

In the Matter of

SOCIAL SECURITY ADMINISTRATION  
OFFICE OF DISABILITY ADJUDICATION  
AND REVIEW  
FALLS CHURCH, VIRGINIA

and

CHAPTER 224, NATIONAL TREASURY  
EMPLOYEES UNION

Case No. 16 FSIP 69

ARBITRATOR'S OPINION AND DECISION

Chapter 224, National Treasury Employees Union (Union or NTEU) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Social Security Administration, Office of Disability Adjudication and Review (ODAR), Falls Church, Virginia (Employer or Agency).

Following investigation of the request for assistance, arising from reopener negotiations over the parties' telework article in their master collective bargaining agreement (CBA), the Panel determined that the dispute should be resolved through mediation-arbitration with the undersigned. The parties were informed that, if a complete settlement of the issues at impasse was not reached during mediation, a binding decision would be issued to resolve them.

Consistent with the Panel's procedural determination, on August 8, 2016, I conducted a mediation-arbitration proceeding at the Panel's headquarters in Washington, D.C. During the mediation phase, the Union withdrew an issue concerning reimbursement for high-speed internet expenses. Both parties also revised their proposals but in the end were unable to find agreement on the three remaining issues. Thus, I am required to issue a final decision imposing terms for the disputed issues in accordance with the Statute and 5 C.F.R. § 2471.11 of the Panel's regulations. In reaching this decision, I have considered the entire record, including documentary evidence, testimony from witnesses, and the Union's post-hearing statement

of position submitted to the undersigned on August 19, 2016 (the Employer waived a post-hearing statement.)

### BACKGROUND

ODAR's mission is to render decisions affecting claimants' rights to, and amounts of, benefits under Social Security laws applicable to those with disabilities. The Union represents a bargaining unit consisting of approximately 1,550 professional (attorneys and paralegals) and non-professional employees who work in 168 Hearings Offices within 10 Regions; 5 National Hearing Centers (NHC); and 2 National Case Assistance Centers (NCAC). Attorneys in the bargaining unit are generally known as "decision writers" and they draft decisions at the direction of Administrative Law Judges (ALJs) who decide benefits eligibility *de novo* based on an evidentiary hearing or written record. There also are a few paralegals in the bargaining unit who are decision writers. The parties' CBA went into effect on June 2, 2014, for a duration of 4 years.

The dispute arose because the Union requested to reopen Article 17, "Telework," of the CBA pursuant to a mid-term reopener clause. The parties participated in multiple negotiation sessions and also received mediation assistance from the Federal Mediation and Conciliation Services (FMCS) but were unable to reach full agreement.

### ISSUES AT IMPASSE

The parties disagree over three issues: (1) the number of days bargaining-unit employees may telework per week; (2) telework during emergency closures of an employee's official duty station (ODS); and (3) rescheduling missed telework days (or "in-lieu of days").

### PARTIES' PROPOSALS AND POSITIONS

#### 1. Number of Telework Days

##### a. The Union's Position

The Union's proposed language is as follows:

#### Section 5A Telework Procedures

Management recognizes that most of the duties performed by employees are portable. Accordingly,

management will approve requests to work four (4) (or fewer) Telework days per workweek, absent written justification under this Article to deny a Telework day(s). October, 2016, will be the application period for employees to request a 4th day of telework. All employees approved under the contract will begin a 4th day of telework no later than January 9, 2017.

The Union proposes that the Employer grant all bargaining-unit employees the right to telework up to 4 days a week if they wish with a start date of no later than January 9, 2017. Currently employees may work up to 3 days a week, and a large majority do so. For the reasons discussed below, the Union maintains that expanding the number of days is warranted.

The U.S. Office of Personnel Management (OPM), among other federal agencies, has continued to document data demonstrating that telework provides benefits to "employers, employees, and tax payers." As it relates to these bargaining-unit employees, telework serves as a valuable recruitment and retention tool, which is vital because a majority of decision-writing employees within the bargaining unit are capped at the General Schedule 12 level. Further, per unchallenged survey results, 91% of bargaining-unit employees now telework and 82% telework at least 3 days per week. It is clear that telework is a "wildly popular" option among employees, and this popularity will only increase with the opportunity to telework more often, leading to a more satisfied work force.

