

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

NATIONAL TREASURY EMPLOYEES UNION

And

FEDERAL ELECTION COMMISSION

Case No. 2022 FSIP 048

**DECISION AND ORDER**

**BACKGROUND**

This case, jointly filed by the National Treasury Employees Union (Union) and the Federal Election Commission (Agency or Management) on April 5, 2022, concerns negotiations over a pilot program for expanded telework and alternative work schedules (AWS). The Agency is an independent regulatory agency of the United States whose purpose is to enforce campaign finance law in United States federal elections. The Union represents over 150 non-professional and professional employees located in Washington, D.C. The parties are governed by a 2013, as amended in 2015, labor master agreement (LMA) that expires on February 28, 2023. This matter was filed with the Federal Service Impasses Panel pursuant to Section 7119 of the Federal Service Labor Management Relations Statute (the Statute).

**PROCEDURAL AND BARGAINING HISTORY**

As a consequence of the Covid-19 pandemic, the Agency permitted a number of increased telework and AWS flexibilities. Subsequently, the parties agreed to reopen the existing 2013 LMA so that they could negotiate a pilot program that would enshrine these flexibilities for a period of 1 year following the physical return of employees to their office space. The parties successfully negotiated most of the substance of the pilot program with the exception of a few issues discussed below. Indeed, the work force returned to the office and the parties are currently abiding by the provisions of the pilot program that were agreed upon.

The parties had 8 bargaining sessions over their pilot program from September 2021 through November 2021. Afterwards they reached out to the Federal Mediation and Conciliation Services (FMCS) for assistance. The parties had one 4-hour mediation session on December 21, 2021, but they could not reach agreement. Accordingly, the FMCS Mediator released the parties from mediation. The parties jointly filed a request for assistance with the Panel on April 5, 2022. On

May 9<sup>th</sup>, the Panel voted to assert jurisdiction over all disputed issues and to resolve them through a single Written Submissions process. The parties submitted their arguments on May 27, 2022. The record is hereby closed.

## **ISSUES**

The parties' proposals focus primarily around the continued availability of flexible telework and AWS options under the pilot program if the program expires and the parties have not completed negotiations over a permanent expansion of those options. However, there is a related issue concerning the timeframe for those negotiations.

### **I. Union Position**

The Union offers the following language:

**I.D.2.** The Pilot will conclude at the end of the first pay period occurring one (1) year from the Pilot's commencement in accordance with and subject to the procedures described below. The parties will meet to discuss and assess the program ninety (90) days before the conclusion of the Pilot period. After this discussion, either party may invoke negotiations over this MOU, or the parties may agree to extend the MOU into a permanent program, taking into consideration the data gathered during the pilot. Any invocation of negotiations will occur within fourteen calendar days after the parties have met to discuss the program and review data. Should the parties engage in negotiations to modify the pilot program, the current program described in this MOU will remain in effect during those negotiations, subject to the provisions below or agreement by the parties to extend. The parties agree to prioritize meeting to negotiate in good faith any changes, should negotiations occur. The parties agree to pre-schedule six full-day bargaining dates, in order to expedite negotiations concerning whether any changes to this MOU should occur based on the results from the pilot. These bargaining dates will occur after the program-assessment meeting described above and prior to the conclusion of the one-year pilot period. If the parties are unable to resolve any differences within forty-five (45) days after their first bargaining session, the parties will utilize mediation. Should mediation be necessary, the parties will hold such mediation prior to the conclusion of one year pilot period. Mediation will be scheduled with a mutually-agreeable private mediator, with costs shared, if needed to expediate the mediation process. The parties further agree that if they have not reached agreement within 90 days after the assessment meeting described above, impasse will be declared and any

disagreements will be submitted to the FSIP, unless the parties mutually agree to extend the timeline for doing so.

**I.D.3.** In addition to any rights under the law, if the pilot program diminishes employee productivity or hinders agency operations with regard to Telework, or if AWS under this MOU causes an adverse agency impact, the Agency may make adjustments to Telework or AWS scheduling under this MOU as needed to address identified areas where such problems have occurred, starting 90 days following the conclusion of the pilot, subject to any subsequent ruling from FSIP or later agreement between the parties. This may include, if warranted by the specific circumstances as described above, reversion to former telework or AWS standards under the parties' 2013 LMA, as amended in 2015, with regard to identified areas. The parties may also agree to enter into an interim policy, should they choose.

