United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of INTERNAL REVENUE SERVICE OFFICE OF CHIEF COUNSEL And NATIONAL TREASURY EMPLOYEES UNION	Case No. 2024 FSIP 047

The National Treasury Employees Union (Union) filed the above-captioned matter involving bargaining a successor collective bargaining agreement (CBA) with the Internal Revenue Service (IRS), Office of Chief Counsel (Agency). The Agency is chief legal advisor to the IRS Commissioner on all matters pertaining to the interpretation, administration, and enforcement of the Internal Revenue Laws and other related legal matters. The Agency provides legal guidance and interpretive advice to the IRS, the Department of the Treasury, and taxpayers.

The Union represents a bargaining unit of approximately 1,657 professional and non-professional bargaining unit employees. The bargaining unit consists of employees located at the Agency's National Office/Headquarters in Washington, D.C. and throughout 47 field office locations nationwide. The parties are currently covered under a CBA that expired on January 31, 2023, and continues until a new successor is executed.

BACKGROUND AND BARGAINING HISTORY

In July 2021, the parties agreed to negotiate expanded telework opportunities for the eventual return of employees to the office following 100% telework due to the COVID-19 pandemic. Specifically, the parties reached agreement on a Telework Bridge Pilot Memorandum of Understanding (Bridge Pilot MOU). Under the Bridge Pilot MOU, the parties agreed to expanded telework opportunities for employees rather than returning to the more limited telework from the parties' current CBA. The parties agreed to abide by the Bridge Pilot MOU until the negotiation and execution of a successor CBA.

In 2023, the parties agreed to a limited reopener of their CBA. The parties negotiated between May and December 2023, before engaging in mediation with the assistance of the Federal Mediation and Conciliation Service (FMCS) in January

2024. Unable to reach agreement on three articles of the parties' successor CBA, FMCS released the parties to the Panel in April 2024.

Then on May 20th, after the Union filed for Panel assistance in this matter, the Agency notified the Union that it intended to exercise a provision from the Bridge Pilot MOU and cancel Level 3 telework which had allowed employees to telework up to four days per week. Specifically, the Bridge Pilot MOU Part M. Duration, Section 2 permits the Agency to end Level 3 telework during the Bridge Pilot MOU if the arrangement is having "a negative operational impact." The Bridge Pilot MOU requires the parties meet to discuss whether modifications of Level 3 telework can be instituted in lieu of termination. If there is no agreement within 30 days of the Agency's notice, the Agency may terminate the Level 3 telework after giving employees a two-pay period notice. As of the date of this report, the parties have not met to discuss the Agency's May 20th notice.

On June 13, 2024, the Panel voted to assert jurisdiction over this matter and ordered the parties to resolve their impasse through a mediation-arbitration with the undersigned, Panel Member Pamela Schwartz. The parties were advised that if they did not reach settlement in mediation, I would move the parties into arbitration mode which would lead to me issuing a binding decision to resolve the matters that remained at impasse. In accordance with the Panel's procedural determination, I conducted a virtual mediation-arbitration on July 18-19, 2024, with representatives of the parties.

During the mediation phase, the parties were able to voluntarily resolve all outstanding issues related to Article #55 (Office Space) but were not able to reach agreement on two provisions from Article #14 (Awards) and three provisions from Article #48 (Telework). I then moved into the arbitration phase on the remaining matters. At arbitration, the parties had the opportunity to provide their last best offers (LBOs) and file Post-Hearing Briefs, with the opportunity for rebuttal. The parties' submitted timely Post-Hearing Briefs and rebuttals, which I have reviewed.

In accordance with 5 U.S.C. § 7119 and 5 C.F.R. § 2471.11 of the Panel's Regulations, I must issue a final decision resolving the parties' remaining issues. I have made this decision after carefully considering the entire record, including the parties' Post-Hearing Briefs, rebuttals, and related supporting materials.

