

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

NATIONAL TREASURY EMPLOYEES UNION

And

FEDERAL ELECTION COMMISSION

Case No. 23 FSIP 037

**DECISION AND ORDER**

The above captioned matter was jointly filed before the Federal Service Impasses Panel (FSIP or Panel) by the National Treasury Employees Union (Union) and the Federal Election Commission (Agency or Management) pursuant to Section 7119 of the Federal Service Labor-Management Relations Statute. The matter concerns negotiations over the expansion of telework and alternative work schedules (AWS). On June 22, 2023, the Panel informed the parties that it had asserted jurisdiction over this dispute and ordered resolution through an Informal Conference to be conducted via Panel Members Mark Gaston Pearce and Pamela Schwartz. Because the parties did not fully resolve all outstanding issues, the Panel issues the following Decision and Order.

**PROCEDURAL AND BARGAINING HISTORY**

The Agency is an independent regulatory agency of the United States whose purpose is to enforce campaign finance law in United States federal elections. The Union represents over 150 non-professional and professional employees located in Washington, D.C. The parties are governed by a labor master agreement (LMA) that expired on February 28, 2023. As a consequence of the Covid-19 pandemic, the Agency permitted increased telework and AWS flexibilities. Consequently, the parties agreed to reopen their LMA article that covers telework and AWS in order to negotiate a pilot program to temporarily, and perhaps permanently, expand the two forgoing items. The parties reached agreement on all aspects save for one and they jointly sought assistance from the Panel in 22 FSIP 048. The issue involved concerned whether schedules would revert to pre-pandemic status should the pilot program end without a permanent negotiated expansion already in place. The Panel asserted jurisdiction over the filing, ordered resolution via a Written Submissions process, and issued a Decision and Order imposing the Union's language in full on August 8, 2022.

The pilot program began in February 2022 and the parties had several “check in points” during 2022. In December 2022 the parties had a check in meeting and the Agency provided the Union with several pieces of information, and the Union invoked negotiations over the permanent expansion of increased workplace flexibilities. In early January 2023 the Union provided its first proposal. The parties had 6 days of bilateral negotiations sessions in January and February 2023. On March 27, 2023, the parties had a single 3 hour mediation session with the Federal Mediation and Conciliation Services (FMCS). The parties could not make movement during mediation so the FMCS released them from mediation. The parties subsequently sought assistance from the FSIP.

On June 22, 2023, the Panel informed the parties that it had asserted jurisdiction over this dispute and ordered resolution through an Informal Conference to be conducted via Panel Members Mark Gaston Pearce and Pamela Schwartz. The Members held an in-person conference in Washington, D.C. on July 24<sup>th</sup> and July 25<sup>th</sup> where they assisted the parties in resolving a number of issues. However, the parties were unable to settle 5 issues. Accordingly, the Members accepted evidence and witness testimony on those issues. Additionally, the parties submitted post-hearing briefs on August 19<sup>th</sup>. The record is hereby closed.

## ISSUES

There are five issues that remain in dispute: (1) number of telework days; (2) availability of remote work; (3) office sharing; (4) core days; and (5) break periods for certain employees on AWS.

### I. Telework Days

#### A. Agency Argument

The Agency proposes that employees on a telework schedule must report to their duty station at least 4 days per pay period. Under the pilot program employees were required to report 3 days a pay period. The Agency’s language is as follows:

Employees participating in Regularly Scheduled Telework must be scheduled to work at the ODS no less than four (4) calendar days per pay period.<sup>1</sup>

The Agency argues that its proposal fully balances the interests of employees seeking an expansion in telework with “the need for in-person work to facilitate better cross-agency communication and collaboration, as well as training and mentorship opportunities, to support the Agency’s mission effectiveness and

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<sup>1</sup> Agency Final Offer at 2.

organizational health.”<sup>2</sup> As to the former, the Agency notes that this is an expansion from the parties’ pre-pandemic LMA which permitted telework up to 2 days per week.<sup>3</sup> Employees were required to be in person 3 days per week, whereas the Agency currently proposes that they only need be present 2 days per week.