The Union is also keenly aware of the Employer's imminent space consolidation efforts. The Employer is continuing to hire additional ALJs. New ALJs mean new office spaces, likely at the expense of space for bargaining-unit employees. Already, as the result of a 2015 space-sharing MOU that the parties negotiated, employees may be required to share offices if they telework more than 2 days a week (a tradeoff for increasing telework to 3 days a week). This requirement will become a part of Article 17 in the CBA during future CBA renegotiations. It is also noteworthy that the language of Article 17 references "workspace" and "space" rather than "offices" signaling that the Employer intends to place decision-writers and paralegals into cubicles or shared work spaces. Increasing the available number of telework days is a needed measure to help stem what can be expected to be a tide of displeasure flowing from this course of action.

Increased telework also benefits the Employer's mission because it will allow bargaining-unit employees to work more frequently in distraction-free environments. The Employer is under significant pressure to quickly adjudicate disability claims at the same time it is moving towards requiring employees to work in more noisy and crowded environments. Adopting the Union's proposal will permit employees to regularly perform their critical duties at home free from work-place distractions promoting speed and efficiency. Moreover, additional telework days will reduce the need for office space, diminishing the Employer's footprint and operating costs.

The Employer's justifications for its opposition to the Union's proposal are not persuasive. Claims that the proposal could create communication problems between supervisors and teleworking employees are not borne out by the facts. The Union's survey data from bargaining-unit employees shows that most supervisor-employee communication occurs electronically, by email or instant messaging. During negotiations the Union agreed to a "virtual hallways" system that permits supervisors to set up times to talk to teleworking employees by web camera. Supervisors also have the ability to call employees into the office for face-to-face conversations. Thus even with 4-day telework available, communication efforts will not be hampered. The Employer presented testimony from a Los Angeles management official concerning the general importance of supervisor-employee engagement. But this testimony failed to rebut the Union's arguments and it certainly did not establish why 4-day telework would be inappropriate.

The Employer proposal to stagger 4-day telework participation for employees so that it can gather information on how this approach would "impact[] all facets of the job" is ill advised. Providing all employees with the opportunity to telework 4 days a week immediately will provide the Employer with a "broader and deeper pool" of information.

As a practical matter, the concept of 4-day telework is not foreign to this agency. A small unit of approximately 25 decision-writer attorneys has been working under such an arrangement for nearly 20 years per a local agreement. The Employer has never claimed that this situation has created any difficulties. On a larger scale, NTEU has bargained telework agreements with several other federal agencies - including the U.S. Customs and Border Protection, Department of Health and Human Services, and the National Credit Union Association - providing the option of teleworking 4, or even 5, days a week.

In summary, 4-day telework is not only desirable to bargaining-unit employees, it is also consistent with federal mandates and facilitates the accomplishment of the Employer's mission. This opportunity should be made available to all bargaining-unit employees sooner rather than later. The Employer has not offered any convincing rationale to support an opposite conclusion.

b. The Employer's Position

The Employer's proposed language is as follows:

Sidebar to Article 17 Telework

Telework Pilot for Decision Writers

1. Effective October 3, 2016, NTEU Bargaining Unit Employees (BUEs) in the National Case Assistance Centers (NCAC), National Hearing Centers (NHC), and Regional Writing Units will be allowed to Telework up to 4 days per week. Requests for the 4<sup>th</sup> day should be submitted during the August 2016 request period.
2. Effective with the first full pay period effective October 2017, up to two (2) NTEU BUEs per hearing office may Telework up to 4 days per week. Requests should be submitted during the August 2017 request period. BUEs will be selected based on employee time in a hearing office.
3. BUEs electing to work a 4/10 Alternate Work Schedule (AWS) may Telework a maximum of 3 days per week. BUEs electing to work a 5/4/9 AWS may Telework a maximum of 3 days in weeks they are scheduled to work 4 days and a maximum of 4 days in weeks they are scheduled to work 5 days.

The Employer is offering a 4-day telework pilot with staggered implementation and fewer employees than the full bargaining unit. In the first phase, all bargaining-unit employees at the NCACs and NHCs would be granted the opportunity to participate in 4-day telework starting October 3, 2016. In the second phase, up to 2 bargaining-unit employees per hearing office throughout the country will be granted the same opportunity effective October 2017. This schedule will lead into the parties' negotiations over their successor CBA in 2018.