ISSUES AT IMPASSE AND PARTIES' ARGUMENTS

The parties have been unable to resolve five remaining issues. The first two issues involve provisions from Article #14 pertaining to awards, including whether awards for employees will be mandatory. The last three issues involve provisions from Article #48 covering telework, including the maximum number of days an employee may telework in a pay period.

<u>Issue #1: Article #14 (Awards) - Section 1.C</u>

Within Article #14 (Awards), the parties have both proposed the following language be included in Section 1.C:

> *Consistent with the goals and limitations set forth above, the Office's policy is to recognize high levels of performance (outstanding or excellent/exceeds fully successful) and to recognize employees who achieve a relatively high level of performance in their organizational component, regardless of job classification. Within an individual work unit, employees with outstanding annual appraisal ratings will be considered first for performance awards.*

The Union proposes, and the Agency objects to, adding the following language at the end of Section 1.C.:

> *Employees with annual appraisal ratings of Outstanding and Exceeds Fully Successful will receive a Sustained Superior Performance Award, subject to the awards budget and provided they are eligible pursuant to Section 1H below.*

Agency's Position

The Agency takes the position that it uses discretion in rewarding and motivating employees with awards under Article 14. The Agency argues that as the Union is proposing to change the status quo by adding their proposed language, they bear the burden of proving the change is needed. The Agency claims the Union has failed to establish that the change to mandatory awards is needed.

First, the Agency claims that it has already addressed the Union's interests. The Union raised employees' concerns regarding transparency of awards, and that the Agency agreed to Article 14 Section 1.E to address those concerns. The Union raised a concern that employees had no basis to challenge non-receipt of an award and the Agency supplied testimony of Labor Relations Director Cesar Olmos that as of 2011, language precluding such grievances was removed from Article 14. The Agency argues that the Union's real unmet interest is in eligibility for attorney's fees under the Back Pay Act. This is the Union's only remaining interest.

Second, the Agency argues that its evidence demonstrates that the Agency's discretion in giving awards is fair and inclusive. A majority of Counsel bargaining unit employees receive performance awards yearly (99% of those rated Outstanding and 89% of those rated Exceeds Fully Successful during the life of the current contract received awards). Counsel employees are more satisfied than employees in all other Treasury bureaus and filed only two awards grievances between 2018 and 2023.

Third, the Agency claims that the Union's proposal for mandatory awards is inconsistent with language the parties have already agreed to in Article 14. Specifically, the Agency notes that the parties have already agreed to language in Article 14, under Section 1.B, which states that the Agency will give awards in a "fair and objective basis considering merit, budget limitations and the nonmandatory nature of awards." The Agency reasons that adding the Union's proposed language making awards mandatory for employees receiving an appraisal rating of Outstanding or Exceeds Fully Successful would be inconsistent with Section 1.B. The Agency also points to language it deems inconsistent in Section 1.C, 1.E and 1.F. The Agency voiced its concern that the ambiguity caused by the inconsistent language could lead to confusion and litigation.

Union's Position

The Union takes the position that there is a need to change the current contract language to make SSP awards mandatory for employees receiving a performance review of Outstanding or Exceeds Fully Successful. The Union's proposal leaves such awards contingent upon an awards budget and an employee meeting the eligibility requirements in a later section of the Article. Specifically, the Union claims this change is needed so that if an employee's award is improperly withheld, the employee will have a legally enforceable remedy if they challenge the Agency's decision and prevail. The Union argues that adding its proposed language would make it possible for the Union to grieve an improperly withheld award and recover under the Back Pay Act (5 U.S.C. § 5596).

The Union argues that awards must be mandatory in order for the Union to be able to properly enforce the Agency's compliance with Article 14 (Awards). The Union alleges its evidence shows that the Agency has not been following Sections 1.A.1 or I.B of Article 14. The Union contends that Article 14, Section 1.B was added in 2018 "to define SSP awards and to mandate they be based on an employee's overall performance rating." The Union presented evidence of instances between 2018-2023 when the Agency withheld a SSP award from an employee who received an overall performance rating of Outstanding or Exceeds Fully Successful. The Union noted that the Agency-provided reasons for awards being withheld included: no reason, "management discretion" and, in 15 instances, "performance" even after its commitment in Section 1.B to base the SSP award on the employee's overall performance rating. The Union argues that the provided reasons for withholding awards are outside the criteria established in Section 1.B.

