American Federation of
Government Employees

Memorandum

Step 3 Grievance on behalf of bargaining unit employees who had their telework agreements terminated

Dated: May 23, 2024

To: Celeste Matthews, Director of Operations, Office of Information & Technology (OI&T), Department of Veterans Affairs (VA or Department)

Re: Terminating telework agreements in violation of the parties' collective bargaining agreement and federal law

From: Steve Eckerman, Esq., Steward, American Federation of Government Employees (AFGE), Local 17, AFL-CIO

I. Statement of the grievance

This step 3 grievance[1] involves violations of various provisions of the Master Agreement, the Federal Service Labor-Management Relations Statute (hereinafter "the Statute"), and the Department's own core values. The violations stem from the Department's unilateral termination of telework for approximately 31 bargaining unit employees during negotiations with the Union, coupled with the absence of prior notice to employees and the threat of repercussions for non-compliance.

[1] The grievance is filed under the provisions of Article 43, Section 7 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (2023) ("Master Agreement").

The affected group operates under the supervision of area manager Cassandra Heiges. Ms. Heiges reports to Director of Operations Celeste Matthews. On April 17, 2024, Ms. Heiges reached out to Local 17 President Douglas Massey to discuss temporarily altering telework schedules for a "refresh project." She proposed discontinuing the current telework arrangement of one week in the office and one week at home, starting May 6, 2024, for an estimated duration until September 30, 2024, or until the project's completion. Ms. Heiges assured that teleworking could be reinstated post-project, albeit with modified schedules to ensure continuous coverage. These modifications were to be temporary until the conclusion of Union negotiations, after which the telework policy could be adjusted accordingly.

The Union promptly filed a Demand to Bargain on April 22, 2024, which included a cease-and-desist order and request for a briefing before submitting proposals. A briefing occurred on April 25th. At no point during the briefing did Ms. Heiges state to the Union that the Department intended to terminate ad hoc telework without fulfilling its notice and bargaining obligations under the Master Agreement and the Statute. In fact, Ms. Heiges appeared receptive to bargaining regarding the frequency of office attendance.

On Friday, May 3rd, the Union was preparing proposals that included requesting office attendance no more than three days a week. However, at 2:20pm, before the Union could submit its proposals, Ms. Heiges notified her group via email that their telework was entirely cancelled and that employees must report to the office on Monday, the following workday, under threat of disciplinary action. The email reads as follows:

> On April 18, 2024, the Union informed you of the request I sent them requiring our teams to resume onsite work at the office on May 6, 2024, to support the VA's Tier 2 desktop services Refresh Project. Ample notice was given to allow for necessary adjustments to accommodate your return. Your Position Descriptions (PDs) allow for Ad-Hoc Telework only, not scheduled. You are expected to adhere to your pre-Covid onsite full-time schedule. Starting on May 6, 2024, the Action Item Refresh project will commence.
>
> If you need to request leave during this period, please reach out to your supervisors for assistance.
>
> Failure to report to the office onsite or to request leave properly may result in appropriate action.

On May 7, 2024, the Union filed a Step 2 Grievance with Ms. Heiges. On May 16, 2024, Ms. Heiges denied the grievance. Ms. Heiges stated:

> The BUE's Position Descriptions are not eligible for scheduled telework, only Ad-Hoc. We would allow for Ad-Hoc and the staff could maintain or request to work a compressed work schedule.

> The department did not terminate the 31 BUEs' telework agreements, rather, they were given approval to temporarily work one week at a duty station (ODS) and one week at an alternate duty station (ADS) during the pandemic which has now ended. The 31 BUE's positions are not telework eligible. I was not under the impression we were bargaining for temporary recall from ADS because this is already bargained at the National level, therefore, cannot be bargained at the Local level.

Ms. Beard appears to think that Article 20, Section 9, does not apply whenever the Department cancels ad hoc telework. *E.g*., the "positions are not telework eligible" and "this is already bargained at the National level." She is incorrect. There is nothing in Section 9 that exempts ad hoc telework from its provisions. The OIT employees have been operating under the same telework schedule since March 2020, a period of over four years. Once a past policy or practice has matured into a term or condition of employment, it cannot be unilaterally changed. *Social Security Administration*, 83 FLRR 1-1286, 13 FLRA 112 (FLRA 1983). The cancellation of ad hoc telework is a change in the conditions of employment resulting in a more than "de minimis" impact,[2] which requires the Department to bargain with the Union. The duty to bargain under the Statute requires that, absent a clear and unmistakable waiver of bargaining rights, parties satisfy their mutual obligation to bargain before implementing changes in conditions of employment of unit employees. *Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA 9 (1981). With respect to management-initiated changes, a union must be provided with notice of the change and an opportunity to bargain, to the extent consistent with the Statute, over the change. *Id*. at 10-11.

Ms. Beard's attempt to claim that this issue is non-negotiable is also wrong. When an agency does not respond to a union's request to bargain over a change, it is not necessary for the FLRA to examine the negotiability of the union's proposals in order to find a unilateral change violated the statute. *Pension Benefit Guaranty Corp*., 103 LRP 37848, 59 FLRA 48 (FLRA 2003). When an agency believes it has no duty to bargain, at a minimum it must respond to a union's request to bargain over a perceived change in conditions of employment. *Customs and Border Protection*, 104 LRP 22938, 59 FLRA 910 (FLRA 2004).

