their duties. The second most popular response was a round-trip travel time of 2-3 hours, which 32.81% of the participants selected. If these employees telework from a location within the local travel area of their assigned SEC office, then they would be left with only 75% - 62.5% of their day to complete their responsibilities.⁸ If those same employees telework from a location outside the 50-mile radius of their assigned SEC office, then Federal Travel Regulations would apply.⁹ The potential loss in productivity to the SEC is very concerning.

The Union is correct that SEC bargaining unit employees are professionals who, even during a global pandemic, were able to get the job done. However, we are not convinced, as the Union suggests, that the three years of 100% telework because of the COVID-19 pandemic was Presence with a Purpose. The pandemic had a major impact not only on how the SEC conducted business but also on other entities

⁷ Travel times data from column Union Exhibit 7

Travel Times	No. of Respondents	% of Respondents
Under 1 hour	242	10.95%
1-2 hours	883	39.95%
2-3 hours	725	32.81%
3-4 hours	256	11.58%
Over 4 hours	104	4.71%
Total	2210	

⁸ We are aware that bargaining unit employees can work a Compressed Work Schedule and have adjusted these estimations for both nine or ten hours: travel times of 1-2 hours leaves 88.89% - 77.78% of a nine-hour day and 90% - 80% of a ten-hour day; and travel times of 2-3 hours leaves 77.78% - 66.67% of a nine-hour day and 80% - 90% of a ten-hour day.

⁹ In those circumstances travel time is accounted for using an appropriate combination of regular work hours for travel during their normal tour of duty, creditable travel time for time spent traveling outside of normal tour of duty, and noncreditable travel time for travel to and from a transportation terminal outside of normal tour of duty.

with whom the SEC regularly interacts, such as courts, businesses, and law firms. This makes it difficult to generalize from the experience of the pandemic to the likely experience in a post-pandemic environment. To say that bargaining unit employees did not need to come into their assigned SEC offices to perform their duties is to ignore the fact that going into the office was not even an option for part of that time.¹⁰

Accordingly, we adopt the Agency’s proposal that all employees are eligible to request to telework up to 8 days per pay period. We now consider specific sections as detailed in the Agency’s final offer.

Section 1

Part A of Section 1 of parties’ current CBA states:

The Parties recognize that telework arrangements may: (a) protect environmental quality and conserve energy by reducing traffic congestion and vehicle emissions; (b) improve employees' work lives by allowing a better balance of work and family responsibilities and reduce work-related stress; (c) improve the Employer's ability to recruit and retain a high-quality workforce in a competitive job market; and (d) provide for continuity of operations during emergencies. In recognizing the benefits, both parties also acknowledge the need of the Commission to accomplish its mission. Eligible employees may participate in the telework program to the maximum extent possible without diminished employee performance (Public Law 106-346, 359 of October 23, 2000 and Public Law 111-292 of December 9, 2010).

The parties agree to add the following sentence to the *status quo* language:

Taking into consideration the agency’s mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation, telework schedules may not be the cause for a decline in productivity or impeding work duties.

However, the Agency proposes adding “unreasonable delays in scheduling,” to this final sentence outlining issues that telework schedules may not cause. The Agency’s additional language is unnecessary. To the extent that unreasonable delays in scheduling impede work duties, the Agency’s interests are already

¹⁰ The SEC did not reopen its offices for voluntary return until August 2021 and remains as of the date of this Opinion in a 100% telework posture.

protected. Therefore, we order the parties to strike the phrase from the Agency's proposal.

Section 2 – Definitions

Approved Temporary Telework Location

The parties' current CBA does not include a definition for "Approved Temporary Telework Location." Both parties have proposed including the term in the definitions section of the article. The Union proposes defining approved temporary telework location as, "(a) location, approved in writing (via email) by an employee's supervisor, where an employee can temporarily telework away from their Alternative Worksite or Reporting Office."

The Agency's proposed definition does not include "(via email)," but the Agency has not provided any evidence or justification that email would not be sufficient evidence of approval. We order the parties to adopt the Union's proposed definition.

Core Hours

The Agency proposes including a definition for "Core Hours," which the parties' current CBA does not include. The Union has not proposed including core hours in the definition section. Specifically, the Agency proposes defining core hours as, "(t)he hours, defined in Article 7, that must be worked by all full time employees during their daily tour of duty."

As the proposed definition itself references Article 7 of the parties' agreement, inclusion is redundant. Accordingly, we order the Agency to withdraw its proposal to include this definition.

Section 4 – Eligible Positions

The parties have agreed to the *status quo* language from their current CBA in part B of the section on positions eligible for telework, which states:

B. Work suitable for telework depends on the nature and job content, rather than job series or title, type of appointment, or work schedule. Jobs not entirely suited for telework may contain duties that can be performed at an Alternative Worksite either on a Routine or Situational Telework basis.