The Union also cited testimony provided by the Agency's witnesses on the record in these proceedings as evidence that the Agency has used additional criteria in issuing SSP awards. Specifically, the Union referred to a statement made by Management witness Kathryn Meyer that first-line supervisors base SSP awards only in part on the employee's appraisal but that the rating was not the exclusive factor. Based on this evidence, the Union argues, there is a demonstrated need to change the status quo.

Issue #2: Article 14 (Awards) - Section 1.H.3

The parties have agreed upon the following language for Section 1.H.1 of Article 14 (Awards) regarding employees' eligibility to receive an award:

> *No Counsel employee will receive any award under this Article if the employee has (during the twelve (12) months prior to the effective date of the award) received a suspension, a demotion, or is the current subject of an ongoing investigation into serious misconduct (including but not limited to employee tax compliance, or misconduct before the tax court). If an award will be precluded because of such an investigation, the employee will be promptly notified of that decision.*

Within this same section, the parties have proposed language regarding an employee's eligibility to receive an award following the completion of an on-going investigation contemplated in Section 1.H.1.

The Union has proposed:

> *If there is no penalty imposed after an investigation of an employee for serious misconduct is completed, or if a proposed penalty is reversed or mitigated to a reprimand or admonishment, such awards will be issued consistent with section 1C above, retroactively if necessary, to impacted employees.*

The Agency has proposed:

> *For an employee whose award was withheld pursuant to Section 1.H.1 above, if there is no penalty imposed after an investigation of an employee for serious misconduct is completed, or if a proposed penalty is reversed or mitigated to a reprimand or admonishment, the award will generally be restored by the Office upon consideration of the factors set forth above that awards shall be provided on a fair and objective basis considering merit, budget limitations and the nonmandatory nature of awards.*

Agency's Position

The Agency takes the position that its proposal to reconsider providing an award in such instances is appropriate given its discretion within the awards program. The Agency claims that the Union's proposal would require the Agency to provide an award, which is contrary to such discretion.

Union's Position

The Union takes the position that its interest in requiring the Agency to provide awards in such instances is similar to the Union's interest in having SSP awards be mandatory, subject to an awards budget and employee eligibility.

Issue #3 Article #48 (Telework) – Section 4.A.2 Frequent Telework & Section 7.B.3

The Agency has proposed:

> *Frequent Telework Employees may telework up to six days per pay period.*

The Union has proposed:

> *Employees may telework up to eight (8) days each pay period.*

Both parties have proposed the following second sentence:

> *This level of telework is regularly scheduled and is available for all employees who meet the basic eligibility requirements in Section 2A of this Article and the following additional requirements.*

Related to the parties' proposals in Section 4.A.2, in Section 7.B.3, the Agency has proposed including an in-office requirement of 40%, which employees must meet when working an in lieu of telework day when a regularly scheduled telework day falls on a holiday. The Union proposes referring to the in-office requirements within the article rather than stating a percentage.

Agency's Position

The Agency takes the position that it has provided for additional flexibility in its proposal on telework, but it must also balance such flexibility with its obligation to effectively and efficiently accomplish its mission. In support of its proposal for Frequent Telework to be up to six days per pay period, the Agency claims that six days per pay period is the parties' status quo. Specifically, the Agency cites to the parties' now-expired CBA as containing the six-days per pay period frequency limit as what the Agency is currently proposing. The Agency takes the position that because it terminated the Bridge Pilot MOU's eight-days per pay period frequency limit, that arrangement is no longer the parties' status quo.