The Union's proposal for I.D.2. is intended primarily to "address procedures for expediting the bargaining process"<sup>1</sup> at the conclusion of the pilot program. It creates the following framework:

- The parties will meet 90 days before the end of the pilot program to assess data collected during the program period;
- Within 14 days of this meeting, either party may request to negotiate a permanent expansion of telework and AWS;
- The parties will agree to 6 bargaining sessions;
- If the parties cannot reach agreement within 45 days of the first bargaining session they will engage the services of a private facilitator/mediator with costs to be shared equally;
- If the 90-day assessment period mentioned in the first bullet point ends without agreement the parties will seek the assistance of FSIP unless they mutually agree to extend the pilot period.

In addition to the foregoing, the Union's I.D.2. also establishes that the expanded options under the pilot program will remain in place during any expanded-program negotiations subject to the exceptions set forth in the Union's Section I.D.3. Under the Union's Section I.D.3., if no agreement exists following the conclusion of the pilot program then the Agency must allow the expanded options to remain in place for a period of 90 days. Afterwards, however, the Agency can alter telework if it diminishes productivity or hinders operations; the Agency may also

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<sup>1</sup> Union Position at 3.

alter an AWS if it creates an adverse impact. The foregoing alterations could result in a reversion to existing options available under the LMA or any interim agreement that the parties agree upon. The Union rejects the Agency's proposed approach, which is that within 90 days of the end of the pilot program the telework and AWS options under the program would revert to the options under the LMA if the parties do not reach agreement or if they declare impasse at any point during negotiations over an expanded program.

The Union argues that one of the primary purposes for its proposed bargaining framework is to expedite the bargaining process. This purpose advances both parties' interest of a prompt resolution to all outstanding issues. The Union would facilitate the foregoing by requiring the use of expedited private mediation within 45 days of bargaining commencing and by requiring invocation of the FSIP process before the end of the pilot period.

The Union further argues that its proposal to allow expanded options to remain in place during any negotiations, with defined exceptions, is a fairer and more efficient approach. Assuming the parties are unable to reach agreement by the end of the 90-day period following the end of the pilot program, then the parties will have been operating under the pilot for 15 months. The Union contends the Agency's proposed unilateral reversion approach would prove incredibly disruptive to the lives of employees who have become accustomed to expanded scheduling options. Such a reversion would create, among other things, employee cost increases, morale issues, and health concerns for commuting employees. By contrast, the Union's approach promotes stability because existing schedules would simply remain in place.

The Agency's position, the Union argues, would also be more wasteful. If adopted it would require many teleworking employees to be placed upon a new schedule: as such, they would have to submit a new telework agreement.<sup>2</sup> And then, once the bargaining process ends, those employees could potentially have to submit *another* new agreement. The Union maintains that this arrangement is not an effective use of Agency or taxpayer resources. Moreover, the Union emphasizes that its proposal provides the Agency with flexibility because the Agency may alter schedules for operational needs, performance based concerns, or because of adverse impact.<sup>3</sup> Thus, the Union's proposal is the only one that appropriately balances both parties' interests.

Finally, the Union argues that the Agency's proposals impermissibly ask the Union to waive its bargaining rights under the Statute. The Union notes that the Federal Labor Relations Authority (FLRA) has held that parties have a statutory

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<sup>2</sup> See Union Position at 7.

<sup>3</sup> See *id.* at 5.

obligation to maintain the status quo pending completion of negotiations.<sup>4</sup> The Union avers that enhanced telework and AWS is the status quo and any attempt to unilaterally alter them during ongoing negotiations would be illegal.<sup>5</sup>

## II. Agency Position

The Agency offers the following language:<sup>6</sup>

**I.D.2.** The Pilot will conclude at the end of the first pay period occurring one (1) year from the Pilot's commencement in accordance with and subject to the procedures described below, unless the period is extended as described in Section I(D)(4) of this agreement. The parties will meet to discuss and assess the program no less than ninety (90) days before the conclusion of the Pilot period. After this discussion, either party may invoke negotiations over this MOU, or the parties may agree to extend the MOU into a permanent program, taking into consideration the data gathered during the pilot. Any invocation of negotiations will occur within fourteen (14) calendar days after the parties have met to discuss the program and review data. Should the parties engage in negotiations to modify the pilot program, the current program described in this MOU will remain in effect during those negotiations. If the parties do not reach agreement during negotiations and go to mediation, the MOU will also remain in effect during the mediations process.

