

In the Matter of

DEPARTMENT OF JUSTICE
BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES
WASHINGTON, D.C.

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 07 FSIP 82

ARBITRATOR'S OPINION AND DECISION

The 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 Department of Justice (DOJ), Bureau of Alcohol, Tobacco and Firearms, Washington, D.C. (Employer or ATF).

After an investigation of the request, which concerned telework for legal instrument examiners (LIEs) and alcohol, tobacco and firearms specialists (ATFSs) in the Enforcement Programs Services (EPS) Branch,^{1/} the Panel directed the parties to mediation-arbitration with the undersigned whereby I was granted authority to: (1) mediate with respect to the outstanding issues and (2) issue a binding decision on any that remained unresolved. Accordingly, on September 25, 2007, a mediation-arbitration proceeding was held at the Panel's offices in Washington, D.C., with representatives of the parties. During the course of the proceeding the parties reached an agreement that, among other things, permits ATFSs to participate

^{1/} The parties agreed previously to negotiate over whether and/or the extent to which these employees would be permitted to participate in the Agency's telework program during an informal conference conducted by the undersigned on May 10, 2006, Case No. 05 FSIP 137. At that time, they also agreed to implement a comprehensive telework program (referred to as the May 2006 Telework Agreement) for approximately 650 Industry Operations Investigators (IOIs).

in a 6-month Telework Pilot, in accordance with their May 2006 Telework Agreement, but they were unable to resolve their dispute over the participation of LIEs.^{2/} In reaching this decision, I have considered the entire record in this matter, including the parties' post-hearing statements of position.

BACKGROUND

The Employer's mission is to enforce laws and regulations governing the alcohol, tobacco, firearms, and explosives industries. The Union represents a nationwide bargaining unit of approximately 1,000 employees; in addition to IOIs, LIEs, and ATFSS, employees also work as auditors, contract specialists, program analysts, and in various staff support positions, at grades GS-3 to -15. The collective bargaining agreement (CBA) covering these parties expired on July 20, 2006, but its terms and conditions remain in effect until replaced by a successor agreement.

ISSUES AT IMPASSE

The parties essentially disagree over: (1) the Telework Agreement category under which LIEs should be permitted to participate in telework; and (2) what accommodations, if any,

2/ The parties agreed that ATFS pilot participants would work a Category B - Part Time Schedule. The Telework Agreement defines Category B as follows: "The employee teleworks on a regular basis. This may be one or more days a week, every two weeks, or several days a month." As relevant to the parties' impasse over the LIEs, the parties define Category C - Situational telework as:

The employee teleworks on a regular basis. The telework opportunity may be the result of a medical problem, reasonable accommodation, or the need to be focused on a special project. Other situations may develop that makes it beneficial for the employee and supervisor to agree on an episodic telework opportunity. This type of telework also is essential for potentially volatile situations e.g. during World Bank/IMF mass demonstrations. Telework should be an integral part of any agency's plans for Continuity of Operations (COOP). Telework allows the Federal Government to remain responsive to the nation at all times.

the Employer should provide participating LIEs regarding access to work-related materials at an alternative worksite.

THE POSITIONS OF THE PARTIES

1. The Union's Position

The Union proposes the following wording:

1. The Telework Pilot for Legal Instrument Examiners will run for six (6) months. After six months, either party may propose that the telework option for Legal Instrument Examiners will become a permanent option in accordance with the terms of the parties' May 2006 Telework Agreement (Telework Agreement). The Pilot will continue during the course of such negotiations.
2. The terms of the Telework Pilot will be in accordance with the parties' Telework Agreement and the Panel's decision in Case No. 05 FSIP 137.
3. Pilot participants will work a Category B-Part Time Schedule.
4. All Legal Instrument Examiners will be permitted to participate in the Pilot as long as they meet the Employee Eligibility Requirements for Telework as set forth in 10.c.4. a. b. c. e. and f. of the Telework Agreement.
5. In the event that ATF fails to take the necessary steps to enable Pilot participants to access all relevant documents from their telework site, e.g. by providing a laptop computer, use of a scanner, reasonable access to a telework center or DOJ work space, etc., Pilot participants will be permitted, in accordance with 15.1 of the Telework Agreement, to bring all necessary documents to their telework site, except for classified information.

The Union's proposal is consistent with DOJ's telework security policy, which is similar to those applied by other agencies such as the Department of Defense (DOD), the Department of Homeland Security, and the Internal Revenue Service. Furthermore, "aside from rank speculation, ATF has not provided any evidence how NTEU's proposal would compromise the security

or confidentiality of its records." The Employer's proposal, on the other hand, "violates Department of Justice policy" and conflicts with the parties' May 2006 Telework Agreement, "both of which allow all but non-classified information to leave the worksite." In this regard, the DOJ policy delegates decisions regarding the proper use and handling of non-classified sensitive data (*i.e.*, the type that LIEs must have access to at the alternative worksite if they are to perform their duties) to individual supervisors, and specifically states that "off-site access to sensitive data may be permitted provided that the security for such access is adequate." The May 2006 Telework Agreement also conforms to DOJ policy by addressing the security required when removing sensitive unclassified data from the office.^{3/} The Employer should not be rewarded for violating the telework policies of the U.S. government, those of the DOJ, and its own agreement with NTEU and, "as such, NTEU's proposal should be adopted."

