

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT
OF AGRICULTURE
USDA RURAL DEVELOPMENT
WASHINGTON, D.C.

And

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES, LOCAL 3870

Case No. 17 FSIP 060

DECISION AND ORDER

The United States Department of Agriculture, USDA Rural Development, Washington, D.C. (Agency or Management) 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 American Federation of State, County and Municipal Employees, Local 3870 (Union).

Following an investigation of the Agency's request for assistance, which involves parts of four articles in the parties' successor collective bargaining agreement (successor CBA), the Panel asserted jurisdiction over this dispute and decided to resolve it through a Written Submissions procedure with the opportunity for rebuttal statements. The parties were informed that, after considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the dispute, which could include the issuance of a binding decision. The Panel has now considered the entire record, including the parties' final offers, written submissions, and the parties' rebuttal statements.

BACKGROUND

The Agency is a component of the United States Department of Agriculture (USDA) and runs programs intended to improve the

economy and quality of life in rural America. To support this mission, the Agency has three primary components/activities that are located in Washington, D.C. It also has several field offices throughout the country. The Union represents around 300 bargaining unit employees who are mostly specialists (e.g., financial, loan, and administrative assistants with grades ranging from GS-7 to GS-13). The parties' CBA was executed in July 2010 and expired in 2015, but continues to roll over annually.

The parties engaged in extensive negotiation efforts and were able to make significant progress on numerous articles in their successor CBA between August 2015 to August 2016. Unable to progress further, they turned to the Federal Mediation and Conciliation Services (FMCS) for mediation assistance in FMCS Case No. 2017117500101 from August 2016 to April 2017. The Mediator referred the parties to the Panel on April 12, 2017. On September 6, the Panel voted to assert jurisdiction over all issues in dispute.

ISSUES

The parties are in disagreement over parts of four articles in their successor CBA concerning: (1) official time; (2) core hours for flexible work tours; (3) merit staffing; and (4) telework.

I. Official Time

a. Amount of Official Time

1. Union Position

Originally, the Union requested 100% official time for its President. After deliberation, the Union now proposes that between 1 and 3 Union officials will receive a total of 3 days worth of official time per week. Thus, for example, the President could be on official time 3 days per week. Article 4.7.A of the current CBA states that the Union President shall have 2 days of official time per week.¹ But shortly after the

¹ This language states the "Union shall designate one elected official, the President, 100% official time to conduct Union business two (2) days per week. The designated official will serve in that capacity for a two-year term and notify the Agency prior to assuming the responsibility."

CBA's enactment, the parties executed a memorandum of understanding (Official Time MOU) because of the then-Union President's limited availability. This MOU granted the Chief Steward 2 days of official time per week. Over time, Management allowed the Chief Steward to remain on 100% official time at *all times* or, alternatively, granted the Union the ability to place two of its representatives on official time 1 day a week each. The Chief Steward is now the Union President and maintains that the Agency creates more than enough labor activity to warrant the Union's current proposal. In addition to negotiations over a new CBA, the Union has engaged in numerous bargaining and representational matters over the past several years. The Union argues that Management's routine unwillingness to informally resolve disputes forces the Union to draft and file grievances to preserve its rights. Having less official time will also mean that employees will be less inclined to seek out Union assistance, thereby impairing the Union's effectiveness and efficiency. Despite the foregoing, the Union is willing to modify its proposal in an effort to bridge the gap between the parties. The Union also notes that roughly 5 different other USDA components have CBAs that permit different Union officials to be on full official time, which exceeds what the Union is currently seeking.

2. Agency Position

The **Agency** wishes to maintain a modified version of Article 4.7.A of the existing CBA. Under Management's proposal, the Union has to elect to either grant the Union President 2 days of official time per week or place two Union representatives on 1 day of official time each. The Agency believes that the Union's proposal is not justified by empirical data. Indeed, since the parties enacted their CBA in 2010, the Agency is aware only of three grievances, three representation petitions, two unfair labor practice charges, several bargaining matters, and time spent in the parties' Labor Management Forum (LMF). The foregoing work load is not robust enough to support more than 2 days of official time per week. Moreover, in the view of Management, the Union has a habit of making work for itself in an effort to justify its official time usage.