**I.D.3.** The parties agree to prioritize meeting to negotiate in good faith any changes, should negotiations occur. The parties agree to pre-schedule six full-day bargaining dates, in order to expedite negotiations concerning whether any changes to this MOU should occur based on the results from the Pilot. These bargaining dates will occur after the program-assessment meeting described above and prior to the conclusion of the one-year pilot period. If the parties are unable to reach agreement by the end of the one-year Pilot, the parties will move immediately to mediation, unless the parties mutually agree to extend the negotiations period. However, in no event may the negotiations period, to include any mediation invoked during the

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<sup>4</sup> Union Position at 5 (citing *United States INS*, 55 F.L.R.A. 69, 76 (1999)).

<sup>5</sup> Curiously, the Union concedes that its position, i.e., reversion only if certain conditions are met, also constitutes a waiver of "certain rights," Union Position at 5, but does not allege this position creates any waiver issues. To the contrary, the Union states it willingly engages in such bargaining. *See id.* The Panel also notes that the Union never raised the waiver issue during the Panel's initial investigation of this dispute.

<sup>6</sup> The number in the parties' proposals did not match. Accordingly, the Agency's proposed Sections I.D.2. and I.D.3. are responsive to the Union's I.D.2. The Agency's I.D.4. is responsive to the Union's I.D.3.

period, be extended by more than 90 days from the end of the Pilot. The parties will seek mediation through the Federal Mediation and Conciliation Service (FMCS). If necessary to expedite the process, mediation can alternatively be scheduled with a mutually-agreeable private mediator, with costs shared. The parties further agree that if they have not reached agreement within 90 days after the end of the Pilot, impasse will be declared and any disagreements will be submitted to the Federal Service Impasses Panel (FSIP).

**I.D.4.** If the parties do not reach agreement within 90 days of the end of the Pilot, or in the event that impasse is declared at an earlier date, employees will revert to the telework and work schedule programs established in the parties' 2013 LMA, as amended in 2015, unless the parties mutually agree to an alternative interim policy.

The Agency does not directly address the Union's proposed expedited bargaining schedule in its submissions to the Panel, but its proposal is largely similar to the one put forth by the Union with the exception of two key respects. First, although the Agency proposes mediation before the end of the initial 90-day window it does not propose a specific timeframe or the mandatory use of a private facilitator. Second, whereas the Union would require the parties to seek FSIP assistance during the initial 90-day assessment window, the Agency proposes that the parties will seek FSIP assistance if the parties have not reached agreement within 90 days of the *end* of the pilot program.

Turning to the end of the pilot program, the Agency's proposal is that the parties will revert to telework and AWS options under the 2013 LMA if the parties do not reach agreement within 90 days of the end of the program or if the parties declare impasse during negotiations, whichever event occurs first. The parties have never committed to an expansive workplace flexibility program, so the Agency is not comfortable maintaining the pilot program past the end of the 1-year period since it does not know what the data will look like at that time. The pandemic workplace is not a useful comparator because it is not analogous to the current "hybrid" workplace model in which offices are now open to employees, visitors, and the general public.

The Agency also argues that, unlike the Union's proposal, the Agency's proposal provides employees with a definitive framework for what to expect if no agreement exists once the pilot program ends, i.e., employees will simply revert to the LMA. As such, employees would be in a better position to assess what personal arrangements need to be made to address their respective situations. By contrast, the Union's position creates several possibilities. For example, employees *could* continue to remain under expanded pilot flexibilities; but the Union *also* has the

option to modify those flexibilities on an interim basis if the Agency is amenable. So, the Agency contends its position is much more concrete.

### III. ANALYSIS AND CONCLUSION

**The Panel will impose a modified version of the Union's proposal in the following manner: (1) their language in Section I.D.2. concerning an expedited approach to negotiations will be modified so that the 45-day invocation of mediation, use of private mediator, and end-of-pilot-period invocation of FSIP are all optional; and (2) the rest of their language in Union's Section I.D.2. and I.D.3. will be imposed without alteration to resolve all remaining issues.**

#### A. Expedited Bargaining

The parties appear to agree that bargaining over any permanent expansion of flexible work options should be a priority. However, the Union offers several concrete deadlines: moreover, it establishes defined actions that the parties *must* take at certain guideposts in order to ensure that those negotiations continue apace. Namely, under the Union's proposal the parties must: invoke mediation within 45 days of first meeting; utilize the services of a private mediator; and seek the assistance of the Panel before the conclusion of the pilot period.