Next, the Agency claims that the Union's proposal for Frequent Telework of up to eight days per pay period exceeds the Department of Treasury's 50% limit. According to the Agency, the Department of Treasury issued a 50% limit on telework in February 2024. The Agency claims it received an exception to the Department of the Treasury's 50% limit, which under its proposal of up to six days per pay period could result in a 40% in person requirement. However, the Agency claims that the Union's proposal exceeds the Agency's 40% in person requirement exception, as the Union's proposal of up to eight days per pay period could result in a 20% in person requirement.

Last, the Agency argues that the Union's proposal for Frequent Telework will impede on the Agency's ability to serve its client, the IRS, and taxpayers. The Agency claims that allowing employees to work from home eight days a pay period under the Telework Bridge Pilot MOU has adversely affected employees' assimilation, positive work experience, and professional development. In support, the Agency cited to Agency witness Kathryn Meyer's testimony on the record. Specifically, Meyer indicated that the Agency had onboarded employees remotely during the COVID-19 pandemic and those new employees, in her opinion, struggled due to a lack of critical experiences and spontaneous conversations in the office.

The Agency further claims that there has been a steep rise in the attrition rate of newer employees over the past few years. The Agency believes that the increase in attrition is linked to fewer people being in the office. The Agency supported its claim with the testimony of Agency witness Vicky Miller, who described an experience with one entry-level attorney who joined the Agency just before the COVID-19 pandemic. Miller claimed that the employee's work performance began to decline when he stopped going into the office because of the pandemic and was eventually put on a Performance Improvement Plan (PIP). After his performance began to improve, Miller claimed that the employee told his manager that being in the office and having access to his colleagues and manager had been helpful, ultimately leading him to not return to teleworking after completing the PIP. Miller further claimed that the employee cited the pre-pandemic office culture deterioration when he ultimately decided to leave the Agency.

Union's Position

The Union takes the position that its proposal for Frequent Telework to allow an employee to telework up to eight days per pay period is the status quo. The

Union argues that the parties' agreement under the Telework Bridge Pilot MOU, which permits telework under Level 3 of up to eight days per pay period, has been a success. In support of its position, the Union provided evidence of high employee satisfaction with the telework arrangements and employee testimony that most, if not all, of their work is portable. The Union also provided testimony of several employees as evidence that the nature of the Agency's organization, including trial teams consisting of members located throughout the U.S., is such that teleworking up to eight days per pay period does not affect working relationships within the Agency.

The Union also claims that the Agency terminated Level 3 telework under the Telework Bridge Pilot MOU based on the unsubstantiated claim that it was having a negative operational impact and causing difficulties in assimilating new hires. Rather, the Union claims its evidence shows that there has been a decrease in the number of employees separating from the Agency during the Telework Bridge Pilot MOU compared to the two years leading up to the pandemic. The Union further claims that Agency did not produce any data in support of its negative impact assessment. What evidence the Agency provided in support of its proposals in this proceeding, the Union claims, is unpersuasive as it was based on individuals' opinions and observations regarding telework.

Issue #4 Article 48 (Telework) – Section 4.A.2.c Positions eligible for Frequent Telework

The parties have both proposed including the following positions as eligible for Frequent Telework: Attorney, Tax Law Specialist, Paralegal, and other bargaining unit non-support staff including Tech Advisors, Budget Analysts, and Librarians. The Union has additionally proposed that the following positions would also be eligible for Frequent Telework: Legal Processing Division (LPD) Legal Assistants in Finance & Management and Procedures & Administration and Management Assistants.

Agency's Position

The Agency takes the position that the Union's proposal to include certain Legal Assistants and Management Assistants as eligible for Frequent Telework is not necessary or prudent. The Agency argues that having these additional employees be eligible for Frequent Telework would be a change from the status quo since these positions were previously eligible for Infrequent Telework which the parties have already agreed to increase to up to five days per pay period. The Agency further argues that the Union has not presented evidence to support a change to the status quo.