The Agency has proposed adding on to Part B the following:

An employee will enter into a telework agreement that sets forth expectations for tasks that must be completed in the office and otherwise will consult their supervisor if they are unsure whether a

task requires presence in the office. The following examples may not be applicable to every situation, particularly with regard to employees who are not co-located with their team, so employees should discuss specific situations with their supervisor:

The Agency has failed to provide any reason or evidence to support this additional language, and we will order the parties to adopt a modified version of the Agency's proposed Part B, striking the additional language noted.

The parties' current CBA, includes the following list of tasks that are suitable for telework:

Tasks and functions (positions) generally suited for telework include, but are not limited to:

1. Writing,
2. Policy development,
3. Research Analysis (e.g. investigating, program analysis, financial analysis), Report writing,
4. Telephone-intensive tasks,
5. Computer-oriented tasks, and
6. Data processing in cases where the security of data can be adequately assured.

The parties are generally in agreement over including the same list in their successor CBA, but they differ on a few items. We order the parties maintain the *status quo* with the addition of the Agency's proposal to add "and evaluation" to item number 3.

The Agency has proposed including a lengthy list of duties and tasks generally not suitable for telework to this section. The Union opposes inclusion of the Agency's proposed list, arguing instead that the parties' *status quo*, which does not include such a list, is appropriate.

Specifically, the Union makes the following argument against changing the parties' *status quo*:

NTEU's proposal would maintain the current CBA rule that makes clear Management may require an employee to come into the office for a specific reason: "The employer reserves the right to direct an employee scheduled for telework to report to [their SEC worksite] in circumstances deemed necessary by the Employer to meet mission, staffing and/or workload requirements..." (2018 CBA, Art. 11, § 14(D)). This general rule, which affords management considerable discretion, has been in effect at SEC for over twenty years, and renders

SEC's novel list of "unsuitable" telework tasks unnecessary. SEC has never identified any problems with this rule, and in fact, NTEU has only very rarely, if ever, filed a grievance over its application." (Union Closing Brief, page 9).

We find this argument persuasive, as the Agency has failed to provide any evidence that the *status quo* is insufficient.¹¹ Accordingly, we order the parties to adopt a modified version of the Agency's proposed Section 4 that does not include a list of things generally not suitable for telework.

Section 7 – Community Days

The Agency introduced the concept of Community Days, proposing that one day each pay period, all of the members of a particular office would report to work in person at their assigned SEC office. The parties current CBA does not reference Community Days or a similar concept.

The Agency proposes the following section on Community Days:

A. Community Days are intended to advance the Employer's mission, enhance communication, and promote collaboration among staff through in-person interaction.

B. Community Days will be determined by first or second line supervisors. Community Days will not exceed more than one day each pay period in frequency.

C. Unless an employee is a participant in the Remote Telework Program, all employees are expected to be present for Community Days in their respective work units unless on approved leave. Supervisors will establish and communicate regularly occurring Community Days in advance so employees may plan their schedules with these days in mind. When a Community Day falls on an employee's regularly scheduled telework day or alternate work schedule day, the employee will be permitted to telework on another day and/or move their regularly scheduled day off unless doing so would negatively impact the mission. Home Duty Stationed employees who have grandfathered schedules will not be expected to attend more Community Days in a pay period than they were otherwise scheduled

¹¹ In its post-hearing brief but not its final offer, the Union requested if we were to adopt the Agency's proposed 8-2 schedule, then we should include the Union's version of a list of duties not suitable for telework. We find it unnecessary to adjudicate this list item-by-item as the Union's suggestion would have us do. Because there is no evidence that the language already cited fails to protect the Agency's interest, we do not need to choose between the parties' proposed lists.

to report to the office. If there is more than one Community Day scheduled in a Pay Period, Home Duty Stationed employees should consult their supervisor to determine which Community Day should be attended.

While the Union has included Community Days as a part of its final offer, the Union proposes Community Days be limited to one day per quarter (i.e., four times per calendar year). The Union did not propose a separate section on Community Days, as the Agency has, but rather proposed defining Community Days in the definitions of Section 2 of this article. Here, the Agency has not supported a need to have a Community Day each pay period. Rather, Agency witness Ms. Hodgman testified that, even without a mandate of community days, she has been able to successfully engage in “mock” community days, with strong employee voluntary participation.