CONCLUSION

This issue arises out of a set of unique circumstances. As noted above, shortly after the parties executed a CBA provision about official time, the parties entered into the Official Time MOU to provide the Union with official time flexibility because

of the former President's unavailability. The then-Chief Steward, and now current President, stretched that flexibility to its limits by becoming a 100% official time Union representative and the Agency did not object. The parties' actions created an environment where, in the Union's view, it is perfectly reasonable to expect that enough labor activity exists to warrant an expectation for 100% official time. Yet, in an effort to strike common ground with the Agency, the Union now requests only 3 days of official time per week for its current President. The Agency, nevertheless, remains steadfast in its position that the Agency should offer no more than 2 days per week of official time. On balance, however, we believe neither party's proposal is warranted.

The Union's position is premised on the assertion that it has enough of a workload to justify placing one individual on official time for 48 duty hours per bi-weekly pay period (or roughly 60% of their duty time). As noted by the Agency, however, since 2010, the Union's workload has apparently consisted largely of three grievances, three representation petitions, two unfair labor practice charges, several bargaining matters, and time spent in the parties' LMF. This collection of data that spans 7 years - which the Union did not refute -- casts doubt on the Union's claim that it is overwhelmed by duties. It is difficult to see how the foregoing activity pressed the Union to the point that it needed or continues to need at least 1 individual on 60% official time. Indeed, the Union has at least several other representatives and officers. Moreover, because the Panel's decision in this matter will bring the parties' dispute over a successor CBA to a close, the Union will have less representational duties on its plate moving forward.

To buttress its position, the Union also provides comparator data in the form of other USDA components that have official time deals granting 100% official time or other significant amounts of time to their respective exclusive representatives. However, the Union did not provide information about the nature of those units. Thus, it is difficult to say that this comparator data is instructive.

Although the Agency is willing to offer 2 days of official time per week, the record before us does not lead to a conclusion that this amount of time is justified either. For all of the reasons noted above, it does not appear that the Union has a burdensome case load. Nor is it apparent that having less than 2 days a week of official time would pose a

hindrance to the Union's representational functions. Accordingly, we will impose the Agency's official time language but with one modification. Specifically, rather than 2 days of official time per week as proposed by Management, we will order 1 day per week.²

b. Labor Management Forums

1. Agency's Position

On October 4, 2017, the Agency informed the Panel and the Union that it was withdrawing its tentative agreement to three previously agreed upon provisions in the parties' successor CBA official time article that address LMFs. It cited Executive Order (E.O.) 13812, "Revocation of Executive Order Creating Labor-Management Forums," which was issued on September 29, 2017, as its basis for doing so. As implied by its name, this Order rescinded a prior Executive Order that permitted agencies to establish LMFs with their respective unions. E.O. 13182 also states that, while current CBA provisions enshrining LMFs remain in effect, future similar CBA provisions are prohibited.

Based on the foregoing, the Agency now disclaims three separate official time sections.³ Article 4.3.A.11 states that the CBA will not limit official time for Union representatives who are appointed to any joint partnership councils.⁴ The second

² The parties also have one minor disagreement in Article 4.2.A about how to define "brief" calls or visits that do not require pre-clearance for official time. The Agency wants to define this time as "less than 10 minutes," whereas, the Union prefers to leave it undefined. We will adopt Management's language as it provides clearer guidance.

³ Based on the above E.O., the Agency also disclaimed its tentative agreement to another portion of the parties' successor CBA, Article 25, "Labor-Management Forums." The Panel did not assert jurisdiction over Article 25, and the parties never previously presented any dispute concerning this article or otherwise suggested that they negotiated to impasse over it. Based on the foregoing, the parties were informed that Article 25 was not before the Panel.

⁴ The language states the CBA "shall not limit the use of time for bargaining unit employees appointed by the Union to partnership councils and related bodies."

section, Article 4.3.D, requires that, as stated by the USDA LMF Charter (which binds the parties), Union representatives would receive time for preparation and participation in the LMF.⁵ Finally, Article 4.7.J covers similar ground as Article 4.3.D.⁶

2. Union's Position

The **Union** objects to the Agency's decision to raise the E.O. at this point in the Panel's proceedings because the parties have not previously addressed this issue. On the merits, the Union sees no issue with retaining the foregoing sections in the new CBA. These sections recognize Union representation when LMFs are available but they do not independently create LMFs. So there is no harm in allowing this language to remain.