The Agency refuted the Union's claim that some of these affected employees perform all of their work electronically. The Agency provided witness testimony of Carrie Mudd, a manager of some of the Legal Assistants at issue in the Union's proposal. The Agency asserts Ms. Mudd testified that Legal Assistants perform in-office tasks (i.e., not electronically) such as helping sort and deliver incoming mail and work in the file room as needed. The Agency also provided witness testimony of Manager Melissa Carter, who supervises some of the Management Assistants at issue in the Union's proposal. Ms. Carter testified that Management Assistants perform tasks that are exclusively in-office work such as distributing the mail, going to the passport office, and escorting visitors.

Union's Position

The Union takes the position that Legal Assistants in Finance & Management and Procedures & Administration in the Notional Office should be eligible for Frequent Telework. The Union argues that these employees perform almost exclusively electronic duties. The Union also argues that the Agency's own witness, Ms. Mudd, testified that allowing these Legal Assistants to telework six days per pay period, which is the Agency's proposed Frequent Telework limit, would be feasible. Accordingly, the Union argues that these employees should be permitted to be eligible for Frequent Telework.

<u>Issue #5 Article 48 (Telework) – Section 7.A.7.e Union Proposed Online Communication Tools</u>

Union's LBO proposed:

> *The Office does not use these online communication tools as the official time and attendance record or to measure productivity of individual employees. If the Office determines in the future to use online communication tools for any of these purposes, it will bargain with NTEU to the extent required by law or this Agreement.*

The Union, in its rebuttal, clarified it provided the incorrect version of its proposal in its LBO. The Union claimed its intended LBO was:

> *If the Office determines in the future to use online communication tools as the official time and attendance record or to measure productivity of individual employees, it will bargain with NTEU to the extent required by law or this Agreement.*

Agency's Position

The Agency takes the position that the Union's proposal is "ambiguous" and "nonnegotiable" in addition to being unsupported. The Agency claims the Union has failed to establish how its proposal is a negotiable proposal or an appropriate arrangement. Moreover, the Agency argues that the Union's proposal includes language that is unclear and the Agency would not know how to properly comply with the provision if it were implemented.

Union's Position

The Union takes the position that its language will ensure its bargaining rights are not waived if, in the future, the Agency were to want to use online communication tools for employees' official time and attendance or productivity.

ANALYSIS AND CONCLUSION

Issue #1: Article #14 (Awards) - Section 1.C

When faced with a proposed change to the status quo, the Panel first reviews the status quo itself. The parties' awards program has been subject to repetitive negotiations over many years. Through these iterations, the parties have added and removed language from Article 14, warranting a discussion of the previously agreed upon language and its impact on this decision.

The Agency's reliance on past Panel decisions involving awards between these same parties is largely misplaced. Panel decisions are not precedent setting. Further, the facts and the status quo in this matter differ from those earlier matters. In 2004, the Panel in Case No. 2004 FSIP 005 resolved a dispute concerning the parties' awards program. In that matter, the Union had proposed SSP awards be set amounts (i.e., a certain percentage of an employee's individual salary) for employees receiving an Outstanding or Fully Exceeds Successful rating. The Panel held that it was not inclined to unilaterally limit an agency's discretion to distribute performance awards. The Panel ordered the parties to maintain status quo language that SSP awards would be based on an employee's overall performance appraisal rating.

The Panel next resolved a dispute over the parties' awards program in 2010 in Case No. 2010 FSIP 123. The Union again proposed SSP awards be set amounts for employees receiving an Outstanding or Fully Exceeds Successful rating, arguing that the awards program was arbitrary and unfair. The Panel declined to order the Union's proposal finding, in part, that the evidence in the case did not support the Union's argument that the agency abused its discretion.

In 2017, the Panel ordered the parties to resolve an impasse related to their awards program through a private interest arbitrator in Case No. 2010 FSIP 005. In that case, the Union had not proposed mandatory awards. Rather, in pertinent part, the Union proposed that if there was an awards budget, it would be divided into two pools, one for bargaining unit employees and one for those employees outside the bargaining unit. The arbitrator declined to order the Union's proposed award pools, finding no need to change from the status quo of one centralized awards budget. The final agreement from that case would go on to be the parties' 2018 CBA and their status quo in the current matter.