As to the Agency’s claims concerning communication, collaboration, and mentorship opportunities, etc., the Agency first notes and concedes that as part of the pilot program the Agency conducted a formal written assessment (the assessment) that was developed by several of its components but was spearheaded by its human resources (HR) department. This assessment considered:

Pilot Program enrollment and usage; workforce satisfaction with the Pilot Program flexibilities; the impact of the Pilot Program on mission achievement; effects of the Pilot Program on employee recruitment, retention, and morale; employees’ ability to access training, technology, and equipment for hybrid work; and the potential effects of the COVID-19 pandemic on the way the Pilot Program flexibilities were being used.<sup>4</sup>

Although the above demonstrates a thorough breadth of analysis, the Agency nevertheless believes that the assessment contained limitations. Notably, the Agency claims the assessment was limited to a relatively brief period of 6 months, relied on self-reporting, and did not account for all performance period cycles. Because of these limitations, the Agency supplemented its findings with scholarly and academic studies concerning in person workplace attendance. These studies demonstrate, among other things, that a lack of in person connection inhibits collaboration and communication and encourages employees to “silo” amongst themselves.<sup>5</sup> Thus, to the Agency, these studies demonstrate a basis for increasing in person attendance.

The results of the studies are buttressed by testimony from FEC Chair Dara Lindenbaum who testified at the Informal Conference on July 25th. Specifically, she testified that it was the opinion of her and other FEC Commissioners that workplace collaboration had suffered under pandemic telework and expanded telework under the pilot program. She testified that virtual meetings involving employees had become more confrontational and the Chair attributed that to a lack of in person interaction.

Chair Lindenbaum testified that in person attendance would also foster collaboration by promoting “water cooler” discussion amongst the workforce. In such

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<sup>2</sup> Agency Brief at 5.

<sup>3</sup> See *id.* at 2.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> See *id.* at 6-7.

discussions, the Chair testified, employees could foster a connection by discussing items such as reality television and local dining establishments. These discussions would create and enhance workplace connections and could not be accomplished virtually. The Chair also expressed a concern that a lack of in person presence could act detrimentally to the Washington, D.C. business scene in terms of employees who could provide financial support to local businesses, e.g., for meals.

While acknowledging that employees have expressed an interest in expanded telework, the Agency downplays its significance. As part of the assessment, HR conducted exit interviews of employees who left the Agency during the pilot period. HR discovered that the most common factor cited for leaving was to seek promotion opportunities elsewhere;<sup>6</sup> that is, telework, or lack thereof, was not a motivating factor in decisions to leave the Agency.

### **B. Union Argument**

The Union proposes that teleworking employees be required to be physically present no more than 2 days per pay period. That is, the Union is looking to decrease the amount of in person time set under the pilot program. The Union's language is as follows:

Employees participating in Regularly Scheduled Telework must be scheduled to work at the ODS no less than two (2) calendar days per pay period.<sup>7</sup>

In enacting the pilot program, the parties agreed that the pilot would "give the Agency the opportunity to assess which flexibilities can be offered on a more permanent basis and potentially expanded."<sup>8</sup> The pilot has been in place since February 2022. During the pandemic, employees were granted maximum telework. So, the bargaining unit has had over 3 years of experience with a 3 day (or less) in person per pay period requirement. The Union believes the data collected as a result of the pilot, and even during the pandemic, demonstrates that expansion of telework is appropriate as envisioned by the aforementioned language of the pilot.

The most probative evidence, the Union contends, arises from the Agency's own assessment. Tellingly, the assessment concluded that:

[T]he Pilot Program has been successful in providing the FEC workforce with expanded workplace flexibilities, as compared to those

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<sup>6</sup> See Agency Ex. F at 20-21.

<sup>7</sup> Union Final Offer at 2.