The Employer's proposed approach is premised on its desire to implement and measure the impact of 4-day telework in a careful, deliberate manner. Other than a small handful of employees, bargaining-unit employees nationwide have never worked under a scheme where they teleworked 4 days per week. ODAR supervisors have yet to experience an ODAR workplace that involves this level of telework. The Employer's proposal will provide employees and supervisors with an "ease-in" process with an opportunity to gather data and "smooth out" any issues that arise before considering a larger scale roll out. The Arbitrator heard from a management witness about the current emphasis on employee engagement and communication being key elements to mission achievement. This calls for caution in increasing the amount of telework.

The Employer pilot designates the NCACs and NHCs as the "first adopters" because of easier implementation (e.g. fewer locations and supervisors.) This approach will allow around 500 bargaining-unit employees - or about a third of the unit - to begin 4-day telework immediately. Another third will be permitted to telework under this schedule in October 2017 when selected hearing office employees are allowed to take advantage of the schedule. This means that a total of almost two-thirds of the unit will be on 4-day telework under the pilot as the parties head into negotiations over a new CBA. The need for caution outweighs the Union's simple desire to have more, faster.

#### CONCLUSION

Neither party presented much in the way of evidence (as opposed to argument) to support their proposals. The Union, being the proponent of a change in the status quo, carries the heavier burden. Given that the Employer now proposes a pilot for a sizeable number of employees, the question is whether circumstances establish some need (not just preference) for a faster, more full-blown approach to adopting 4 day telework.

Government policy favoring the use of telework does not speak to that question. All relevant guidance on this topic stresses that decisions about telework (who can work it, when and for how long) are to be informed by the specific context.<sup>1/</sup> Here, it is plain that employees like teleworking, and have

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<sup>1/</sup> That fact limits the utility of the other NTEU contracts for comparability purposes.

suitable work for telework. But that does not automatically make the case for expansion of telework to 4 days per week. The Arbitrator is asked to accept justifications based on a very limited sample (25 employees in one location)<sup>2/</sup> or that remain conjecture at this point, for example, that new Administrative Law Judge hires will mean all hearing office employees going into cubicles, and that employees will meet numerical performance goals more successfully working at home an additional day.

The Employer moved significantly, from complete opposition to 4 day telework to proposing a large pilot of 4 day telework to run between now and negotiations on a new contract in June 2018. With the potential success of 4 day telework now being conceded, the Union's only argument is about how to best implement it and measure impact. The reasons put forward for adopting the Employer's staged approach are not unreasonable while the need for ordering a faster, full-blown approach has not been demonstrated. Therefore the Employer's proposal will be adopted. I assume that the timetable for instituting the pilot will have to be tweaked but will leave this to the parties.

## 2. Telework During Office Closures

### a. Union's Position

The Union's proposed language is as follows:

#### Section 6A Office Closure/Early Dismissal/Late Opening

If there is an early dismissal, or late opening at the ODS [official duty station], and the employee is working at their residence as the ADS [alternate duty station], the employee is required to complete a full workday, unless the employee takes appropriate leave. If the ADS is a telecenter or another SSA facility, the employee must abide by the office closure, early dismissal, or late opening rules for that location.

If there is a full day closure at the ODS, the Teleworking employee will be excused without a charge to leave.

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<sup>2/</sup> No one from that location testified about the experience.

The Union proposes that bargaining-unit employees receive administrative leave if their ODS is closed for a full day, irrespective of their being on scheduled telework. The proposal rests on the need for parity within the agency. ODAR employees represented by the American Federation of Government Employees (AFGE,) as well as ODAR non-bargaining unit employees to whom the AFGE rule is traditionally applied, currently receive administrative leave when their offices close, regardless of telework status. NTEU had a similar arrangement prior to the parties' current CBA. But in negotiations the Union agreed to give it up based upon management's assurance that the agency intended to end the practice of giving administrative leave for all other bargaining units. That has not happened. More egregiously, the Employer has yet to end this arrangement for non-bargaining unit employees for which it has *no bargaining relationship* and total discretion. Until the Employer can demonstrate comparability, it should restore the previous rule for this bargaining unit.

b. Employer's Position

The Employer's proposed language is as follows:

Section 6 A Office Closure/Early Dismissal/Late Opening

If there is an early dismissal, late opening or full day closure at the ODS, and the employee is working at their residence as the ADS, the employee is required to complete a full workday, unless the employee takes appropriate leave. If the ADS is a telecenter or another SSA facility, the employee must abide by the office closure, early dismissal, or late opening rules for that location. (Emphasis added)

Sidebar to Article 17 Telework

Telework Pilot for Decision Writers

Employees electing to schedule Telework 4 days per week and who are scheduled to work at the Official Duty Station (ODS) on a day when the ODS is closed must Telework at the ADS on that day. Therefore, employees scheduled to Telework 4 days per week must take their laptop home every day. Employees who do not have their laptop must request leave for that day.