CONCLUSION

We agree with the Agency that the prior agreed-to language should not be included in the CBA. Rather than rely upon the E.O., however, we conclude that Management's approach is appropriate because it is consistent with our findings and conclusions concerning the amount of official time to be allotted to the Union. In this regard, as we discussed above, we do not believe that the Union has a particularly robust workload. Thus, granting the Union official time for LMFs is unnecessary. Accordingly, the previously agreed language for LMFs and official time shall be removed from the successor CBA.

II. Core Hours

1. Union's Position

⁵ The language is that in "accordance with the USDA [LMF] Charter, it is understood that participation in the [LMF] is considered Agency work, and members serving in the [LMF] (and/or its work groups) will be provided time for preparation and participation.

⁶ "It is understood that meetings of the [Agency's LMF] and its working groups are considered [Agency] work, and accordingly, members who serve on this body and/or related bodies (e.g., the USDA [LMF] and/or its task groups) shall be provided time for the meetings, as well as related preparation and follow through."

The parties agree that bargaining-unit employees may work flexible work schedules. These schedules permit employees to vary their daily work schedules so long as they end their bi-weekly pay period with 80 duty hours. However, employees are expected to work a certain set of "core hours" every day or use leave to cover those hours. The Agency's current core-hours are 9:00 a.m. to 2:30 p.m. The **Union** proposes changing those core hours to 9:30 a.m.-2:30 p.m. The Union views this proposal as consistent with Federal guidance encouraging family-friendly flexible work places. Many schools in the D.C. metro area open at 9 a.m., so employees would be able to drop their children off and report to their duty stations by 9:30. Agency guidance calls for flexible schedules to end by no later than 6 p.m. each work day; coming in to work by 9:30 a.m. will still satisfy that guidance. Finally, at least 5 other USDA CBAs allow start times of 9:30 or later.

2. Agency's Position

The **Agency** opposes the Union's proposal and seeks to maintain the *status quo*. The Union has not demonstrated that the start time of 9:00 a.m. is not family friendly. This start time has been in place largely throughout the Agency's D.C. offices since 1995 without issue, so it is unclear why this time must now change. In this regard, the Agency has a well-established instruction (Agency Core Hour Instruction) that states the expected start time for its offices is 9:00 a.m. (although the Instruction states it applies to non-bargaining unit employees). The Agency is also aware that 2 of its smaller offices in St. Louis have a 9:30 a.m. start time, but their work is more local in nature as opposed to the Agency's predominantly nationwide focus.

CONCLUSION

This dispute boils down to 30 minutes. The Union requests a start time of 9:30 a.m.; the Agency requests 9:00 a.m. On balance, we believe the latter approach is the appropriate one.

As noted by the Agency, both its policies and the existing CBA establish a long-standing start time of 9:00 a.m. for its employees, flexible work schedule or otherwise. Based on this establishment, it logically follows that the daily performance of the Agency's functions are conducted with the expectation that most Agency employees are usually available beginning at 9:00 a.m. in order to facilitate those functions. The Union's proposal would disrupt that expectation. Moreover, it is likely

to create confusion about the morning availability of non-bargaining unit employees versus bargaining unit-employees.

The Union's primary concern driving its proposal is school start times. While this concern is understandable, it is not clear that these start times have created any sort of systemic problem for bargaining-unit employees over the past several years. Accordingly, balancing the parties' respective interests, we will impose the Agency proposal.

III. Merit Staffing

1. Union's Position

When the Agency publishes a vacancy announcement for a vacant position, it will review the applications it receives and create a list of "best qualified" individuals from those who applied to the announcement. The Agency will then interview individuals from this list. With respect to this practice, the Union proposes as follows:

When considering best qualified candidates for interviews if one candidate is interviewed, all best qualified interviews in the bargaining unit must be interviewed.

The Union's proposal tracks the *status quo* of the existing CBA which requires the Agency to interview all best qualified individuals on the list.⁷ The Union's proposal, by contrast, narrows this language by requiring interviews for only best qualified *bargaining-unit employees*. The bargaining unit is under 300 employees and it logically follows that the entire unit would not apply to every vacancy. So the Union's proposal would not create a significant work load for Management. Moreover, elsewhere in their successor CBA, the parties have agreed to language that will allow management to determine the qualifications for those applicants who make the best qualified list. Management can therefore narrow the number of individuals on that list. And finally, the Union is aware of at least 2 other USDA CBA's that have language similar to the Union's proposal.