<sup>8</sup> Union Brief at 3.

offered by the Agency pre-pandemic, and that the flexibilities offered have led to positive impacts on the Agency.<sup>9</sup>

In addition to the foregoing, the Union notes that the assessment concluded that the Agency accomplished its mission with no adverse impact, increased productivity due to diminished workplace distractions, and that there was a desire from supervisors to permanently codify or expand the flexibilities under the pilot program.<sup>10</sup> Surveys of supervisors backed up much of the foregoing conclusions. Additionally, the Union conducted its own workforce survey and learned that 98% of the bargaining unit believes they could telework in accordance with the Union's proposed language and not create any adverse impacts upon the mission of the Agency.<sup>11</sup> Moreover, the Union's analysis of employee performance data established that employees' performance scores actually *increased* during the pilot program. And, increased telework saved the Agency at least \$250,000 in transit subsidies during Fiscal Year 2022.<sup>12</sup>

The Union also argues that expanded telework is necessary for attracting and retaining qualified employees. This was buttressed by the assessment itself and by hearing testimony from the HR Director who acknowledged that some employees in Agency exit interviews listed telework as an important factor in job satisfaction. Indeed, the Union conducted another survey of its unit and discovered that 88% of the respondents stated they would consider leaving the Agency if the Agency failed to remain competitive with other Federal agencies in the arena of telework.<sup>13</sup> This fact is significant because the Union analyzed a number of other Federal agencies and discovered they offer telework/remote work at the same level of the pilot program or greater.

The Union rejects claims presented by the Agency. The Union argues that the Agency provided little to no actual data to buttress a need for decreasing telework levels established by the pilot program. For example, although the Agency claimed that collaboration decreased, the Agency's own assessment states that supervisors were able to foster collaboration and communication during the pilot period.<sup>14</sup> Similarly, the Union finds the Agency's citation to Office of Management and Budget (OMB) guidance<sup>15</sup> unpersuasive because that guidance calls upon agencies to support conclusions via real world data: the Agency did not do so according to the

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<sup>9</sup> *Id.* at 5 (citing Union Ex. 3 at 3).

<sup>10</sup> *See id.*

<sup>11</sup> *See id.* at 6.

<sup>12</sup> *See id.* at 8.

<sup>13</sup> *See id.* at 7.

<sup>14</sup> *See id.* at 9-10.

<sup>15</sup> Although not cited in the Agency's brief, at the hearing the Agency did reference *OMB Memorandum M-23-15, Measuring, Monitoring, and Improving Organizational Health and Organizational Performance in the Context of Evolving Agency Work Environments* (Apr. 13, 2023) (OMB Guidance). This document is discussed in greater detail below.

Union. The Union rebuffs the Agency's concern that the pilot program lasted only 6 months: this was the timeframe the parties agreed upon and, in any event, more than 6 months have elapsed since February 2022.

The Union also argues that the FEC Chair's testimony was unpersuasive because she did not identify any concrete harms arising from the pilot program. Instead, the Union believes its own witness testimony demonstrated the feasibility of the Union's proposed approach. The Union President offered testimony concerning her role as an FEC enforcement attorney. She testified that there are approximately four meetings per month that can involve attorneys – executive and open sessions. However, attorneys need only be present if they are presenting materials and they will not always present at meetings. Moreover, the Union President testified, meetings were conducted without problem during the pilot program, a fact that was buttressed by the assessment. The Union President also testified that she was approached by a number of bargaining unit employees who stressed their ability to perform their duties in accordance with the parameters of the Union's proposal.

### C. Conclusion

The Panel orders the parties to withdraw their proposals and imposes a 3-day per pay period reporting requirement to resolve this dispute. Since February 2022 the parties have operated under a pilot program that granted employees the option to report to the office no more than 3 days per period. The Union seeks to alter this by decreasing the number to 2 days and the Agency wishes to increase the number to 4 days. After a review of the record and the parties' arguments, the Panel concludes that neither position is sufficiently supported.