ATF's EPS Branch also should not be rewarded for refusing to automate its work processes by denying LIEs the opportunity to telework. Numerous public agencies and private companies have figured out how to automate their processes so their employees can telework, including other divisions within ATF where some employees (IOIs) are permitted to telework 100 percent of the time. Moreover, EPS's claim that it does not have the \$2.7 million necessary to make LIE telework happen rings hollow in circumstances where ATF recently found \$19 million "to cover its cost-overruns on a new Headquarters building." EPS has known since at least 2000 when the parties

^{3/} Section 15.a., "Privacy Act, Sensitive or Classified Data," of the May 2006 Telework Agreement provides:

Employees will secure all sensitive but unclassified material in a locked container (e.g. file cabinet, briefcase etc.) Classified data may not be removed from the employer's official office worksite to an offsite location. For regular and recurring telework, sensitive but unclassified material, including Privacy Act and For Official use Only data, may only be used by teleworkers provided with Government-furnished equipment. The employee is responsible for the security of all official data, protection of any Government-furnished equipment and property, and carrying out the mission of ATF at the alternative worksite

negotiated their first telework agreement that it would be required to offer telework to its employees, yet it "chose the option of doing **nothing** to address its LIE telework security concerns." Since that time, it also forced most of the LIEs, who previously worked in Washington, D.C., to relocate to West Virginia or to commute 3 hours to and from work if they wanted to remain employed at ATF.

Finally, "resolving the parties' impasse on the basis of ATF's proposal would also support ATF's policy of discriminating against its [LIEs] vis-à-vis higher graded employees." The truth of the Union's contention in this regard is demonstrated by the following facts. IOIs are graded GS-9 through -13, while LIEs are graded GS-6 through -9. IOIs are permitted to telework up to 100 percent of the time, while the Employer would prohibit the LIEs from teleworking at all unless given explicit permission by management for selected projects. During the mediation-arbitration proceeding, however, the Employer conceded that both sets of employees would take the same documents out of their office in order to telework and that LIEs would work with these documents in their homes while IOIs routinely transport them as part of their field investigations. Thus, ATF "can live with the security implications of the higher-graded IOIs taking documents out of the office, but the same exact security implications prevent the lower graded LIEs from the benefits of telework." For all of these reasons, the Union requests that the Arbitrator adopt its final offer to resolve the parties' impasse.

2. The Employer's Position

The Employer's counter-offer is as follows:

1. ATF LIEs are only suitable to perform telework under Category "C" Situational Telework (*i.e.*, occasional special projects at the discretion of the manager and on-line training) under the current May 2006 Telework Agreement (Telework Agreement). ATF LIEs may never remove original application materials from ATF premises, transcribe the contents of application materials, or make copies of original application materials for the purpose of performing Situational Telework. LIEs who remove original application materials from ATF premises, transcribe the contents of such materials, or make copies of original application materials for the purpose of

performing Situational Telework may be subject to discipline.

2. All ATF LIEs will be permitted to participate in the Telework Pilot as long as they meet the Employee Eligibility Requirements for Telework as set forth in 10.c.4.a, b, c, e, and f of the Telework Agreement.
3. Any ATF LIE who applies for and is deemed eligible for Situational Telework will be afforded the opportunity to use pooled laptops and cell phones and/or receive reimbursement for expenses incurred as a result of using a personal phone for business related long distance calls.
4. The Telework Pilot for ATF Legal Instrument Examiners (LIEs) will run for six (6) months. After six (6) months, either party may propose that the telework option for ATF LIEs will become a permanent option in accordance with the terms of the parties' Telework Agreement and this document. The Pilot will continue during the course of such negotiations.

Preliminarily, it should be noted that LIEs process applications for licenses, permits, transfers and notices under a variety of Federal statutes, including the National Firearms Act (NFA). Once the applications are approved, the applicant gains access to such items as firearms, machine guns, military aircraft, and rocket launchers. LIEs should only be eligible to work in Category C because they "cannot remove applications for processing, the bulk of their work, to telework sites." The removal of applications "would put the general public at risk if criminals or terrorists were to gain access to them by theft or other means and then obtain weapons for criminal purposes." In addition, EPS "does not yet have the technological infrastructure for e-form capability or money designated to create such in its 2008 budget." Since EPS "has no discretion not to meet its statutory deadlines," it is concerned that without e-form capability LIEs would fail to meet those deadlines. Hence, adoption of the Union's proposal that LIEs participate in part time telework "would conflict with Congress' intent that telework should be mutually beneficial to both the government and employees."