Of particular note in this matter is what the Agency voluntarily agreed to in the awards article of the 2018 CBA and how the Agency has administered the awards program since agreeing to that new language. Specifically, the parties agreed to language in Section 1.B that awards would be provided on an "objective" basis. While the parties' past agreements have included that awards would be provided in a fair manner, the 2018 agreement was the first to introduce an additional standard for the awards that, by its essence, prohibits the Agency from basing a decision to withhold a SSP award on subjective reasons.

Here, the parties have voluntarily agreed to maintain the status quo language from Section 1.B., specifically that awards will be provided on a "fair and objective basis" and SSP awards will be "based on an employee's overall performance appraisal rating." The parties also voluntarily agreed to retain status quo language from Section 1.C regarding awarding SSP awards to employees who receive an Outstanding or Fully Exceeds Successful annual appraisal rating.[1]

The Union presented evidence that the Agency has not been properly administering SSP awards in accordance with the current agreement language. Specifically, the Union presented evidence that it obtained through an information request concerning the Agency's rationales for not awarding SSP awards to employees with an Exceeds Fully Successful performance rating. The Agency had no rationale it could recall for withholding an award from some employees, and when it did provide a rationale, it often referred to the "Agency's discretion" as the reason an award was withheld. These responses provided little basis for finding that the Agency's determinations were objective let alone fair.

The Union correctly points out that testimony from two Agency witnesses confirmed that the Agency was using subjective criteria in addition to an employee's performance rating in awarding SSP awards. For example, the Union cited to

[1] The parties have agreed to the following language: "Consistent with the goals and limitations set forth above, the Office's policy is to recognize high levels of performance (outstanding or excellent/exceeds fully successful) and to recognize employees who achieve a relatively high level of performance in their organizational component, regardless of job classification."

Agency witness Kathryn Meyer, who indicated that an employee's performance rating was one, but not the exclusive factor, in awarding SSP awards. Ms. Meyer testified that the Agency also considered an employee's performance since the issuance of the annual performance appraisal rating when awarding SSP awards for a performance year. Finally, the Union presented testimony from one of the employees who received an Exceeds Fully Successful rating and did not receive a SSP award in 2022. The employee testified that other employees in her work unit who received a Fully Exceeds Successful rating, including employees that she had trained, had received a SSP award that year.

I am not convinced by the Agency's argument that the Union's language would be in conflict with other portions of the awards program. The parties agreed that the awards program, which includes SSP awards, Quality Step Increases, and Special Acts, is "non-mandatory." However, I do not find that requiring the Agency to give an employee who receives an Outstanding or Fully Exceeds Successful a SSP award, if budget permits and the employee is otherwise eligible, conflicts with this language. First, the Agency voluntarily agreed to base SSP awards on an employee's annual performance appraisal rating. Next, the Agency voluntarily agreed that its policy is to recognize employees who receive an Outstanding or Exceeds Fully Successful rating with SSP awards. Last, and most importantly, the Agency voluntarily agreed to administer awards on an objective basis. I am left to question what discretion, if any, the Agency has left itself outside of the matters that have been voluntarily agreed to in regard to who will receive a SSP award. In absence of such, I do not accept the Agency's arguments against including the Union's language.

Based on this status quo language, I cannot think of a situation for which, if there is an awards budget and the employee is eligible, the Agency can deny a SSP award to an employee who received a performance rating of Outstanding or Fully Exceeds Successful. However, because I cannot conceive of circumstances under which the Agency would be justified in withholding an award, does not mean that such circumstances do not exist.

