

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 476

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1904

And

DEPARTMENT OF DEFENSE,
UNITED STATES DEPARTMENT OF THE ARMY
U.S. ARMY COMMUNICATIONS-ELECTRONIC
COMMAND,
ABERDEEN PROVING GROUND, MD

Case Nos. 23 FSIP 039 &
042

ARBITRATOR'S OPINION AND DECISION

BACKGROUND

This case concerns two separate requests for assistance filed by NFFE, Local 476 (NFFE) and AFGE, Local 1904 (AFGE), with the Federal Service Impasses Panel (FSIP or Panel) over proposed changes to a telework policy (the telework policy). The Department of Defense, United States Department of Army, U.S. Army Communications-Electronic Command, Aberdeen Proving Ground, MD (Management, CECOM, or Agency) is in a collective bargaining relationship with AFGE and NFFE. CECOM specializes in communications-electronics systems and equipment, to include setting up headquarters and command and tactical operations centers in remote areas to installing and maintaining communications systems in vehicles and aircraft. CECOM also provides training activities, field support for modifications and upgrades, and logistical expertise. It utilizes approximately 13,000 personnel amongst six components spread throughout the globe.

NFFE represents about 200 professional employees who encumber positions such as engineers, scientists and attorneys. It has a collective bargaining agreement that was executed in 2022. AFGE represents approximately 1,700 non-professional employees and it executed a CBA in 2019 that remains in place.

As stated above, AFGE and NFFE filed separate requests for assistance under Section 7119 of the Federal Service Labor Management Relations Statute, and the Panel promptly investigated the filings. On May 17, 2023, the Panel voted to assert jurisdiction over both matters, consolidate them and resolve them via a Mediation-Arbitration conducted by the undersigned Arbitrator. I held a virtual Mediation-Arbitration on June 26, 2023, and, despite the best efforts of all parties involved, resolution of all outstanding issues was not possible. Accordingly, I am now obligated to issue a final award resolving these matters.

BACKGROUND AND BARGAINING HISTORY

In 2014 the Agency implemented its telework policy; it then updated the policy in 2019. Under the 2019 policy employees are afforded two days of telework per week. As a result of increased telework flexibilities offered during the Covid-19 pandemic, the Agency decided to alter the policy again. In 2022 the Agency notified all of its unions that the Agency wished to reopen the policy for negotiations and AFGE and NFFE requested to negotiate.

The Unions provided around 70 proposals in their initial offers to the Agency. All parties had about 12 bargaining sessions from August 2022 through January 2023. They had a single mediation session with the assistance of the Federal Mediation and Conciliation Services (FMCS) on February 23, 2023. Through all the foregoing efforts the parties reached agreement on all outstanding proposals save for one. Accordingly, the FMCS Commissioner released the parties from mediation and NFFE and AFGE sought assistance from the Panel. As described above, I conducted a Mediation-Arbitration and accepted presentations and testimony. After the conclusion of mediation and prior to the arbitration portion, I requested the parties provide their final offers in writing to me and all other parties. The parties did so. On July 10, 2023, the parties submitted post hearing briefs. The record is hereby closed.

PRELIMINARY ISSUE

As part of their July 10th submissions to the Panel, AFGE included two unsolicited documents (unsolicited AFGE documents).¹ In addition, the Unions included a final offer proposal that differed from the one provided at the June 26th

¹ Specifically, AFGE submitted two documents labeled as: (1) witness achievement; and (2) CG letter of success.

Mediation-Arbitration (alternative proposal). In this regard, at the hearing on June 26th, the Unions provided the following language as their final offer:²

Eligible employees may be approved to telework a regular and recurring schedule that shows at least three days per pay period at the Official Duty Station. Personnel and CECOM sub organizations may pursue an exception to policy for this requirement. To accommodate new or changing mission needs, employees may, on their own initiative, come to the agency worksite on scheduled telework days without prior coordination with their supervisors as long as they know they will have the facilities needed to be productive.

