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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
COUNCIL of NATIONAL ARCHIVES LOCALS

DATE: October 24, 2023
TO: Valorie Findlater, Chief Human Capital Officer (H)
FROM: David Castillo, Executive Vice President, AFGE Council 260
SUBJECT: Change in NARA Telework Policy

STATEMENT OF GRIEVANCE

This statement is to notify the National Archives and Records Administration (NARA) that the American Federation of Government Employees (AFGE) is invoking the negotiated grievance procedure as outlined in Article 26, Section 8 of the National Agreement between NARA and AFGE. This grievance procedure is being invoked to seek remedy for a violation of Article 9 and Article 30 of the National Agreement; Section I of the 2022 Mid-term Memorandum of Understanding between NARA and AFGE; 5 USC §7116(a)(5); and all other applicable provisions of the collective bargaining agreement, laws, rules, and regulations. The grievance has both group and institutional components. For the group aspects, the Union is filing on behalf of all telework-eligible bargaining unit employees at NARA. Because the institutional and group issues are interrelated, they are included in one document to facilitate the consolidation of these matters into one arbitration hearing, absent settlement, before a neutral arbitrator selected from the panel of arbitrators the Parties have established for the Washington DC region.

Description of Violation & Basis for Grievance:

On October 6, 2023, the Agency issued NARA Notice 2024-006: Change in NARA Telework Policy, communicating a new NARA telework policy. The new policy restricts telework availability across NARA, limiting telework to no more than six days per pay period for most employees. This policy violates NARA and AFGE collective bargaining agreements and statute in three areas: 1) the Agency's authority to institute a cap on the number of telework days across the entire bargaining unit; 2) the legitimacy of the Agency's business need; and 3) failure to negotiate in good faith with the Union.

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

The National Agreement and the 2022 Mid-term Memorandum of Understanding do not give the Agency the authority to establish a bargaining unit-wide cap on telework days. 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. Article 9, Section 3A

and 3B specify this, stating that “An employee requests telework by submitting the following documents to her or his supervisor:” and that “For all requests, except 100 percent telework and reasonable accommodations, the supervisor will respond within 10 business days.”

Sections I.B.1, I.B.2, and I.E.2 of the 2022 Mid-term MOU include provisions for limiting the amount of telework granted to an employee. To the extent that the Mid-term MOU permits restrictions on the amount of telework granted (“The number of days granted will be based on legitimate business needs” [Mid-term MOU Section I.B.1 and I.B.2]; and “The Agency will assign work in a way that maximizes telework availability when doing so does not negatively affect efficiency or productivity.” [Mid-term MOU Section I.E.2]), it is within the context of the particularized approval process described in Article 9 of the National Agreement. The employee’s supervisor would assess the request and determine whether there is a legitimate business need to deny or amend the number of telework days requested, based on the employee’s duties; the legitimate business needs of the work unit; and whether the amount of telework requested will have a negative impact on productivity and efficiency if it is granted. The National Agreement and MOU do not contemplate a process in which this assessment is made at the level of the entire Agency.

The bargaining history of the Agency and the Union further supports the Union’s position that the Agency does not have the authority to institute a bargaining unit-wide cap on telework. Prior to the 2022 Mid-term MOU, the National Agreement included a provision capping the number of telework days permitted for recurring telework (Article 9, Section 3C). However this provision was explicitly superseded by Section I.B.2 of the Mid-term 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 Agency and the Union did not agree to explicitly supersede Article 9, Section 3C, only to provide a backdoor for the Agency to reinstate similar restrictions through other provisions of the Mid-term MOU. The removal of the bargaining unit-wide cap that was originally part of the National Agreement supports the notion that Sections I.B.1, I.B.2, and I.E.2 of the MOU only permit limiting telework on a particularized basis. They do not grant the Agency the authority to make the sweeping changes in the new NARA telework policy.