The Department's actions violated several provisions of Article 20 of the Master Agreement. First, while acknowledging that employees temporarily need to report to their official duty station for operational needs, the Department failed to demonstrate, beyond mere assertions, that cancelling telework entirely was a valid operational need that was required to meet the office's mission during the refresh project. [3] In fact, our members assert that there is no valid operational need. The Union has requested that the Department provide metrics to show a valid operational need, but its requests have been ignored.

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[2] *American Federation of Government Employees v. Federal Labor Relations Authority*, 122 LRP 3977 (2022).
[3] *See* Master Agreement, Article 20, Section 9.B.

Even assuming that a valid operational need had been shown, Ms. Heiges violated the Master Agreement by not providing reasonable advance notice and a reasonable time to report.[4] Informing employees of the unilateral cancellation of telework on a Friday afternoon, and requiring immediate office attendance on the next workday, is not reasonable advance notice. Ms. Heiges' claim that the Union's *ex parte* email to bargaining unit members on April 18th amounts to "ample notice" from management is also absurd and without a legitimate basis. The Department may not avoid its duties to notify employees of changes in the conditions of employment by arguing that "the Union did it for us." These actions showed a complete disregard for employees, who were given very little time to restructure their domestic lives.

Moreover, the Department's failure to provide adequate notice and its reluctance to engage in meaningful negotiation contradict VA's Core Values of Integrity, Commitment, Advocacy, Respect, and Excellence, encapsulated by the acronym "I-CARE," as outlined in 38 CFR § 0.601. Managers and supervisors are explicitly tasked with treating employees with the utmost respect and dignity to enhance productivity.[5]

Lastly, the Department committed an unfair labor practice under 5 U.S.C. § 7116(a)(1), (5), and (8) by failing to fulfill its bargaining obligation under the Statute. It is imperative under the Statute to consult and negotiate in good faith with a labor organization, which was disregarded in this instance. In *Department of Housing and Urban Development and AFGE, Local 3956, Council 222*, 111 LRP 61771 (FLRA 09/15/11), the arbitrator found that the decision to terminate and replace telework agreements constituted a change that was subject to bargaining under the CBA (collective bargaining agreement). Because the agency failed to give the union notice and an opportunity to bargain, the arbitrator found that the agency violated the statute and CBA. The arbitrator directed the agency to compensate teleworkers for additional mileage travel expenses that they incurred from not being able to telework. He also ordered the agency, as the "losing party," to pay the costs of arbitration. Finally, Ms. Heiges bypassed the Union by excluding it from its May 3rd notice to employees which mandated their immediate office attendance or risk potential consequences.

II. Statement of the violation

The Union asserts the right to amend this Grievance if violations of any other applicable sections of the contract, laws, or regulations are discovered. When an agency unlawfully makes unilateral changes, the typical remedy is for the FLRA to order a make whole or status quo ante remedy. The purpose of such a remedy is to ensure agencies bargain with their unions. *Federal Deposit Insurance Corp. v. FLRA*, 92 FLRR 1-8045, 977 F.2d 1493 (D.C. Cir. 1992). By unilaterally terminating telework agreements without a valid operation need and meeting all notice and bargaining obligations, the Department violated, and continues to violate, the following:

[4] *Id.*
[5] Master Agreement, Article 17, Section 1.F.

- 5 U.S.C. § 7116(a), stating that it shall be an unfair labor practice for an agency to refuse to consult or negotiate in good faith with a labor organization; and which makes it an unfair labor practice to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
- Article 2 of the Master Agreement due to the Department's failure to comply with applicable federal statutes and regulations in the administrative matters covered by the Master Agreement, to include 5 U.S.C. § 7116(a);
- Article 17 of the Master Agreement, stating that managers and supervisors are explicitly tasked with treating employees with the utmost respect and dignity to enhance productivity;
- Article 20, Section 9, of the Master Agreement, stating that the Department may only require employees to report to the official duty station (ODS) for valid operational needs, and requiring that when this is done the Department must provide employees with "reasonable advance notice" and that they be provided a "reasonable time to report";
- Article 49 of the Master Agreement, stating that the Department will not communicate directly with bargaining unit employees regarding conditions of employment without prior notification to the Union and bargaining where appropriate;
- 38 CFR § 0.601: VA's Core Values are Integrity, Commitment, Advocacy, Respect, and Excellence. Together, the first letters of the Core Values spell "I CARE;
- The Telework Enhancement Act. PL 111-292 ("the Act") which authorizes federal employees to telework to the maximum extent possible without diminishing agency operations and performance;
- Any other relevant articles, laws, regulations, customs, and past practices not herein specified.

III. Statement of the remedy

The Union asks that, to remedy the above situation, the Department agree to the following:

- Withdraw the notice dated May 3, 2024, which recalled employees from telework, until the Department has fulfilled all obligations outlined in accordance with the Federal Service Labor Relations Statute, 5 U.S.C. § 7101 et seq., and the Master Agreement;
- Issue a notice posting to all bargaining unit employees represented by Local 17 acknowledging its obligations to the Union under the Federal Service Labor-Management Relations Statute;
- Compensate teleworkers for additional mileage travel expenses that they incurred from not being able to telework;
- Agree to any additional remedies deemed appropriate in addressing this matter.

The time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions regarding this Grievance, please contact the undersigned.

Submitted by,

STEPHEN ECKERMAN Digitally signed by STEPHEN ECKERMAN
Date: 2024.05.23 12:32:35 -04'00'

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Steve Eckerman, Esq.

Steward

AFGE, Local 17