As described above, the Agency proffered an exhaustive and meticulous assessment of the pilot program that reviewed mountains of evidence, data, and information in order to reach one primary conclusion: increased telework benefitted the work force *and* the Agency. The assessment reached this conclusion by “combin[ing] program data from across FEC offices, workforce statistics, three workforce surveys, and interviews to paint a broad picture of how the Pilot Program's flexibilities [were] working and how they affect[ed] Agency operations as well as the FEC workforce.”<sup>16</sup> And, as discussed in the summaries of the parties' arguments, the assessment produced a number of positive conclusions that telework not did *not* inhibit the Agency's operations, it actually *enhanced* them. And, both employees and supervisors found the experience to be an overall positive one.

The Agency nevertheless attempts to circumvent this conclusion by offering a host of unpersuasive academic studies that fail to account for the specific environment studied during the assessment period. It is hard to take seriously a

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<sup>16</sup> Union Ex. 3 at 3.

study that did not actually study the parties' conditions. Further, it is of no consequence that the pilot period lasted "only" 6 months. As the Union correctly points out, this was the timeframe mutually agreed upon by the parties. If the Agency had concerns about the length, the appropriate time for addressing those concerns would have been when the parties established the program. And, in any event, the parties have been operating under the terms of the pilot since February 2022: nearly 1.5 years have elapsed since the enactment of the pilot, a time period which should have provided sufficient data to the Agency.

At the hearing the Agency also relied upon OMB guidance that addresses the health of work environments in the face of evolving workplace realities. The guidance does call upon Federal agencies to establish work plans and provides that agencies are expected to "increase meaningful in-person work at Federal offices."<sup>17</sup> The OMB guidance put agencies on notice about a potential need to increase in person attendance, OMB also placed them on notice that such attendance should be "*meaningful*."

The Agency's efforts to meet the qualifying language in the OMB guidance were lacking. The FSIP Members placed the parties on notice, prior to the Informal Conference,<sup>18</sup> that they should be prepared to present evidence concerning the impact of telework and remote work upon the workplace. Despite this, the Agency provided little in the way of information to demonstrate that telework under the pilot program was disruptive. None of the Agency's exhibits or documents presented such claims. Instead, the sole evidence offered came in the form of non-specific testimony from the FEC Chair in which she raised concerns that certain meetings were allegedly more confrontational because they occurred virtually rather than in person. But, she failed to offer specific examples or incidents. Instead, much of the Chair's testimony focused on the Agency's belief that telework should be reduced in order to support collaboration and communication. Again, however, specifics were few and far between. Indeed, the Agency's own assessment undercut the Agency's argument by noting that supervisors reported they were able to successfully foster these two items during the pilot program. The Agency attempted to discredit this point at the hearing by claiming that these reporting supervisors were biased in favor of expanding telework. But, if the Agency intended to consider supervisory assessment responses valid *only* if they aligned with the Agency's preferred policy conclusion it is difficult to find credible the Agency's chosen methods of evaluation.

Bereft of specific examples of telework diminishing the workplace, the Agency Chair testified to a fervent desire to establish what could only be viewed as team building in the form of "water cooler talk." In such situations, she contended, employees could build esprit de corps by sharing information on topics like

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<sup>17</sup> OMB Guidance at 1.

<sup>18</sup> At the direction of Members Pamela Schwartz and Mark Gaston Pearce, FSIP Staff notified the parties of this request by email on July 20, 2023.

entertainment and dining. To ask whether hypothetical in person conversations about pizza and "Desperate Housewives" support undercutting the results of the parties' expansive and meticulously crafted pilot program is to answer the question. Accordingly, the Agency's proposal is rejected.

Although the Agency's proposal is unsupported, it does not follow that the Union's proposal should be imposed. The pilot program did state that its parameters, after study, could be maintained or expanded. But, the latter was not any sort of mandate. As the Union is seeking to alter the terms of the pilot program, it too bears a burden to demonstrate that a change is necessary. The Union did not meet this burden.

Much of the Union's argument for expansion essentially focused on its contention that, because the assessment data was overwhelmingly positive for telework under the program, it logically follows that expansion is warranted. Yet, this data establishes only that the 3 day per pay period reporting requirement created a successful environment that did not impede Agency operations. The Union has not offered any concrete data establishing what, if any, impact a 2 day reporting requirement could have upon the workplace. It may be that the Union's proposal could actually bolster the Agency's fortunes, but in the absence of empirical data it is difficult to conclusively reach this determination.