### Office Closures

NTEU may elect to apply the office closure procedures negotiated by SSA in the next term agreement with AFGE. Such office closure language would replace current language in Article 17 Section 6.A.

Under the Employer's proposal, all employees who are on telework, including those teleworking 4 days a week in the pilot, must work when their ODS is closed. Those on 4 day telework are also expected to take their work laptop home every day. The requirement to work on closure days if scheduled for telework reflects the status quo.

Acknowledging the Union's parity concern, the Employer's final offer gives the Union the option to replace this language with whatever SSA and AFGE renegotiate in their new CBA.

### CONCLUSION

The Employer does not dispute that when it negotiated the current language concerning closure days it was on the understanding that the Agency would be applying this new rule across the board. Nor does the Employer dispute that contrary to that assurance, in actuality everyone else (AFGE unit employees and non-bargaining unit employees) has continued to receive administrative leave on closure days even if on scheduled telework. The across the board change never happened, so that the NTEU unit alone has been treated less advantageously.

The Arbitrator concludes that the Union has demonstrated a need to change the current language to align with actual conditions and the mutual intent of the parties when the language was agreed to. The parties will be ordered to adopt the Union's proposal with the following addition: "Should, during the life of this agreement, AFGE-represented and non-bargaining unit employees become subject to a requirement that they work on closure days if on scheduled telework, then such requirement will be reinstated for this bargaining unit."

### 3. Rescheduling Missed Telework Days

#### a. Union's Position

The Union's proposed language is as follows:

Section 6U

Employees are also not guaranteed replacement time if a telework day falls on a holiday. However, the employee's telework day may be temporarily switched to another day with management's approval.

The Union's proposal represents the *status quo*. Currently, under the parties' CBA, supervisors have discretion to reschedule an employee's telework day if that day happens to fall on a federal holiday. The Union does not believe office coverage is an issue, since indeed most of the Employer's work is done electronically. The Employer has offered no convincing rationale for changing the *status quo*.

b. Employer's Position

The Employer's proposed language is as follows:

Section 6 H

Employees whose scheduled telework day is affected by a holiday or leave do not receive an in-lieu-of day.

The Employer's proposal eliminates the existing discretion of supervisors to allow an in-lieu-of telework day where an employee misses a telework day because of a holiday. Employees are aware in advance of the days when holidays fall. Allowing supervisory discretion leads to a lack of uniformity which the Employer believes should be eliminated.

CONCLUSION

The Employer made no case showing problems resulting from the current language. The Arbitrator will order the parties to adopt the Union proposal.

DECISION

The parties shall include the following wording in their reopened Article 17 of the CBA to resolve the issues at impasse:

1. **Number of Days of Telework:** The parties shall adopt the Employer's final offer.

2. **Telework During Office Closures:** The parties shall adopt the following modified version of the Union's final offer:

Section 6A Office Closure/Early Dismissal/Late Opening

If there is an early dismissal, or late opening at the ODS [official duty station], and the employee is working at their residence as the ADS [alternate duty station], the employee is required to complete a full workday, unless the employee takes appropriate leave. If the ADS is a telecenter or another SSA facility, the employee must abide by the office closure, early dismissal, or late opening rules for that location.

If there is a full day closure at the ODS, the Teleworking employee will be excused without a charge to leave.

Should, during the life of this agreement, AFGE-represented and non-bargaining unit employees become subject to a requirement that they work on closure days if on scheduled telework, then such requirement will be reinstated for this bargaining unit.

3. **Rescheduling Missed Telework Days:** The parties shall adopt the Union's final offer.



Mary E. Jacksteit  
FSIP Chairman

September 14, 2016  
Takoma Park, Maryland