Moreover, the parties are in agreement that Managers will have discretion and authority to approve bargaining unit employees’ telework agreements, which includes the schedule of days to be worked in their assigned SEC offices. We will, therefore, order the parties to modify the Agency’s proposed Section 7, Part B to reflect that “Community Days will not exceed more than one day each calendar quarter in frequency. Additionally, the last two sentences of the Agency’s proposed Section 7, Part C, which refer to a biweekly Community Day, are no longer applicable. We order the parties to adopt a modified version of the Agency’s proposed Section 7, Part C, striking those last two sentences.

Section 8 – Training

The parties’ current CBA contains the following provisions on telework training:

- A. Any employee considering participation in the Telework Program is required to complete telework training prior to submitting a "Telework Request and Agreement Form" and an Alternative Worksite Safety Checklist. The respective supervisor must also complete the telework training prior to the employee teleworking. The telework training can be found via the Employer's online training system.
- B. Certifications of training completion must be attached to a Telework Request and Agreement Form.

The Union proposes maintaining the *status quo* language, but the Agency proposes adding that, “(t)he Employer may require employees to take additional telework training periodically.”

As the Agency has provided no rationale or evidence supporting this additional language or explaining how this is not duplicative of the Agency's general Management Rights, we order the parties to strike the Agency's proposed Item B from the Agency's proposed Section 8.

Section 9 – Telework Agreement

The parties' current CBA includes a section requiring that all bargaining unit employees complete a telework agreement, which must be reviewed and signed by the Agency, before they may begin to telework. The parties are in general agreement over including a similar telework agreement section in their successor CBA. However, the Agency has proposed the following additional item for the telework agreement section:

- I. An employee is required to report into their Reporting Office to attend a Community Day unless they are on leave or excused by their supervisor. Regular failure to attend Community Days may result in the revocation of the employee's Telework Agreement.

As the parties current CBA does not include Community Days, this is a novel issue for the parties. The Union's final offer includes Community Days but does not include a similar telework agreement provision. Here, the Agency's proposed Section 9, Item I, involving attendance at Community Days, is redundant because bargaining unit employees are directed to report to their assigned SEC office in other provisions of the article. We order the parties to strike Item I from the Agency's proposed Section 9.

Section 12 – Performance of Work

The parties' current CBA includes that bargaining unit employees are required to forward their business telephone while performing telework.

- D. The teleworking employee must forward their business telephone to an alternative telephone number so they are available to conduct business. The following are additional Call Forwarding provisions:

...

- 5) The Employer will not preclude an employee from participating in telework arrangements because Call Forwarding is not available in his or her area.

The Union proposes keeping the *status quo* language, but the Agency proposes removing provision #5. As the Agency has provided no rationale or evidence in support of removing the provision, which effectively would permit the Agency to deny bargaining unit employees the ability to participate in telework because they are in areas without call forwarding, we order the parties to include Part D.5 with the Agency's proposed Section 12.

Section 16 – Technology, Equipment & Supplies

The parties are largely in agreement over Section 16, which outlines technology, equipment, and supplies arrangements for teleworking bargaining unit employees. They have each proposed providing bargaining unit employees with a telework stipend, which is not offered under the parties' current CBA, to cover costs associated with teleworking. But, the parties differ as to the appropriate amount for the annual stipend. The Agency is proposing a stipend of up to \$375 per year and the Union proposing the stipend be up to \$1,000 per year. Additionally, the Union proposes the parties keep *status quo* language from Article 11, Section 15, Part G of the parties' current CBA, which states, "(t)he Employer will reimburse a teleworker for appropriate and authorized expenses incurred while conducting official duties at the approved Alternative Worksite, as provided for by law and regulations."

Here, we see the parties' proposed telework stipend as an alternative, rather than an addition, to their *status quo* language requiring the Agency to reimburse bargaining unit employees for "appropriate and authorized" telework related expenses. Given that the Agency will be providing teleworking bargaining unit employees with necessary supplies and ink cartridges, we do not see a need to order the parties to keep their *status quo* language, which would essentially give bargaining unit employees an unlimited stipend for any and all telework related expenses.

The parties do not agree on the appropriate amount for the yearly telework stipend. We note that as the Agency has provided all bargaining unit employees with a total of \$1,005 to supplement telework costs since the SEC went 100% telework in March 2020, bargaining unit employees who elect to telework under the new CBA will have already received resources to establish their telework sites. We were not persuaded by the Union's use of the FDIC's \$1,000 yearly telework stipend as a comparable arrangement to the proposed telework stipend before us. The FDIC's stipend has several additional conditions, such as eligible FDIC employees telework 100%. We are not persuaded that the SEC is obligated to offer a \$1,000 stipend. Accordingly, we find the Agency's proposed \$375 yearly stipend is reasonable and order the parties to adopt the Agency's proposed Section 16.