Finally, the Agency has already conceded the Union’s position on this matter in prior communications with the Union. In the formal notification the Agency provided to the Union regarding the telework policy change, the Agency included a document outlining the changes. The final page of the document (M-23-15 telework plan v09272023, p. 11, “NARA-AFGE Agreement on Telework,”), includes the following statement:

NARA-AFGE agreement presumes no agency-wide maximum number of telework days and establishes decentralized approval of telework and remote work requests for employees who reside within 50 miles of their facility.

Thus the Agency has essentially acknowledged that in instituting this new telework policy, which includes an agency-wide maximum on the number of telework days, it is in violation of its collective bargaining agreements with the Union.

2) Legitimacy of the Agency's Business Need

Even assuming, for the sake of argument, that the establishment of a cap on telework days across the whole bargaining unit is permitted by the National Agreement and the Mid-term MOU, the Agency has not complied in good faith with the requirement to provide a legitimate business need.

Prior to the issuance of the new telework policy, the Agency engaged the Union in what it called "pre-decisional involvement (PDI)" regarding the changes. The draft policy that the Agency presented in "PDI" was largely identical to the policy it eventually issued; however, rather than listing the business needs for the Agency's decision, it simply stated that "NARA has a legitimate business need to limit telework to a maximum of three days per week or six days per pay period for most employees" without further elaboration (M-23-15 telework plan v08302023 update 0901, slide 1).

The Agency's inability to articulate a business need for the policy at the time it originally presented the policy to the Union suggests that this policy was not organically derived from the Agency's legitimate business needs. Instead, the Agency developed a detailed telework policy reflecting Agency management officials' personal preferences and then later tacked on the business needs as a pretext to support these preferences. This is a clear violation of Section I.B.1 and I.B.2 of the Mid-term MOU, which requires the number of telework days granted to be based on the legitimate business needs of the Agency.

3) Failure to Negotiate in Good Faith

The Agency changed policy involving key provisions of the Parties' collective bargaining agreement with respect to bargaining unit employees' ability to telework. Because these matters were covered by the Parties' Agreement, the Agency should know that it has no authority to change them unilaterally. Absent mutual agreement to reopen the contract, the Agency was obligated to raise these matters in the next term contract and fulfill its bargaining obligations with the Union before implementing changes. Because the Parties have only recently completed negotiations for a successor collective bargaining agreement, without either party having submitted proposals or issues consistent with the terms set forth in NARA Notice 2024-006, the Agency's failure to negotiate in good faith in this instance is particularly egregious. OMB memorandum M-23-15 itself notes that an Agency's plan must include fulfillment of collective bargaining obligations. That has not happened here. Rather, the Agency's decision to unilaterally implement changes to key

provisions of the Parties' collective bargaining agreement, in a permanent way rather than as a one-time occurrence, is a repudiation of the Parties' agreement and an unfair labor practice in violation of section 7116(a)(1) and (5) of the Federal Labor-Management Relations Statute and Article 30, Section 1 of the National Agreement.

Proposed Remedies:

- That the NARA telework policy communicated in NARA Notice 2024-006, as it applies to bargaining unit employees, be immediately withdrawn and its implementation be rescinded;
- That all bargaining unit employees who needed to take additional leave as a result of a reduction in telework have their leave restored;
- That employees be reimbursed for any and all transportation expenses that they incurred, but would not have, but for the Agency's violations;
- That affected bargaining unit employees otherwise be made whole in every way;
- That the Agency post a remedial notice in all NARA work areas, send it by email, and post on the ICN stating that it committed an unfair labor practice by repudiating the Parties' agreement and failing to negotiate in good faith;
- That the Agency pay the Union's attorneys' fees associated with the processing and prosecution of this grievance; and
- Any and all other remedies deemed appropriate by the arbitrator.

Sincerely,

David Castillo
Executive Vice President, AFGE Council 260

cc: AFGE Council President
Chief, Labor/Employee Relations

Attachments:

M-23-15 telework plan v09272023
M-23-15 telework plan v08302023 update 0901