This language calls for employees to be physically present 3 days a pay period (3-day option). During several hours of arbitration, the Unions never indicated that any changes to this language would be forthcoming or that it was otherwise deficient. However, in their post hearing briefs on July 10th, the Unions provided the following language:

Eligible employees may be approved to telework a regular and recurring schedule that shows at least two days per pay period at the Official Duty Station. To accommodate new or changing mission needs, employees may, on their own initiative, come to the agency worksite on scheduled telework days without prior coordination with their supervisors as long as they know they will have the facilities needed to be productive.³

In a reversal from what had been submitted at the hearing as their final offer, the post-hearing brief language now calls for an in-person presence of no more than 2 days per pay period (2-day option). The Unions did not alert the Panel or the Agency that it intended to provide this alternative language.

The Agency objects to consideration of the above language because it differs from what the Unions offered at the hearing as their final offer, i.e., that employees would be required to be physically present 3 days per pay period. Additionally, the Agency objects to the following items on the grounds that they were allegedly raised for the first time in the Union post-hearing submissions:

- An allegation that teleworking employees are willing to provide ergonomic equipment at their own cost;⁴

² See Email from NFFE Vice President T.A., "FW: NFFE-476 Witnesses for FSIP Union & CECOM Telework Policy Mediation," (Sent: 1:56 P.M. E.T., June 26, 2023).

³ See AFGE Post-Hearing Brief at 1; NFFE Post-Hearing Brief at 1.

⁴ See AFGE Post-Hearing Brief at 3; NFFE Post-Hearing Brief at 3.

- A claim that CECOM’s duties are not functionally different from other Aberdeen Proving Ground entities where telework occurs;⁵ and
- A Union statement about the Agency’s alleged failure to provide information the Unions requested;⁶ the Agency believes this refers to an information request unfair labor practice (ULP) charge, but notes that there was no discussion of this ULP at the Mediation-Arbitration.

In response to the Agency’s objections, AFGE claims it “feels” it presented everything discussed in AFGE’s brief and was merely summarizing its evidence. NFFE concedes it provided a 3-day option during negotiations and mediation, but it claims that option was presented as a settlement offer that the Agency rejected. Once the parties went to arbitration on June 26th, it is NFFE’s “recollection” that the offer it provided was the 2-day option. As to the ULP issue raised by the Agency, NFFE maintains that it is not requesting that the Panel rule on it. Rather, NFFE is merely asking the Panel to consider it as relevant evidence of information that the Agency failed to provide concerning the alleged effectiveness of in-person work.

After consideration of the parties’ positions, I will strike the two unsolicited AFGE documents because AFGE never requested permission to provide them. I will also decline to consider the alternative language the Unions provided in their post-hearing briefs. The parties and I spent a significant amount of time at the June 26th hearing ensuring that all parties involved had each side’s final offer language prior to the initiation of arbitration. Neither Union alleged the 3-day language offered at the hearing was a mistake. Indeed, as discussed above, the record contains the precise language presented by the Unions during the hearing.⁷ NFFE’s “recollection” is an inaccurate one. Considering the 2-day option now would cause undue prejudice to the Agency because the Agency prepared its post-hearing brief under the assumption that the Unions’ final offer, as provided at the hearing, was the 3-day option.

With regards to the three other items that the Agency has alleged are newly raised, I find it unnecessary to address whether it is procedurally appropriate to consider them. The allegations raised in those three items are largely conclusory in

⁵ See AFGE Post-Hearing Brief at 3; NFFE Post-Hearing Brief at 3.

⁶ See AFGE Post-Hearing Brief at 4; NFFE Post-Hearing Brief at 4.

⁷ The NFFE Vice-President’s June 26th email does reference a prior email it provided to the Panel on May 4, 2023, concerning the Unions’ position. But the Unions did not offer that May 4th exchange into the record. Much more importantly, the 3-day option was presented *at the hearing*, after much deliberation and discussion amongst the Union representatives and was represented as their final offer. Thus, I give no credence to the Unions’ May 4th reference.

It is also true that the Unions, in their initial FSIP filing, presented the 2-day option as their position. However, the Unions did not raise or address this filing at the June 26th hearing when they presented their final offer. Thus, the language in the initial filing is irrelevant.

nature and were offered with little to no evidentiary backing. Thus, while I will permit those arguments to remain of record, I afford them little weight in my consideration of the Unions' overall position.