Its proposal is also supported by the testimony provided during the mediation-arbitration proceeding of a representative of manufacturers, importers and dealers of "implements of war." His clients "oppose LIEs being allowed to remove, transcribe or copy various applications in order to process their applications at their residences or alternative work sites." In this regard, information provided in connection with the processing of applications is sensitive and proprietary as it involves the acquisition and sale of weapons, including weapons systems to the DOD. The loss of such information would damage importers and suppliers by giving others a competitive advantage, and "could potentially . . . pose a risk to national security" because "all major defense contractors, including those supplying the Iraq war, file applications with ATF." Moreover, the representative also testified that NFA applications to transfer firearms "are tax returns covered by 29 U.S.C. Section 6103 which cannot be legally removed from ATF facilities." Notably, he agreed with the statements of the EPS Deputy Assistant Director that "it would be virtually impossible for LIEs to process applications from a telework site without a sophisticated electronic database that could capture the fine printed details of applications." Even if such capability were provided, the representative also expressed concern that LIEs' efficiency would decrease because they must regularly collaborate with other ATF employees in the processing of applications.

The Union's arguments in support of placing LIEs in Category B should be rejected. Contrary to its assertion, e-form capability cannot be provided merely by purchasing scanners at minimal cost. As ATF's Chief of Information Services testified, it would require the technological infrastructure of a document imaging center. The estimated cost of modifying existing data systems to support such an imaging center would be over \$1.9 million with an additional annual ongoing cost of over \$2 million. Nevertheless, ATF "realizes the value of a totally electronic environment" and has invested what little funding it has to support its long term plan of replacing all paper applications with electronic forms that would not require the scanning of images, in accordance with "a Presidential mandate to participate in the International T[r]ade Data System." Finally, also contrary to NTEU's claims, the LIE position is "not analogous to the IOI position." They have been classified differently and perform substantively different jobs, with LIEs performing the majority of their work processing applications on computer systems in the office while IOIs frequently work in the

field performing offsite inspections of firearms and explosives dealers.

CONCLUSION

Having carefully considered the parties' positions concerning the issues surrounding telework for LIEs, I have concluded that the Union's final offer provides the more reasonable basis for resolving their dispute. In my view, the Employer has not demonstrated on the basis of evidence that it would be inappropriate for LIEs to participate in telework under Category B of the parties' May 2006 Telework Agreement.

Its primary contention is that the removal of materials from the Agency's premises needed by LIEs to process applications, including photocopies of original documents, would pose risks to the general public and national security. While the Employer raises a serious concern, hundreds of IOIs have been transporting similar sensitive materials on a daily basis from their homes to the sites of firearms and explosives dealers since the May 2006 Telework Agreement went into effect without any reported incidents of theft or loss. In light of this experience, there is no evidence in the record that permitting LIEs to make copies of the materials they need to be productive at an alternative worksite would raise risk levels beyond what ATF already finds acceptable. Moreover, employees who do not immediately report the loss or theft of sensitive materials could be subject to serious disciplinary action. For this reason, in the unlikely event that loss or theft of such materials occurs, the Employer would be in a position to take the steps necessary to prevent the dire consequences it has predicted. Thus, I am not persuaded by the Employer's primary contention.

The Employer's second concern is that permitting LIEs to participate in part-time telework would decrease efficiency by causing ATF to miss statutory deadlines for processing license applications. Under the May 2006 Telework Agreement, however, first level supervisors may terminate a participant's telework arrangement for a variety of reasons, including "a decline in performance . . . a reduction in customer service standards, and any adverse impact on the operations or performance of the employee's office."^{4/} In addition, under Category B, first level

^{4/} Section 10.h., "Suspension or Termination of Telework," of the Telework Agreement states, in relevant part:

supervisors have the discretion to restrict an LIEs ability to telework to as little as 1 day per pay period. It appears, therefore, that the Employer's interest in ensuring that there is no adverse impact on its mission from permitting LIEs to participate in part-time telework is more than adequately addressed by the parties' May 2006 Telework Agreement.

Finally, the Union's final offer is limited to establishing only a 6-month telework pilot, after which the Employer can reopen negotiations. I believe the Employer's interests, and those of the general public, are further protected by its ability to terminate Category B status for LIEs if it can demonstrate after the 6-month pilot has run its course that there is actual evidence to support its stated concerns. Accordingly, I shall order the adoption of the Union's final offer to resolve the impasse.

The first level supervisor may temporarily suspend or terminate a telework arrangement should circumstances warrant and after following the procedures set forth in this section. Telework arrangements should not be terminated or suspended by supervisors without justifiable reasons. Grounds for termination by supervisors include, but are not limited to the following: misuse of Government-owned equipment, violation of the employee code of conduct, a decline in performance, failure to conform to the work schedule, working unapproved overtime, a reduction in customer service standards, and any adverse impact on the operations or performance of the employee's office.

If at any time the first level supervisor should determine that the participant's work product or service has deteriorated or that work is not being performed in a timely manner, the first level supervisor shall provide the employee with written notice of discontinuance of participation if the employee's work performance does not improve during the following thirty (30) day period.

DECISION

The parties shall adopt the Union's final offer.

Grace Flores-Hughes
Arbitrator

December 13, 2007
Alexandria, Virginia