

Management response to AFGE 10/24 Telework Grievance
November 8, 2023

This letter responds to your grievance dated October 24, 2023, with the subject “Change in NARA Telework Policy”. Your grievance is based on three alleged violations: (1) Agency authority to institute bargaining unit wide caps on telework days; (2) Legitimacy of the Agency’s business need; and (3) Failure to negotiate in good faith. Your grievance proposes as remedies that NARA: rescind its new telework policy; reinstate leave, reimburse employees, and otherwise make employees “whole”; post a remedial notice; pay Union attorneys’ fees; and any other remedies deemed appropriate. For the reasons described below, your grievance and the requested remedies are denied.

1. Agency Authority to Institute Bargaining Unit-Wide Caps on Telework Days

The first element of your grievance argues that NARA’s policy violates the 2022 NARA-AFGE Mid-term Memorandum of Understanding (MOU), dated November 2022. This element of your grievance is effectively summarized with this quote, “The National Agreement clearly contemplates a decentralized telework approval process, in which an employee’s supervisor determines whether to approve or deny the type of telework agreement and the number of telework days requested.” Your grievance further argues that, “...the Agency does not have the authority to institute a bargaining unit-wide cap on telework.” However, your grievance does not cite any provision of NARA’s telework policy or any agency communications to demonstrate that NARA’s new telework policy contradicts the positions adopted in your grievance.

I have carefully reviewed NARA’s telework policy, NARA directive 332, “Telework and remote work,” and its Supplements, dated November 6, 2023. I find that NARA’s telework policy establishes a decentralized telework approval process, consistent with the MOU, where the supervisor approves or denies employee requests for telework, including the number of days requested. In fact, paragraph 1f of NARA 332 specifically states, “Supervisors approve or deny employee requests for telework arrangements, including the number of telework days authorized, based on the business needs of the work unit, organization, or NARA.”

I further find that NARA’s telework policy, NARA 332, does not establish a bargaining-unit wide cap on telework, as alleged in your grievance. The NARA 332, in paragraph 1b, expressly states, “The number of telework days approved for an employee in each pay period (on a recurring or ad-hoc basis) must be based on legitimate business needs and the employee’s continued eligibility for telework. NARA has a legitimate business need to limit telework to no more than six days per pay period for most positions.” Paragraph 1b then provides three numbered sub-paragraphs, each of which establishes a legitimate business need of the agency to limit telework. In each case, NARA establishes a unique legitimate business need of the agency and then describes the characteristics of certain positions or work units that would necessarily be required to limit telework in order to meet the stated legitimate business need.

This provision is consistent with and grounded in Section I.B.2 of the MOU, which states: “For recurring telework, an eligible employee may be granted a maximum of five telework days per week (and six days per week for maxiflex employees), without regard to Article 9, Section 3C, of the National Agreement between NARA and AFGE Council 260, dated February 2019 (“National Agreement”). The number of

days granted will be based on legitimate business needs and continued eligibility as otherwise provided in Article 9.” (Section I.B.2)

NARA 332 retains the supervisor’s authority to approve telework consistent with the agency’s legitimate business needs, exactly as described in and contemplated by the MOU provision cited above and in your grievance. NARA 332 provides NARA supervisors with reasonable guidance on the legitimate business needs of the agency regarding telework. NARA provides this guidance to help ensure consistent and appropriate application of section I.B.2 of the MOU when supervisors make determinations regarding employee requests for telework and the number of telework days. Under NARA 332, supervisors approve and disapprove telework requests based on legitimate business needs, and legitimate business needs are established by the Agency.

NARA routinely makes determinations regarding legitimate business needs of the agency on a large range of topics and according to deliberative management processes. NARA makes these decisions at multiple levels, including agency-wide, at the Executive organization level, and by Division, Branch, and work unit. NARA did not cede Management’s right to determine its own legitimate business needs in the MOU and NARA did not agree to replace its deliberative management processes with a decentralized approach that allows individual supervisors to independently determine the agency’s business needs. Nothing in the MOU mandates or contemplates that only first-line supervisors can determine the legitimate business needs of the agency.

In fact, the system established in NARA 332 is already in place in multiple work units across the agency with the full knowledge of – and uncontested by – the Council. For example, at NARA’s National Personnel Records Center (NPRC) 495 bargaining unit employees in the military correspondence sections are currently limited to no more than two days per week of telework. This is a policy established by the Center Director, not individual supervisors, based on the agency’s legitimate business need that most service requests received at the NPRC require access to records available only onsite and in paper. This policy has been in place since January 2023. Prior to this policy, the same employees were restricted to one day per week since November 2022.

Similarly, in the A2 Textual Research Room approximately 58 bargaining unit employees are only permitted to enter into situational (ad-hoc) telework agreements. Those employees are only permitted to telework up to one day per pay period, and only to the extent that onsite work allows. Supervisors approve situational telework agreements and approve ad-hoc telework days when possible. This policy was established within the entire research room organization (RR2RM) to ensure adequate coverage for in-person customer service provided onsite by NARA employees in this organization.