Section 20 – Alternative Worksite

The parties' current CBA does not contain a section on alternative worksites (i.e., approved telework locations). The Agency has proposed the section, which reviews telework location considerations, as it coincides with the Agency's proposal that bargaining unit employees no longer be restricted to telework locations within 200 miles of their assigned SEC offices. The Union did not propose such a section, and rather proposed, under Presence with a Purpose, to maintain the existing 200-mile radius restriction for teleworking bargaining unit employees.

As we have ordered the parties to adopt the 8-2 schedule, we believe it is important to include the Agency's proposed section on alternative worksites as well. This provision makes it clear to bargaining unit employees that they are no longer restricted to teleworking from an alternative worksite within a 200-mile radius of their assigned SEC office and advises them of the reasonable consequences that flow from a distant alternative worksite. This would appear to liberalize bargaining unit employees' options and we will order the parties to adopt it.

Section 21 – Extended Situational Telework

The parties have both proposed extended situational telework, similar to Temporary Medical Telework under their current CBA, but with new consideration for non-medical related requests. Under part B of this section, the parties agree to keep the existing *status quo* language on documentation required for requests for extended situational telework due to medical conditions.

B. Documentation of a Medical Condition: If an employee requests Extended Situational Telework due to a documented serious health condition of the employee or family member (as defined in Article 28, Section 2B) that temporarily prevents the employee from performing their duties in the Reporting Office, the employee must submit medical documentation from a physician supporting the request to the Office of Human Resources. The documentation must detail the expected duration/frequency of the medical condition and an assessment of the employee's ability to perform work while teleworking or a description of the time commitment required to provide care for a family member during the work week.

However, the Agency has proposed adding a sentence to the *status quo* language, which the Union rejects. Specifically, the Agency proposes adding the following:

Risk of exposure or speculative risk to the employee or employee's family member will usually not be a qualifying reason for extended

situational telework (but may qualify for a reasonable accommodation under certain circumstances).

The Agency has not provided any evidence or argument to justify changing the *status quo* with this specific exclusion, and we order the parties to adopt a modified version of the Agency's proposed Part B, which strikes this added sentence.

Part C of this section involves evaluating non-medical requests for extended situational telework, which the parties have agreed to add to this section. The parties agree to the following:

C. Evaluation of Non-Medical Requests: Supervisors will evaluate requests for Extended Situational Telework for non-medical circumstances on a case-by-case basis and make recommendations for granting such requests to the appropriate Director of the Division or Office, and the Office of Human Resources.

The parties have not reached agreement on a final sentence in this section that will specify the Agency's considerations in exercising its discretion to approve non-medical requests.

The Agency proposes that, "(s)uch requests will be granted at the Employer's discretion in order to advance the mission of the respective Division or Office." But, the Union proposes that, "(s)uch requests will be granted at the Employer's discretion taking into account the mission of the respective Division or Office."

As neither party has addressed this difference, we will decide the issue in a manner that will give the Agency the most discretion in granting such requests. We find the Union's proposal for the Agency to have discretion to grant such requests "...taking into account the mission of the respective Division or Office" would give the Agency the most flexibility. Therefore, we order the parties adopt a modified version of the Agency's proposed Section 21, which includes the Union's proposed language as identified here.

Section 22 – Remote Telework Program

The parties' current CBA established a three-year Remote Telework Trial Program in which eligible participants could work remotely from an approved location greater than 200 miles from their assigned SEC offices. The Union has proposed to make the trial program permanent, and although the Agency's post-hearing brief speaks of a continuation of the trial, it is clear from the Agency's final

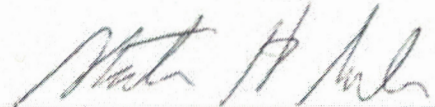
offer that it is also proposing a permanent program.¹² We recognize that the evaluation of the program was overall very positive, but in light of the SEC working 100% telework due to COVID-19, such evaluations are not optimal.

We are ordering the Agency's proposed Remote Telework Program because it is more generous to bargaining unit employees. While the Union's proposal restricts bargaining unit employees to telework from locations greater than 200 miles from their assigned SEC offices, the Agency's proposal has no restrictions on who may apply.

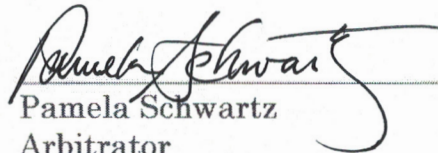
¹² The parties are, of course, free to continue to evaluate the Remote Telework Program and make modifications as they see fit.

ORDER

Pursuant to the authority vested in us by the Federal Service Impasses Panel under the Section 7119 of the Statute, we will impose the language outlined herein to resolve this dispute:



Martin H. Malin
Arbitrator



Pamela Schwartz
Arbitrator

February 21, 2023
Washington, D.C.