⁷ Article 9.11.B of the existing CBA states that if "one best qualified candidate [from the best-qualified list] is interviewed, all best qualified candidates must be interviewed."

2. Agency's Position

The **Agency** counter-proposes as follows:

When considering best-qualified candidates from a merit promotion certificate, interviewing is strongly recommended in evaluating candidates' competency levels. If interviewing, the selecting official must interview at least five (5) candidates for all those referred, if fewer than (5) on that certificate.

Although the proposal states "at least five" candidates will be interviewed, in all likelihood, Management will limit its interviews to only five individuals. Federal hiring guidance promulgated in 2010 instructed agencies to broaden its merit-hiring practices. Management has, therefore, broadened what it considers to constitute "best qualified" and, as a result, "100's" of names can appear on a single list. Interviewing all of these individuals would significantly hamper the Agency's hiring process. Thus, limiting the number of best qualified interviews to "at least five" makes the most sense from an economy standpoint. Indeed, in 2013 the Agency promulgated an instruction that mimics the "at least five" interviews approach. However, this instruction also applies to non-bargaining unit employees primarily. Moreover, the Agency surveyed around 10 different USDA CBA's and found no uniformity about how this issue is approached.

CONCLUSION

We adopt Management's proposal. It is undisputed that, since the enactment of the original CBA, Federal hiring reforms have directed Agencies to expand the scope of individuals who may qualify for Federal vacancies. Consistent with that reform, and equally undisputed, Management has sought to increase the number of applicants who fall under the umbrella of "best qualified." Given this increase, it only logically follows that, the Agency's hiring process would become slower and more inefficient were it required to interview a large number of best-qualified applicants. Because the Agency's proposal caps interviews, it best ensures that Management's hiring resources will not become strained. But the Agency's proposal also keeps open the option that it *could* interview more than 5 individuals if it chooses to do so.

IV. Telework

a. Telework and Administrative Leave

1. Union's Position

The Union proposes that, when an Agency office is closed, all "telework ready" employees (as defined by the CBA) "may be required to work" at their telework sites but "shall be excused if:"

- i. [H]e/she is prevented from safely teleworking by an act of God (i.e., natural disasters such as earthquakes, floods and snowstorms), terrorist attack or other similar circumstances not in the employee's control that prevents working safely; and
- ii. either (A) the occurrence of such condition(s) could not be reasonably anticipated, or (B) the employee is prevented from safely teleworking (including e.g.: the unavailability or inaccessibility of specialized equipment necessary for teleworking, power outages, and interference with internet connectivity) despite having taken reasonable steps within his/her control to prepare for telework (e.g., by taking home the needed equipment and/or work).

(emphasis added).

The Union's language emphasizes that an employee cannot safely telework during office closures when, for example, he or she encounters power outages or equipment failure. The Union views this approach as consistent with the Administrative Leave Act of 2016 (the Act) which created a category of paid leave known as "weather and safety" leave. In this regard, the Act states that an agency may approve weather and safety leave:

[W]ithout loss of or reduction in the pay of the employee or employees, leave to which the employee or employees are otherwise entitled, or credit to the employee or employees for time or service only if an employee . . . is prevented from safely traveling to or performing work at an approved location due to . . . an act of God . . . or another condition that prevents the employee or group of employees from safely

traveling to or performing work at an approved location.⁸

Additionally, the U.S. Office of Personnel Management (OPM) has proposed regulations that track the above language. These regulations are intended to grant "exceptions to the bar on granting weather/safety leave for teleworkers[.]"⁹ Further, the Union's proposal is consistent with Federal and Agency guidance that encourages telework. In this regard, employees would be discouraged from teleworking if they knew they could not receive administrative leave in the circumstances laid out in its proposal. By contrast, non-teleworking employees who encounter a power outage or a system failure at the office would receive excused leave. Finally, the Union is aware of at least two other USDA CBA's that grant excused leave to teleworkers in the circumstances described by the Union's proposal.

2. Agency's Position

The **Agency** proposes language that differs slightly from the Union's proposal. During office closures, telework ready employees may receive administrative leave if the following conditions are satisfied:

- i. [H]e/she is prevented from safely teleworking by an act of God, (i.e., natural disasters such as earthquakes, floods and snowstorm) terrorist attack or other similar circumstances not in the employee's control that prevents working safely; and
- ii. either (A) the occurrence of such condition(s) could not be reasonably anticipated, or (B) the employee is prevented from safely teleworking despite having taken reasonable steps within his/her control to prepare for telework (e.g., by taking home the needed equipment and/or work).
- iii. For purposes of this provision . . . an employee prevented from travelling to or performing work

⁸ 5 U.S.C. §6319c(b) (1) and (3).