The witness testimony provided by the Union does not alter any of the foregoing. To wit, the Union President testified that executive session meetings were successfully accomplished via telework under the pilot program. While this may demonstrate that telework established in accordance with the pilot is sustainable, there was no direct evidence presented demonstrating what impact telework could have on these meetings were it expanded. Additionally, although employees she surveyed expressed their opinion that expanded telework would still permit accomplishment of the mission, in the absence of empirical data these opinions cannot be considered conclusive.

In summary, neither party's presentations support adoption of their respective position. However, the information in the record establishes that expanded telework under the pilot program was successful and did not result in any serious detriment to the Agency's operations. Accordingly, the following language will be imposed to resolve this dispute rather than the language offered by the parties:

Employees participating in Regularly Scheduled Telework must be scheduled to work at the ODS no less than three (3) calendar days per pay period.

## II. Remote Work



### A. Union Position

The Union proposes an expansive remote work article that is attached as an appendix to this document. In addition, the Union proposes the following language in the “Key Definitions” section of the parties’ MOU:

Official Duty Station (ODS) – The duty station for an employee’s position of record as indicated in their most recent notification of personnel action. The ODS generally is the FEC building at 1050 First Street, NE, Washington, DC 20463, except for those employees remote working.<sup>19</sup>

The Union’s proposal would grant employees the ability to request the option to remote work. The Union argues imposition of a remote work program is appropriate because, since telework during the pandemic was successful, the data for expanded telework gathered during the pilot program also supports remote work. Additionally, remote work options are necessary to stay competitive with other Federal agencies. The Union’s proposal is intended to introduce remote work in a cautious manner by, among other things, identifying positions that are appropriate for remote work, ensuring selected positions can still meet the needs of the Agency, and encouraging ongoing supervisory monitoring.<sup>20</sup> The Union argues that any concerns about costs are overblown because the Union’s proposal permits denial of remote work requests if such requests would be too financially burdensome to grant.

### B. Agency Position

The Agency opposes remote work in its entirety. Remote work was never assessed as part of the pilot program. Moreover, it is inappropriate to cite remote work experience during the pandemic because this time period was unique. To that end, employees were not even permitted in the offices absent advance permission, the Agency modified its operations, and members of the public the Agency interacts with modified their operations as well. The Agency also believes that the Union’s proposal would interfere with the Agency’s goals of increasing collaboration and communication.

The Agency is also concerned that adopting the Union’s proposal would lead to a substantial increase in costs. If a remote work employee is located outside of the Agency’s commuting area, the Agency could have to adjust that employee’s locality pay and also pay for any commuting costs if that employee has to travel to

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<sup>19</sup> Union Final Proposal at 1.

<sup>20</sup> See Union Brief at 11 n.12.

the Agency's offices.<sup>21</sup> Additionally, the Agency would have to hire and assign personnel to handle travel requests for remote work employees. That the Union's proposal permits consideration of costs is of no consequence because the costs are largely unknown.

The Agency also offers the following language for its ODS definitional language, which omits any reference to remote work:

Official Duty Station (ODS) – The duty station for an employee's position of record as indicated in their most recent notification of personnel action. The ODS generally is the FEC building at 1050 First Street, NE, Washington, DC 20463.<sup>22</sup>

### C. Conclusion

The Panel orders the Union to withdraw its proposals on remote work and imposes the Agency's language for "Key Definitions." As the Agency correctly notes in its brief, the topic of remote work was not one that was addressed as a part of the pilot program. This fact is confirmed by the language of the pilot itself which states that it was designed to temporarily provide employees with "expanded *telework* and flexible work schedule options."<sup>23</sup> Thus, under the agreed upon framework of the pilot program, telework was intended to be the focus. The Union does not directly dispute this conclusion. Instead, the Union attempts to divert focus to remote work under the pandemic and lessons learned about telework under the pilot. But, pandemic remote work was not subject to the rigorous analysis established under the pilot, so in these circumstances it would be inappropriate to rely upon that situation. And, lessons learned from telework are inapplicable when the issue at hand is remote work.