SUBSTANTIVE ISSUE

Although this dispute involves two unions it concerns only one issue/proposal: how many days per pay period should bargaining unit employees be required to be physically present within the workplace?

I. Position of the Unions

At the hearing, the Unions identified the below language as their final offer:

Eligible employees may be approved to telework a regular and recurring schedule that shows at least three days per pay period at the Official Duty Station. Personnel and CECOM sub organizations may pursue an exception to policy for this requirement. To accommodate new or changing mission needs, employees may, on their own initiative, come to the agency worksite on scheduled telework days without prior coordination with their supervisors as long as they know they will have the facilities needed to be productive.

The thrust of the Unions' proposal is that employees on regular and recurring telework would be required to be physically present no more than 3 days in a 2-week pay period. The Unions argue that their proposal strikes the proper balance between maximizing workplace flexibilities for employees and ensuring the mission of the Agency remains fulfilled. During these proceedings the Unions provided uncontested information that many bargaining unit employees took advantage of maximum or increased telework flexibilities during the Covid-19 pandemic. The Unions claim that workplace performance did not suffer during this period; to the contrary, the Unions maintain that performance actually *improved*. This, according to the Unions, demonstrates that the Agency's mission will not suffer due to increased telework opportunities.

The Unions also provided testimony from 6 different bargaining unit employees who hold a variety of positions throughout the Agency. They generally testified⁸ that they capably perform their duties virtually with little to no concern expressed by their respective supervisors. Several employees testified that, when required to be present at the worksite, the duties they perform on-site are fully capable of being performed while teleworking and are, in fact, performed in the same manner they would be performed were the employee teleworking. Indeed, multiple witnesses testified that work was harder on-site because of interruptions.

⁸ I will discuss some of the testimony in greater detail below.

Moreover, video conferences provide employees with the ability to learn from, and bond with, employees throughout the Agency's services. The Unions also noted that increased telework is necessary for attracting and retaining a qualified workforce.

The Unions refute the idea that in-person duties would suffer due to the availability of increased telework. At least one witness offered that he recognizes certain of his duties need to be performed on-site and he takes the initiative to come into the worksite to perform these duties. Moreover, the Unions note that Section 5(g)(5) of the telework policy grants supervisors the ability to recall employees for necessary duties.⁹

The Unions also presented surveys they conducted of their respective bargaining units. Much of the responses mirrored the testimony described above. Several employees stated that they would travel to the workplace without hesitation when needed to perform tasks that could be performed only on-site. Although some employees did raise concerns about a lack of bonding and social interaction due to telework, the Union claims these concerns were offset by employee complaints of workplace distractions when required to be in the workplace for the purpose of complying with telework policy.

Finally, the Unions argue that the Agency's position does not accomplish goals established by recent Office of Management Budget (OMB) guidance concerning the improvement of work environments. OMB issued OMB Memorandum, M-23-15, "Measuring, Monitoring, and Improving Organizational Health and Organizational Performance in the Context of Evolving Agency Work Environments," (April 13, 2023), in conjunction with broader initiatives by the Federal government concerning post-pandemic philosophies. The Unions note this memorandum calls for Federal agencies to establish indicators for monitoring organizational health and growth and to rely upon "flexible work options" to increase meaningful in-person work.¹⁰ The Unions claim the Agency failed to provide any evidence demonstrating that its proposal would accomplish the goals set forth by the OMB Memorandum.

II. Agency Position

At the hearing, the Agency identified the following language as its final offer:

Eligible employees may be approved to telework a regular and recurring schedule up to three days per week with a minimum of two days per week at the Official Duty Station. To accommodate new or

⁹ This section states that "Employees will . . . [r]eport to the traditional worksite on a scheduled telework day if needed and recalled for mission requirements that cannot be met through telework." Telework Policy at 8.

¹⁰ NFFE Post-Hearing Brief at 1.

changing mission needs, employees may, on their own initiative, come to the agency worksite on scheduled telework days without prior coordination with their supervisors as long as they know they will have the facilities needed to be productive.

Acceptance of 7.3 counter and expanding Supervisor situational/adhoc approval authority to 6 consecutive weeks and Director/Command approval authority to 8 consecutive weeks.