⁹ Citing "Administrative Leave, Investigative Leave, Notice Leave, and Weather and Safety Leave," 82 Fed. Reg. 32263-01, 32,280-281 (July 13, 2017).

at an approved location is "prevented from safely teleworking."

The Agency maintains that its language sufficiently addresses the Union's concerns and that, at this point, the parties' disagreement is merely one of style over substance. In this regard, subsection iii. of its proposal acknowledges that an employee who cannot safely travel or perform work at an approved work location meets the definition of "prevented from safely teleworking." As such, that employee would be excused from teleworking. Subsection iii. actually appeared elsewhere in the parties' successor CBA, and the parties agreed to it, but the Agency has moved it to this section to clarify the options that are already available to teleworking employees. The parties have also tentatively agreed to Article 21.2.K.1, which defines "Telework-Ready" and states that an employee is not telework-ready and may, therefore, request "paid or unpaid leave" if they are "unable to Telework when required." All of the foregoing establishes that the Union has protections under the successor CBA that meet its concerns. The Agency is reluctant to adopt the more specific language offered by the Union given that variables could differ for each employee's situation.

CONCLUSION

This disputed topic poses the following question: when is it appropriate to grant administrative leave to a teleworking employee when their office is closed? Ultimately, we agree with the Agency's suggestion that the parties' dispute boils down to a disagreement over wording rather than substance because the parties' agreed to language meets the Union's needs. Thus, the Panel adopts the Agency's proposal.

The parties agree that an employee may be excused from teleworking if he or she is unable to "safely telework." Their agreed to definition for this phrase focuses on an employee's inability to travel to or perform work at an "approved location," i.e., that employee's telework location or office. Stated differently, under the parties' undisputed agreed to language, an employee may be arguably excused from teleworking if they are unable to perform work at their telework location but cannot safely travel to the office, presumably because it is closed due to conditions that prevent safe travel, to resume that work. This scenario stands in contrast to other portions of the parties' successor CBA -- that are also tentatively agreed to -- which ordinarily require a teleworking employee to

travel to their office should they encounter equipment malfunctions or system errors. Thus, it is understood that continued telework is not always feasible if the office is closed.

Moreover, the parties agree that the above circumstances apply only to employees who are considered "telework ready." Under tentatively agreed to language between the parties in Article 21.2.K.1, the phrase "telework ready" is defined as "all eligible employees with an approved Telework Agreement [] who are prepared and equipped to telework." This definition further states that if such an employee is "unable to Telework when required, use of paid or unpaid leave may be requested." So this language is something else an employee may rely upon when they encounter problems while teleworking but lack the ability to safely travel elsewhere to continue working.

Given the above agreed to contractual provisions in place, the Union's language appears to be superfluous. The language could also create confusion about whether specific situations qualify for excused leave. The Union maintains that failing to include its language could lead to decreased telework participation, but that is simply speculation on the Union's behalf. And, although the Union cites to other USDA CBAs to support its language, there does not appear to be any conformity.

Without issuing any legal holdings, we further note that the Agency's suggested approach appears to be consistent with OPM's proposed regulations for the Act. Proposed 5 C.F.R. § 630.1603 provides agencies authority to grant "weather and safety leave" to employees if they are prevented from "safely traveling to or safely performing work" at an agency approved location due to an "act of God," a "terrorist attack," or another "condition that prevents an employee or group of employees from safely traveling to or safely performing work at an approved location."¹⁰ However, it also is understood that teleworkers should not ordinarily receive weather leave in the foregoing conditions because they are "typically able to safely perform work at their approved telework site."¹¹ Agencies may nevertheless make exceptions for teleworking employees if "the conditions in [proposed] § 630.1603 could not reasonably be anticipated" and, as a result, a teleworking employee "was not

¹⁰ 82 Fed. Reg. 32263-01, at 32,280.