Based on the foregoing, a remote work article should not be in the parties' agreement. As the parties did not contemplate such a program in enacting the pilot program, it would be inappropriate to impose one now. Accordingly, the Panel orders the Union to withdraw its proposal on this topic.

As the Union's proposals on remote work are no longer viable, that leaves only the Agency's definition for ODS in the "Key Definitions" section of the parties' MOU. The parties agree on inclusion of language concerning the definition of ODS, the only dispute for this language is a reference to proposed remote workers. Because remote work is not a part of this MOU, it logically follows that the Agency's language for ODS should be imposed because that language omits any reference to

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<sup>21</sup> See Agency Brief at 13.

<sup>22</sup> Agency Final Offer at 1.

<sup>23</sup> See Union Exhibit 1 at 1 (emphasis added); see also Union Exhibit 3 at 3 (noting that pilot program was enacted to provide employees with expanded telework and hours of work schedule flexibilities on a temporary basis).

remote work. However, this imposition should not be seen as offering an opinion on the appropriateness of the parties exploring remote work in any other contexts. In any event, the Panel orders the imposition of the Agency's language on the definitional language for "ODS."

### III. Office Sharing

#### A. Agency Position

The Agency wishes to include language in the agreement about office sharing, i.e., "hoteling." Their proposed language is as follows:

Employees who are regularly scheduled to work at the ODS five (5) or more days per pay period will be eligible to have an assigned office/workstation. Employees who are regularly scheduled to work at the ODS four (4) or fewer days per pay period may be required to participate in a workstation-sharing/office-sharing arrangement or to work from a hoteling station.<sup>24</sup>

Currently, most Agency employees have a single dedicated office. Because, even under the Agency's telework proposal, the parties are moving towards enhancing telework opportunities the Agency believes it needs to begin to utilize office space more efficiently. In this regard, some Agency divisions are currently close to capacity in terms of office space, and the Agency will be looking towards expanding the work force in the future. So, the Agency has a keen interest in establishing office sharing procedures and believes doing so now, rather than waiting for separate negotiations, is appropriate because the parties are using these negotiations to establish new work parameters.

At the hearing the Union indicated that they believed this issue may be covered by an existing 2017 memorandum of understanding (MOU) on office space. In response, the Agency argues that the parties have an established past practice of bargaining office space issues outside the context of mid-term or term negotiations.<sup>25</sup> Additionally, the Agency maintains the MOU should not bar negotiations in this matter because the parties are now bargaining new telework standards and these standards should supersede the events of prior MOUs.<sup>26</sup>

#### B. Union Position

The Union rejects the Agency's proposal in its entirety. The Agency has not demonstrated a need for it and it was not a topic that was covered under the pilot

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<sup>24</sup> Agency Final Offer at 2.

<sup>25</sup> See Agency Brief at 10-11.

<sup>26</sup> See *id.* at 11.

program. At the hearing, the Agency's own witnesses admitted this proposal was based upon a potential future need rather than an immediate pressing need. Further, the Agency's stated need is based upon future staffing increases, but the Agency has been historically understaffed.<sup>27</sup>

Additionally, Article 54 of the parties' LMA grants the parties the ability to bargain mid-term matters. Office space issues should be reserved for such situations. The Agency's proposal, the Union contends, effectively asks the Union to waive its rights under Article 54. Additionally, the parties negotiated a comprehensive 2017 MOU on office space when the Agency relocated to its current headquarters facility. This agreement establishes private offices for all employees.

### C. Conclusion

The Panel orders the Agency to withdraw its proposal. Like remote work, the topic of hoteling was not covered under the pilot program. Thus, it was not subject to any evaluation or study. As such, in these circumstances, it would be inappropriate to impose any language on hoteling. This conclusion does not offer any opinion on the parties' rights and obligations arising under any negotiated agreement, including any actions that may arise in the future.