The record reflects that the Union has identified many concerns with the Agency’s past administration of SSP awards. Yet, in spite of all of the evidence submitted pertaining to this issue, the Union has failed to provide evidence of any employees with ratings of outstanding or exceeds, who 1) did not receive an award, 2) sought redress, and 3) still did not receive an award because the union proposed language was not part of their agreement. As the Union's proposal is based on the need for an enforceable remedy, it needed to demonstrate that enforcement was an issue. Without such evidence, in spite of the Agency's apparent failure to follow the existing language, the Union's purported need is hypothetical. Accordingly, I find no need to change the status quo language and order the parties to adopt the Agency's proposal for Article #14 (Awards) Section 1.C.

Issue #2: Article 14 (Awards) - Section 1.H.3

Both parties have proposed new language regarding reconsideration of an award decision based on the outcome of a pending investigation. The Union relies on the same argument from Issue #1 (Article 14, Section 1.C) in support of its proposal here, which is to ensure employees have a legally enforceable remedy if an award is improperly withheld. Consistent with my findings above, the Union has not provided evidence to support its argument. The Agency's proposal, which references considerations for all performance awards, rather than just SSP awards as proposed by the Union, is the most appropriate. Therefore, I order the parties to adopt the Agency's proposal for Article #14 (Awards) Section 1.H.3.

Issue #3 Article #48 (Telework) – Section 4.A.2 Frequent Telework & Section 7.B.3

Generally, the Panel will assess proposed changes to the parties' status quo as carrying a burden of proving that such change is necessary. However, the Panel may decide an impasse based on the merits of the parties' positions, regardless of the status quo. Here, where the status quo of telework is a point of contention between the parties, I will resolve that matter based on the merits.

In assessing the issue of Frequent Telework based on the merits of the parties' positions, I find that neither party was able to establish an appropriate number of telework days for employees to work in a pay period. Despite their arguments and anectodical evidence, the parties did not propose a set number of telework days. Rather, both parties proposed that Frequent Telework would be telework "up to" or capped at a maximum number of days.

The Agency argues that the Union's proposal will impede its ability to serve the IRS and taxpayers. Agency witnesses pointed out problems with how telework has been administered. Even so, the Agency did not demonstrate how capping telework at six days a pay period will "ensure that colleagues' in-office days consistently overlap with each other" as argued. For example, Kathryn Meyer, Area Counsel for Area 7, testified that extensive telework during the pandemic made it more difficult to bring new attorneys "up to speed." As an example, she testified that prior to the pandemic, a new attorney might go to a Branerton Conference with a more seasoned attorney but that extensive telework made this difficult to schedule.

However, Ms. Meyer did not explain why, or even if, she was constrained from cancelling and rescheduling a telework day under Section 6.D or 7.D of the parties' current agreement to allow for such participation in a Branerton Conference. I find that the Agency did not provide significant evidence of current or future efforts to match up employee in-office days or to encourage in-person collaboration. It would seem that the Agency's intent is to rely on the chance that a six day telework cap makes it more likely that colleagues will run into each other in-person and that these interactions will result in some amorphous benefit to the employees and the Agency.

The parties both proposed that the appropriate amount of telework days an employee can work will be based on their eligibility under Section 2.A of the article. Section 2.A requires that an employee's work be portable in order to telework. It is that portability of work that is specific to the position and employee that the employee's supervisor should use in review of an employee's request to telework, in both number of days and the schedule of such days. Additionally, the parties have already agreed to recall procedures for employees on telework, which also serve to ensure that the Agency will be able to meet its needs for in-person work.

I find the Agency's argument that telework has caused problems with employee onboarding, assimilation, and retention flawed. The Agency attributing deficiencies in how employees work, function, and learn during and immediately following the pandemic as a result of telework discounts the impact of the pandemic itself. Many new employees who entered the workforce around the time of the pandemic had been forced to complete at least some portion of school remotely and, like many others, had their personal and professional lives upended. To hold telework solely responsible for such issues is inappropriate.