The Panel believes that the Union's language establishes clear aspirational goals that will assist the parties in remaining focused on executing a complete memorandum within a reasonable amount of time. But, the Panel is hesitant to accept the Union's insistence that these goals should be mandatory. For example, if the parties believe they are making significant progress without the aid of a third party mediator but need more than 45 days to continue that progress, it would make little sense to artificially invoke the aid of a mediator. The same could be said for the defined period to invoke FSIP assistance or the need to hire a private mediator. Accordingly, several "wills" in the Union's I.D.2. shall be modified to "mays" as follows (modified language in bold):

If the parties are unable to resolve any differences within forty-five (45) days after their first bargaining session, the parties **may** utilize mediation. Should mediation be necessary, the parties **may** hold such mediation prior to the conclusion of one year pilot period. Mediation **may** be scheduled with a mutually-agreeable private mediator, with costs shared, if needed to expediate the mediation process. The parties further agree that if they have not reached agreement within 90 days after the assessment meeting described above, impasse **may** be declared and any disagreements **may** be submitted to the FSIP, unless the parties mutually agree to extend the timeline for doing so.

The remainder of the Union's proposed I.D.2. is discussed below.

### **B. End of Pilot Period Options**

The parties' views on what should occur at the end of the pilot period are in diametric opposition. The Agency calls for an automatic reversion to the LMA's provisions if no agreement is reached or if the parties reach an impasse; the Union promulgates an approach in which expanded options would continue, albeit subject to carve outs that activate 90 days after the pilot ends. The Panel believes that the Union's position provides a better balance between the parties' respective interests.

The Union's proposal is driven by a concern for the conditions of employees who may be operating under the expanded options made available to them pursuant to the pilot program. As the Union notes, per the terms of its proposal – and potentially that of even the Agency's language – employees could be on those options for a period of 15 months from the date the pilot begins. An automatic reversion, as the Agency suggests, would abruptly place employees in an entirely new arrangement with little to no say over their individual situation. These employees could, among other things, find themselves faced with new transportation issues, dependent care challenges, and other inconveniences. The Agency attempts to counter the foregoing by suggesting that, per its approach, employees will have ample warning that they will simply revert to pre-pandemic options. But, that is thin gruel for employees who have become dependent upon certain work options for over 1 year's time. Indeed, under the Agency's approach it is entirely feasible that employees could go from expanded options, to the LMA's options, and then to expanded or different options all within relatively short order. The comfort offered by the Agency's approach is an illusory one.

The Agency's primary concern appears to be that it believes it is too soon to declare that the options under the pilot will *not* create hardship upon the Agency now that it has shifted towards a "hybrid" work environment. However, the Agency offered no specific examples concerning the types of hardship that could be the direct and proximate result of expanded flexible options arising under a hybrid environment. Indeed, employees are currently operating under the substance of the pilot in a hybrid environment because they have already returned to the workplace. Yet, the Agency did not cite a single hardship that has arisen during this time. The Agency's position, then, is based upon speculation.

The Union's proposal also offers the Agency succor in the form of flexibility. After the post-pilot 90-day period ends the Agency has the ability to unilaterally alter individual telework and AWS arrangements so long as certain conditions are met. So, the Agency would have the ability to meet pressing work-related needs. Although the Union could challenge unilateral alterations, those challenges would

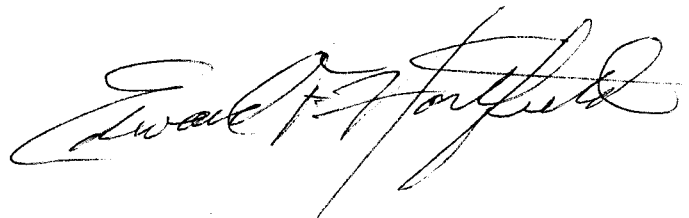


have to come in the form of grievances whose results may be unknown for some time. This tenuous situation, coupled with the expeditated aspirational goals imposed above, should prompt the Union into negotiating a timely resolution to the issue of a permanent expansion of flexible work options.

Based upon the foregoing analysis, the Panel imposes in full the Union's proposed Section I.D.3 and the remainder of the Union's proposed Section I.D.2 that was not discussed above without alteration. Because of this conclusion, it is unnecessary to address the Union's claim that the Agency's position constitutes an illegal waiver of the Union's statutory rights (which the Panel lacks the authority to address in the first instance).<sup>7</sup>

### ORDER

Pursuant to the authority vested in me by the Federal Service Impasses Panel under the Section 7119 of the Statute, the Panel imposes the language as ordered above.

A handwritten signature in cursive script, appearing to read "Edward Hartfield".

Edward Hartfield  
FSIP Member

August 5, 2022  
Washington, D.C.

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<sup>7</sup> See, e.g., *NLRB and NLRBPA*, 72 FLRA 334, 339 n.82 (2021) (stating that FSIP had no authority to resolve union claims that agency proposals were illegal/non-negotiable because they constituted waiver of union bargaining rights).