## IV. Core Days

### A. Agency Position

The Agency seeks to introduce a concept of "core days," in which all employees in a division would be required to be physically present in the office for the work day. The Agency's language is as follows:

To facilitate communication, teambuilding, training, and mentorship, each division will have one designated core day per week on which all employees within that division shall be regularly scheduled to work at the ODS. Each division's core days will be announced prior to the initial application period described in Section I(C)(1) above. The core days are counted as a part of the in-office requirement described in Section II(B)(2)(a) above.<sup>28</sup>

Under the Agency's proposal, employees would be required to be physically present once per week. The Agency argues that "[a]long with facilitating collaboration, communication, training, and mentorship, the division-wide core days will help build greater employee cohesion within groups, to support mission

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<sup>27</sup> See Union Brief at 12.

<sup>28</sup> Agency Final Offer at 2.

achievement and organizational health.”<sup>29</sup> The Agency has already implemented core days for non-bargaining unit employees throughout the Agency, including within its HR division. At the hearing, the HR Director testified that core days enhanced collaboration, increased communication, and improved team dynamics.

The Agency also maintains that core days are consistent with the OMB Guidance’s call for agencies to “substantially increase meaningful in person” work.<sup>30</sup> Similarly, new reports have surfaced that the White House has recently pressed Federal agencies for more of an in person presence in Federal offices.<sup>31</sup>

### B. Union Position

The Union offers the following counter proposal:

There will be one core in office day per pay period, starting with the first open season following the effective date of this agreement. The specific core day will be determined by each division. Managers will consult with employees when setting and making changes to the core day. The core day will be on a Tuesday, Wednesday, or Thursday unless agency operational concerns require a different day. In the event a division believes that operational concerns require different day, the agency will provide NTEU with a written explanation of the reasons and will, upon request, meet to discuss the issue before instituting the core day requirement.<sup>32</sup>

The key point of the Union’s proposal is that core days would be adopted, but they would be limited to one per pay period. The Union’s approach appropriately balances the interests of the parties in a measured manner. It also provides employees with a greater opportunity, with supervisor approval, to cluster their core days on a specific day in the pay period so as not to interfere with telework opportunities. The Agency has not demonstrated a need for more core days, particularly given that its own assessment found that collaboration was already fostered under the pilot program.

### C. Conclusion

The Panel imposes the Union’s language to resolve this dispute. The topic of core days was not one that was addressed in the pilot program. Nevertheless, the

<sup>29</sup> Agency Brief at 7.

<sup>30</sup> *Id.* at 8 (citing OMB Memorandum M-23-15, *Measuring, Monitoring, and Improving Organizational Health and Organizational Performance in the Context of Evolving Agency Work Environments* (Apr. 13, 2023)).

<sup>31</sup> *Id.* (citing David Shepardson, *White House pushes US agencies to ‘aggressively’ boost in-person work*, Reuters (Aug. 5, 2023, 5:13 PM), <https://www.reuters.com/world/us/white-house-pushes-us-agencies-aggressively-boost-in-person-work-2023-08-05/>).

<sup>32</sup> Union Final Offer at 3.

parties agree on adopting the general concept. As such, it is appropriate to impose some language concerning core days.

As to which language should be adopted, the Panel believes the Union's language is the most appropriate one in these circumstances. It captures a balance between the Union's interests – increased telework – and the Agency's interests – increased in person collaboration and communication. The Union's language also grants supervisors the ability to assess the appropriate core day between Tuesday and Thursday while still granting the Union the ability to discuss any issues arising from any needed changes.

The Agency's proposal, in light of the record, is overbroad and unsupported. It relies heavily upon a similar rationale that was rejected on the subject of diminished telework days. The Agency points to the positive experiences that HR employees have had with a weekly core day. Even if true, however, a snapshot of this one shop does not establish that all other divisions would have an identical experience.