The evidence presented by both parties suggests that it may be appropriate for some employees to telework as many as eight days in a pay period. Given the need for supervisors to assess the portability of an individual employee's work, I am not convinced there should be an arbitrary six-day cap on telework as proposed by the Agency.[2] That is, I find the Union's proposal, which allows for telework up to the federally-set maximum number of eight days per pay period, is an appropriate limit.[3]

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[2] I am also not convinced by the Agency's argument that the Union's proposal exceeds the Department of the Treasury's 50% limit. This is largely because the Agency's own proposal exceeds that limit. While the Agency claims they received a waiver, the Agency provided no evidence to suggest that the Union's proposal could not also qualify for such a waiver. As the Agency was extremely vague about the limit and its supposed constraints, I will not afford this argument much credence.

[3] Per 5 C.F.R. § 531.605(d)(1), "If the employee is scheduled to work at least twice each biweekly pay period on a regular and recurring basis at the regular worksite for the employee's position of record, the regular worksite (where the employee's work activities are based) is the employee's official worksite."

Therefore, I order the parties to adopt the Union's Proposal for Article #48 (Telework) Section 4.A.2. I further order the parties to adopt the Union's Proposal for Article #48 (Telework) Section 7.B.3, consistent with my order in Section 4.A.2.

Issue #4 Article 48 (Telework) – Section 4.A.2.c Positions eligible for Frequent Telework

I again am not convinced by the Agency's arguments that an arbitrary cap of telework would resolve any issues surrounding telework. First, Carrie Mudd, Supervisor of the Legal Processing Division in Finance and Management, testified of the struggles she undergoes in having mail processed. It was apparent that part of her difficulty having employees work on-site was due to the nature of their telework, i.e. some of her employees were teleworking based upon Hardship and/or Emergency Situations. However, there was no testimony indicating how this situation could be remedied by capping telework days for these employees at five days per pay period. In addition, Ms. Mudd testified that she believed that a cap of six days might be reasonable for these employees. As a supervisor, she will be in a position to determine the appropriate number of days based upon the portability of assigned work.

Additionally, Melissa Carter, a Supervisory Program Analyst in International testified about the role of Management Assistants in her office. She testified that they perform many functions that are not portable and that her office required on-site coverage. She testified that the maximum level of eight day telework would not be appropriate for Management Assistants in her office, but she also testified that Management Assistants in different offices have different duties. In other words, once again, a one size fits all is not the appropriate approach for the Management Assistant position.

As I find supervisors are the appropriate authority to determine individual employee's telework frequencies, I find it appropriate to include these particular employees in Frequent Telework. Therefore, I order the parties to adopt the Union's Proposal for Article #48 (Telework) Section 4.A.2.c.

Issue #5 Article 48 (Telework) – Section 7.A.7.e Union Proposed Online Communication Tools

Under *Commander, Carswell Air Force Base*, 31 FLRA 620 (1988) (*Carswell*), the Panel may apply existing Authority precedent to resolve negotiability issues if that precedent involves "substantively identical" proposals. Here, in response to the Agency's non-negotiability claim over the Union's proposal for Section 7.A.7.e, the Union claimed that the Union had provided the wrong version of the proposal in its LBO. After clarifying that the Union intended for its proposal to only consist of the second sentence of the proposal, the Union stated that it found the Agency's negotiability concern was "moot," but offered no supporting Authority caselaw.

However, the matter is not, as the Union suggests, "moot," and as such, I must withdraw the Panel's jurisdiction over this provision. As I officially closed the record with the parties' submission of their LBOs, I will not consider subsequent proposal modifications, including the Union's inadvertent mistake. Moreover, even if I did consider the Union's clarified proposal, I am unable to resolve the Agency's now-raised negotiability claims and must therefore withdraw the Panel's jurisdiction over this provision. If after resolving the negotiability of the Union's proposal, the parties reach impasse, either party is free to file a request for Panel assistance.

ORDER

Pursuant to the authority vested in me by the Federal Service Impasses Panel under the Section 7119 of the Statute, I hereby order the parties to adopt the language outlined herein to resolve their impasse.

Pamela Schwartz
Pamela Schwartz
Arbitrator

October 24, 2024
Washington, D.C.