The central premise of the Agency's proposal is that employees are required to be physically present on-site 4 days per pay period. The Agency's commanding officer is charged with undertaking a global view of the Agency's health and success: they cannot limit themselves to a micro level review of individual employees and their respective supervisors. To buttress this world view, the Agency's commanding officer – a Major General – submitted a written statement in which they expressed their philosophy on the foregoing. In summary, they offered:¹¹

- The Agency's workforce must be "agile and cohesive" to meet any potential "emerging and unforeseen conflicts across the globe."
- The workforce must be capable of "deliver[ing] integrated weapon systems, business systems, and medical sustainment to enable full spectrum combat operations 24 hours per day 7 days per week."
- After balancing the foregoing bullets and the needs of the workforce, the Major General concluded that the Agency's position strikes the correct balance of providing soldier support and meeting work-life balance needs.
- This proposal, the Major General contends, meets employee needs "without sacrificing opportunities for face-to-face mentorship, fellowship, and cohesion." This will lead to development of Army leaders for years to follow.

During the hearing, the Agency made much of the fourth bullet point. In its closing statement and its post-hearing brief, the Agency emphasized that increased workplace flexibility might lead to decreased leadership development.¹² The success of the Agency's mission is dependent upon incubating capable and developed leaders *now*, something that can be best accomplished through regular in-person interaction. Indeed, the Agency notes that, even in the employee surveys provided by the Unions, some employees noted that telework decreased opportunities for increasing workforce bonding and cohesion.¹³ The Agency disagrees with the

¹¹ See the Agency's pre-hearing submission, "MEMORANDUM FOR RECORD, SUBJECT: U.S. Army Communications-Electronics Command Proposed Telework Policy," dated June 21, 2023.

¹² See Agency Post-Hearing Brief at 3.

¹³ See *id.*

premise that individual supervisors are in a position to assess the best way to effectuate the Agency's mission goals: the foregoing is something that only the Major General and other similarly situated Agency leadership are able to assess.

The Agency also notes that the Unions provide a proposal that differs from what was stated in its initial Panel filing. To wit, whereas the Unions' original filing called for maximum telework per Office of Personnel Management (OPM) guidelines, i.e., up to 8 days of telework per pay period, the Unions' final offer provided 7 days.¹⁴ More importantly, the offer submitted at the hearing did not reference supervisory discretion. Thus, the Agency believes the Unions' position does not actually grant flexibility to supervisors.

ANALYSIS AND CONCLUSION

Throughout these proceedings the Agency has offered a number of important and weighty goals. There can be no doubt that the Agency's mission to support the United States defense force and to develop leaders who will facilitate the same is of the utmost importance. To be sure, I accord military personnel a significant amount of latitude in assessing the foregoing. As the Agency notes in its closing brief, failures to meet its mission do not simply mean that taxpayers do not receive a deliverable; rather, they could lead to the Army's inability to properly address global threats.¹⁵

However, based upon the record that is before me, I cannot blindly accept the proposition that the only method for accomplishing the foregoing is to require bargaining unit employees to be on-site 1 more day per pay period than what the Unions request. Therefore, I conclude the proposal put forth by the Unions on June 26, 2023, is the most appropriate proposal to impose as a resolution of this dispute.

The arguments and presentations offered by the Unions concerning expanded telework options were thorough and persuasive. Notably, only the Unions provided live testimony – subject to cross examination – on the proposals offered at the hearing. Six Union witnesses testified to the effectiveness of increased telework and their ability to successfully perform their duties while teleworking. Moreover, several witnesses persuasively testified that their work suffered on-site due to workplace distractions. Notably, the Agency did not rebut or challenge the testimony concerning these distractions. It is hard to envision an environment that fosters growth when that environment is ensconced in distractions.

In addition to this general testimony, multiple Union witnesses offered specific testimony that I found compelling. One software engineer – Witness D.B. – testified that 60% of their team consists of contractors who perform their duties

¹⁴ See *id.* at 4.

¹⁵ See *id.* at 3.

fully while teleworking. D.B. did not testify that this arrangement negatively impacted their division's effectiveness, nor did the Agency make such a claim. Indeed, most of the work D.B. performs on-site is work that is fully performable while teleworking. D.B. also testified that they experienced multiple workplace distractions each day they are on-site and that they lost about 15 minutes of worktime per distraction. Finally, they also testified that coming to the worksite requires an onerous commute.