The Agency also relies upon OMB guidance that calls for increased in person attendance. As discussed already, this guidance explicitly calls for "*meaningful*" in person presence.<sup>33</sup> The use of this adjective demonstrates that in-person attendance should not be mandated simply because of personal preference, rather, it should have purpose. The Agency did not demonstrate sufficient meaningful reason to adopt its proposal. Relatedly, the Agency's reliance upon news stories concerning a desire for increased in person footprint is of no avail. As of this decision's publication, there has been no issuance of related guidance or instruction.

## V. Break Periods

### A. Union Position

The Union proposes the following for employees who are on a flexible work schedule (FWS):

Employees may schedule a regularly scheduled break in the day of up to two (2) hours with the flexible bands and subject to supervisor approval (e.g., office coverage needs are met). Employees may arrange any such break consecutively with their lunch period provided that their lunch period is at the start or end of the core hours. For example, an employee could take lunch from 2:00 PM-2:30 PM and have a regularly scheduled break from 2:30 PM to 3:30 PM. Employees who would like to schedule a break during the day on an ad hoc basis should use the credit hour program, or other applicable leave, to do so.

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<sup>33</sup> OMB Guidance at 1.

On a case-by-case basis the Agency may permit scheduling of the break period during the core hours where a compelling need exists.<sup>34</sup>

Under the pilot program the parties agreed that employees on an FWS could request up to a 1 hour break during flexible time bands<sup>35</sup> with supervisory approval. The Union proposes that this be modified to a 2 hour break period. This increase would provide employees with greater opportunity to attend to necessary personal matters, such as picking up children from school, without the need to resort to leave. The Union maintains that the assessment suggests that no adverse consequences would arise from adopting the Union's proposal.

### B. Agency Position

The Agency proposes retaining the status quo as established under the pilot program. So, their language is as follows:

Employees may schedule a regularly scheduled break in the day of up to one (1) hour with the flexible bands and subject to supervisor approval (e.g., office coverage needs are met). Employees may arrange any such break consecutively with their lunch period provided that their lunch period is at the start or end of the core hours. For example, an employee could take lunch from 2:00 PM-2:30 PM and have a regularly scheduled break from 2:30 PM to 3:30 PM. Employees who would like to schedule a break during the day on an ad hoc basis should use the credit hour program, or other applicable leave, to do so. On a case-by-case basis the Agency may permit scheduling of the break period during the core hours where a compelling need exists.<sup>36</sup>

The Agency believes the status quo language is appropriate because it strikes a balance between the needs of the employees and ensuring that employees are available to address timely Agency needs. Adopting the Union's proposal, the Agency fears, would undermine the latter and also diminish the Agency's interest in fostering collaboration and communication.

### C. Conclusion

The Panel imposes the Agency's language to resolve this dispute. The Agency's proposal represents a continuation of the status quo and, most importantly, was subject to study and analysis under the contours of the pilot

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<sup>34</sup> Union Final Offer at 3-4.

<sup>35</sup> Under an FWS schedule, workdays have: (1) core hours; and (2) flexible hours. Core hours are the designated period of the day when all employees must be at work. Flexible hours are the part of the workday when employees may (within limits or "bands") choose their time of arrival and departure.

<sup>36</sup> Agency Final Offer at 3.

program. The existing break period grants employees on FWS some degree of flexibility to attend to private matters while also ensuring they are available during core hours to address mission needs. Neither the Agency nor the assessment identified any negative consequences as a result of this 1 hour break period. Accordingly, its imposition is warranted.

The Union has not offered sufficient rationale to justify adoption of its proposed 2 hour break period. The Union claims that it could alleviate certain situations for employees, like child care, but at no point has the Union offered any specific real world examples involving actual employees. Moreover, the Union's argument is premised on the assumption that, because the 1 hour break did not result in hardship to the Agency's operations, it must logically follow that a 2 hour break would be just as well received. Again, however, the Union failed to provide any data or information that supports such a conclusion.

### ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby orders the parties to adopt the provisions as discussed above.



Martin H. Malin  
FSIP Chairman

October 17, 2023  
Washington, D.C.