¹¹ *Id.* (Proposed 5 C.F.R. § 630.1605(a)(2)).

able to prepare for telework" and is "otherwise unable to perform productive [telework]." ¹² Essentially, then, OPM's proposed regulatory framework permits excused leave when an employee is prohibited from safely working at their approved telework location or an Agency's office due to unforeseen circumstances and cannot otherwise perform productive work. Unlike the Union's proposal, OPM's suggested approach does not delve into the specifics of when an employee lacks the ability to safely work from home. Thus, the Agency's suggested approach appears more consistent with OPM's proposed regulatory framework.

Based on all of the foregoing, we impose the Agency's proposed approach.

b. Full-Time Teleworkers

1. Union's Position

The Union wishes to include the following language regarding full-time telework for bargaining-unit employees: "[a]ll employees eligible may be authorized up to and including full time telework." ¹³ The Union acknowledges that this option would have to be discussed and vetted by an employee's supervisor. In other words, full-time telework is not a guarantee under the Union's language. But the Union wants to "emphasize" the possibility of this telework option to supervisors.

2. Agency's Position

The Agency wishes to exclude the Union's requested language. It concedes that full-time telework may be an option, but it is reluctant to include explicit language out of fear that it will create "needless misunderstanding and workplace confusion."

CONCLUSION

The Union argues that its language merely requires Management to acknowledge that employees have the possibility of teleworking full time. Management is concerned that the language could create an impression that supervisors must

¹² Id. (Proposed 5 C.F.R. § 630.1605(a)(2)(i)).

¹³ Telework Proposal, 21.3.H.

affirmatively grant this option when requested. Thus, the Agency's overall goal is to avoid confusion. We believe this goal is laudable. Individual supervisors and individual employees can work out amongst themselves the feasibility of full-time telework without the air of formality or potential for confusion that the Union's language could create. Thus, we will reject the Union's proposal.

c. Proximity Between Telework and Time Off

1. Union's Position

The **Union** proposes this language:

Management will not deny telework arrangement[s] for certain days solely based on the day's proximity to a day where the employee does not work, for example, due to the weekend, holiday, or day off pursuant to a compressed work schedule.¹⁴

The goal of this language is to prohibit management from denying a requested telework schedule "solely" because that schedule happens to be adjacent to scheduled time off. The Union views that approach as "arbitrary" and lacking any purpose.

2. Agency's Position

The **Agency** opposes the Union's language because the wording assumes that Management is forbidding certain schedules due to their proximity to other days off when, in reality, other issues may be at play, e.g., productivity, conflicting work schedules. Thus, the Union's proposal could hamper Management's scheduling abilities.

CONCLUSION

We reject the Union's suggested language. The Union argues its language is narrow in scope because it is meant to apply to situations where a manager seeks to prohibit a certain telework day(s) "solely" because it is adjacent to other days off. The Union views such a prohibition as "arbitrary." Yet, it is equally arbitrary to suggest that employees have an entitlement to telework on such days. The Union does not explain why these

¹⁴ *Id.* at Article 21.3.J.

days should be considered available as a matter of course. Moreover, as the Agency alludes to, the Union's language could lead to disputes and litigation over whether a decision to exclude an employee from a certain day was "solely" because of its proximity to another day.

d. Reporting to the Workplace

1. Union's Position

The Union proposes the following language:

Teleworkers shall report physically and regularly to the assigned traditional office at least twice per biweekly pay period if the employee resides outside the 50 mile local commuting radius. The [Official Duty Station] ODS¹⁵ of an employee who does not report physically and regularly to his/her ODS at least twice per biweekly pay period and is outside of the 50-mile local commuting radius shall be changed.¹⁶

The Union's language is primarily meant to address the appropriateness of requiring a full-time teleworking employee to come into the office twice per pay period. In the Union's view, Agency regulations do not require a full-time teleworker to make such a commitment. Additionally, the Union contends that if these employees are within 50 miles of their office and they do not report in twice per pay period, relevant Agency regulations do not require them to change their duty station. The proposal also uses the phrase "assigned traditional office" rather than "ODS" because that phrase appears in a different Agency regulation. In short, then, the Union's proposal is largely motivated by how it views applicable Agency regulations and policies.

2. Agency's Position

The Agency's counter-proposal is as follows:

¹⁵ In Article 21.2.G of the successor CBA, the parties have agreed that the term "ODS" generally means "the location where the employee regularly performs his or her duties."

¹⁶ Telework Proposal, Article 21.3.L.