In both cases, Management made a determination regarding a legitimate business need to restrict telework for certain positions and work units, and provided that guidance to individual supervisors. Supervisors, upon receiving employee telework requests, made determinations regarding whether to approve the requests and the number of days to approve *following organization-level guidance regarding legitimate business needs*. This procedure is completely consistent with the MOU and is exactly the structure established for all of NARA in NARA directive 332.

For these reasons, I find that the agency telework policy does not take approval authority away from supervisors and is not an agency-wide maximum on the number of telework days, as alleged in this element of your grievance.

2. Legitimacy of the Agency's Business Need

The second element of your grievance alleges that the agency's business needs to restrict telework participation are not legitimate in the sense used in the MOU because they were not articulated in pre-decisional involvement between NARA and the Council.

Executive Order 13522, Creating Labor-Management Forums To Improve Delivery of Government Services (December 9, 2009), establishes pre-decisional involvement in the Executive Branch. EO 13522 states, "Management should discuss workplace challenges and problems with labor and endeavor to develop solutions jointly, *rather than advise union representatives of predetermined solutions to problems and then engage in bargaining over the impact and implementation of the predetermined solutions.*" (Emphasis added.)

The Federal Labor Relations Authority (FLRA) defines pre-decisional involvement as follows: "Pre-Decisional Involvement (PDI) represents activities where employees, through their union (their elected exclusive representative), are given the opportunity to help shape decisions in the workplace that affect their work *before an agency decides how it will respond.*" (Emphasis added.)

On Friday, September 1, 2023, NARA's Chief Operating Officer (COO) and Chief of Management and Administration (CMA) met with the Council President and Executive Vice President to cover multiple topics, one of which was to engage in pre-decisional involvement over potential changes to the agency telework policy. This meeting was preceded by an email on August 30, 2023, which included a written agenda and a PowerPoint presentation summarizing key points regarding telework.

The COO, CMA, President, and Vice President met and discussed the need to change NARA's telework policies. The Council provided feedback regarding the policy, some of which was incorporated into the final published version. One key piece of feedback was the need for NARA to more clearly articulate its legitimate business needs and articulate the relationship between the legitimate business needs and individual positions impacted by the change. NARA incorporated this and other feedback into its policy.

On October 6, 2023, NARA published an all-employee message, NARA Notice 2024-006, Change in NARA Telework Policy, providing employees with advance notice of future changes in NARA telework policy. That Notice announced a planned implementation date for non-supervisory employees (bargaining unit employees) of December 4, 2023. On November 6, 2023, NARA published an updated version of its telework policy, NARA directive 332, Telework and remote work, establishing the policy, legitimate business needs, and decision-making framework for supervisors described in this letter.

The time that elapsed between the September 1 pre-decisional involvement meeting and the initial announcement on October 6 was used to contemplate and incorporate feedback received from the Council into the agency's overall approach. The additional month that elapsed between October 6 and the publication of the NARA 332 on November 6 was used to fully formulate the detailed procedures included in NARA 332 and its Supplements, including by providing a period for all managers and supervisors to review the draft document. This demonstrates that NARA continued its deliberative process to completely formulate a final policy well past the date that the agency engaged in pre-decisional involvement.

I find that the fact that Management did not have a fully formed solution when it voluntarily initiated pre-decisional involvement with the Council regarding the telework policy is not evidence of bad faith,

as alleged by your grievance, and does not provide compelling evidence regarding the legitimacy of NARA's business needs. Pre-decisional involvement is, by definition, a process where an agency presents incomplete plans to its employee Union to solicit feedback from the Union prior to fully formulating new plans and policies.

The allegation in this element of your grievance only demonstrates that NARA complied with the intention of pre-decisional involvement by engaging the Council in new approaches to telework before finalizing its policy.

3. Failure to Negotiate in Good Faith

The third element of your grievance argues that NARA violated the Statute by communicating a new telework policy inconsistent with the terms of the Collective Bargaining Agreement.

I have carefully reviewed both the terms of the MOU and NARA 332, and I find that the new telework policy articulated in NARA 332 is consistent with the terms of the MOU. My analysis and conclusions are articulated in greater detail above. In summary, I find that the MOU permits supervisors to deny telework requests or reduce the number of telework days requested based on "legitimate business needs". I further find that NARA 332 establishes "legitimate business needs" to restrict telework in certain NARA positions and work units. Finally, I find that no reasonable interpretation of the MOU restricts or limits Management's authority to establish legitimate business needs for the agency, including legitimate business needs to restrict telework.

I further find that the attempt made by NARA Management officials to engage in pre-decisional involvement – and the fact that the agency can identify specific changes made as a result of that pre-decisional involvement – provide evidence that the Agency attempted to act in good faith to implement a policy that, while unpopular with the Union, is consistent with the negotiated terms of the Collective Bargaining Agreement between NARA and AFGE.

For these reasons, the grievance is denied.

If you are not satisfied with my decision, you may request reconsideration from Micah Cheatham, Chief of Management and Administration, within 10 workdays from the date you receive this decision. Further, the Union may invoke arbitration pursuant to Article 26, Section 9. Arbitration must be invoked within 30 calendar days from the date you receive this decision. Arbitration must be invoked in writing and delivered to the Labor Relations office at labor.relations@nara.gov.