Witness B.T. testified that they are on a workforce with 66% teleworking employees and that most of this work is also work that is easily performable from a telework site. Witness B.T. also loses a significant amount of time on days they report to the worksite due to their commute.

Union Witness A.G. testified that they provided virtual mentorship to mentees; A.G. noticed no difference between virtual and in-person mentorship. Again, the Agency did not challenge these claims.

Finally, Witness M.M. estimated that around 5 individuals on her team departed CECOM out of frustration arising from increased in-person attendance. These incidents, taken together, present a compelling picture that the Agency's mission flourishes notwithstanding increased telework; an in-person presence does not, in and of itself, lead to a furtherance of Agency goals. Indeed, sometimes in-person presence decreases effectiveness.

The Unions provided surveys of bargaining unit employees that captured much of the same information discussed in the preceding paragraphs. Thus, both in-person testimony and written statements buttressed the position of the Unions. It is true that in the surveys some individuals complained about lack of bonding and cohesion building opportunities. Nothing prohibits those employees who benefit from more in-person interactions from going into the workplace voluntarily. I give credence to the Unions' argument that for many employees the negatives of workplace distractions outweigh the positives associated with in-person interactions.

In contrast to the presentations offered by the Unions, the Agency's presentation was largely conclusory and lacking in specifics. Notably, at the hearing the Agency did not present any witnesses of its own or even cross examine any of the Union witnesses. The former is particularly notable given the Agency's heavy reliance upon the Major General. While the Major General identified several important goals in their position paper they did not do so in real time and did not subject themselves to questioning by the Union. Moreover, the substance of their statement contains a number of conclusory assertions. For example, the Major General states that the Agency's position is "carefully crafted to . . . develop Army leaders who will shape national security posture for years to come." What specific

criteria did the Major General rely upon to reach this conclusion? What is it about the Unions' position that is at odds with the Major General's assessment? The answers to these and other questions are not evident on their face.

These omissions are particularly significant given that the Agency failed to provide any evidence of situations in which the Agency's mission suffered due to telework. The Agency did not provide a single incident in which work was not accomplished or mentorship failed. It did not identify any specific tasks that mandated a need for 4 days in-person work.

I also reject the proposition that the Unions' proposal deprives supervisors of discretion in decisions concerning individual requests for telework. The plain language of the Union proposals state that employees "may" be granted requests to telework. The language does *not* state "shall" or "will." This language is consistent with the agreed upon application process employees must go through when submitting requests for telework. In this regard, supervisors are required to, among other things, assess the eligibility of each position for telework via "yes" or "no" responses.¹⁶ For example, supervisors must answer whether a position needs to perform on-site duties or whether telework would result in a decrease in service to the customer base.¹⁷ Thus, the framework in place appears to leave a great deal of discretion to supervisors.

Finally, I address the Agency's concern that individual supervisors are unable to appreciate the breadth of the Agency's overall mission and, therefore, are not in a position to evaluate the need for an increased in-person presence. I do not find this position persuasive. To begin with, as noted in the previous paragraph, the Agency's own policy grants supervisors a significant amount of discretion in assessing whether to authorize requests for telework. This high level of supervisory discretion undercuts the Agency's claim. Moreover, common sense dictates that supervisors would not be in positions of authority if they lacked the capacity to understand the needs of their employer and how to best use their workforce to meet those needs.

DECISION

Having carefully considered the arguments and evidence presented in this case, as the Statute requires, I hereby order the parties to adopt the following language in their agreement regarding the CECOM telework policy:

Eligible employees may be approved to telework a regular and recurring schedule that shows at least three days per pay period at the Official Duty Station. Personnel and CECOM sub organizations may

¹⁶ See Appendix A & C – Telework Request Package.

¹⁷ See *id.* at 2.

pursue an exception to policy for this requirement. To accommodate new or changing mission needs, employees may, on their own initiative, come to the agency worksite on scheduled telework days without prior coordination with their supervisors as long as they know they will have the facilities needed to be productive.

/Pamela Schwartz/
Pamela Schwartz
Panel Member

July 28, 2023