Employees shall report physically and regularly to the ODS named on his/her Notification of Personnel Action (Standard Form 50 or equivalent) at least twice per biweekly pay period. The ODS of an employee who does not report physically and regularly to his/her ODS at least twice per biweekly pay period and resides outside of the 50-mile local commuting radius shall be changed.

The Agency argued that the term "ODS" should be used throughout this proposal rather than alternating with the phrase "assigned traditional office" because using them interchangeably could suggest that the two mean different things. The Agency also feels that the Union's language creates the impression that an employee who resides within a 50 mile radius does not regularly have to report to the ODS. Such an approach is impermissible in the Agency's view. Finally, the Agency maintains its proposal is consistent with a decision issued by the Federal Labor Relations Authority Office of General Counsel, Atlanta Region, concerning the scope of bargaining unit representation. In this regard, the Atlanta Office concluded:

[A]ll employees, including teleworkers and those who report to alternate duty stations, who are physically located within the Washington, D.C. metropolitan area are properly included in their respective bargaining units. However, those employees who work outside the metropolitan area, remain excluded.¹⁷

The Union's proposal essentially allows employees to alter their duty stations, and the Agency believes that approach could create inconsistencies with the above holding.

CONCLUSION

Following the submission of the above arguments, the Panel was informed that the parties reached agreement on this proposal by accepting all of the Union's language save for the phrase "if the employee resides outside the 50 mile local commuting radius." The disagreement over this phrase is ultimately a legal one in that each side disagrees whether applicable law requires a teleworking employee to regularly report to their

¹⁷ Department of Agriculture, Rural Development and AFSCME, Council 26, WA-RP-17-0022 (June 23, 2017). The decision was not a published one and neither party appealed it to the FLRA.

assigned traditional office. In essence, then, each side asks the Panel to enshrine their respective legal arguments into the CBA. The foregoing is not the proper role of the Panel because it has no ability to address such arguments. Accordingly, we will drop the disputed phrase and replace it with "in accordance with applicable law." The parties can rely upon this language to resolve any remaining legal disputes in the appropriate forum.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel under § 2471.11(a) of its regulations hereby orders the adoption of the following:

I. Official Time

a. Amount of Official Time¹⁸

Management's language shall be imposed but with the following substitution for its offered Section 4.7.A:

The Union may send the Employer notice designating up two (2) elected officials for whom the Employer shall approve full workdays of official time for the purpose of conducting Union business up to a combined total of one (1) day per week.

b. LMFs

The tentatively agreed upon language shall be withdrawn.

II. Core Hours

The Agency's language shall be adopted.

III. Merit Staffing

The Agency's language shall be adopted.

¹⁸ The full language for this section is attached to the Appendix of this decision.

IV. Telework

a. Administrative Leave and Telework

The Agency's language shall be adopted.

b. Full-Time Teleworks

The Union's Proposal shall be withdrawn.

c. Proximity Between Telework and Time Off

The Union's Proposal shall be withdrawn.

d. Reporting to the Workplace

The Panel shall impose the parties' agreed upon language but shall substitute the following for the first sentence:

Teleworkers shall report physically and regularly to the assigned traditional office at least twice per biweekly pay period in accordance with applicable law.

By direction of the Panel.



Mark A. Carter
FSIP Chairman

January 2, 2018
Washington, D.C.

APPENDIX4.7 SCHEDULED FULL DAYS OF OFFICIAL TIME FOR SPECIFICALLY DESIGNATED UNION OFFICIALS

- A. The Union may send the Employer notice designating up to two (2) elected officials for whom the Employer shall approve full workdays of official time for the purpose of conducting Union business up to a combined total of one (1) day per week.
- B. Designated officials on full workdays of official time shall report to the Union office or telework during the designated day(s) per week. To assure confidentiality required by the duties, the Union office shall be a private office.
- C. Each designated Union official shall be free to apply for any vacancy and shall be fairly considered for any promotional opportunity within the Employer. The performance of Union work on official time shall be viewed with neutrality by selecting official(s).
- D. In the event of a reduction in force (RIF), each designated Union official shall have the same rights as other RD employees, and his/her position of record shall be viewed with neutrality in any RIF planning.
- E. Each designated Union official shall be eligible to attend training or conferences necessary to maintain the professional skills of his/her assigned permanent position of record. Criteria for approval or disapproval shall be the same as applied to other employees in that work unit.