American Federation of Government Employees
Council 215, AFL-CIO

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Representing Social Security OHO and OAO Employees Nationwide

VIA ELECTRONIC MAIL

January 29, 2020

Theresa Gruber, Deputy Commissioner
Social Security Administration
Office of Disability Adjudication and Review
6401 Security Blvd
Baltimore, MD 21235
Theresa.Gruber@ssa.gov

RE: CG-01-20: Agency Decision to Reduce or Eliminate Telework for AFGE OHO Bargaining Unit Employees

Dear Ms. Gruber:

This document constitutes a union-management grievance filed pursuant to Article 24, Section 10 of the 2019 SSA-AFGE National Agreement. At issue are the Agency's draconian cuts to telework for major positions within the Office of Hearings Operations (OHO).

On January 27, 2020, OHO held formal meetings nationwide to announce major unilateral cuts in telework days for legal assistants and eligibility for systems staff positions in OHO installations nationwide.[1] Effective March 2, 2020, legal assistants will see their telework days drastically slashed from up to three days per week to only one day per pay period, resulting in an overall cut of up to five days of telework per pay period. Further, legal assistants working a 4/10 flexible work schedule would be ineligible to telework. Systems staff like Hearing Office Systems Analysts/Computer Assistants will no longer be eligible to telework. Regional office bargaining unit staff were reduced to one day per pay period, and headquarters bargaining unit staff were reduced to one day per week.

Additionally, OHO informed teleworking employees (legal assistants, decision writers, etc.) that if they wanted to telework, or continue to telework, that they needed to submit a new telework agreement by

[1] It is important to note that, as of this filing, OHO or other agency officials have not provided the Union with any memorandum or other document explaining the telework changes, which is unheard of for a major condition of employment such as telework.

February 7, 2020, or else be deemed to have withdrawn from telework. OHO leadership explained that the changes were consistent with current needs and would provide management with the flexibility they needed to handle workloads.

APPLICABLE PROVISIONS

Article 3, Section 1: Each employee shall have the right to join or assist the Union, or to refrain from such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under law, such right includes the right:

> * to act for a labor organization in the capacity of a representative, and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities; and
> * to engage in collective bargaining with respect to conditions of employment through representatives.

Article 3, Section 2.A (in relevant part): All employees shall be treated fairly and equitably in all aspects of personnel management and without regard to political affiliation, race, color, religion, national origin, sex (including sexual orientation, and gender identity), genetic information, marital status, age, parental status or disability, and with proper regard and protection of their privacy and constitutional rights.

Article 41, Section 1: The SSA Telework Program permits eligible AFGE bargaining unit employees to perform Agency-assigned work at a management-approved alternate duty station (ADS). The Agency may offer telework opportunities provided that the technological components and equipment are available and in place and that sensitive materials, including Personally Identifiable Information (PII), can be safeguarded. **Management will make telework determinations consistent with the eligibility criteria contained herein, taking into account requirements of the position**, performance of the employee, **impact on organizational performance, level of service provided to the American public**, and availability of appropriate technology. (emphasis added)

Article 41, Section 3 (in relevant part): Each Deputy Commissioner will determine the number of scheduled telework days, if any, eligible positions, and percentage of employees permitted to telework. In accordance with applicable law, each Deputy Commissioner will also determine whether teleworkers are eligible to work the following:

> * Credit hours at the ADS
> * A 5/4/9 or 4/40 work schedule
> * Overtime at the ADS (unless required by FLSA, e.g. late interview or call)
> * A part-time schedule
> * At the ADS on a non-tour day

Article 41, Section 5.B: Employees will request to participate in the Telework program by electronically submitting a Telework Program Request and Agreement consistent with PPM S650_1. Management will act on requests within ten (10) working days of the close of the request period for scheduled

telework. If the number of eligible employees exceeds the coverage requirements on a specific day, approval will be made in SCD order starting with the most senior. If the participant's request is denied, management will annotate the reasons for the denial on the telework request form.

During the months of February and August of each year employees may request to participate in scheduled telework. Employees will not have to submit future requests once the original request is approved unless: a schedule change is requested by the employee during the February and August timeframes; the employee needs to revise the telework request and/or agreement; or the employee is otherwise directed by management.

5 U.S.C. § 7102: Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7116(a)(1) and (2): **(a)** For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment […]

DISCUSSION

1. The Agency abused its discretion by reducing and eliminating telework for AFGE bargaining unit legal assistants, RO staff, and HQ staff because its decision is not consistent with historical and actual needs, thus constituting unfair and inequitable treatment of affected employees in violation of Article 3, Section 2.A and Article 41, Section 1.

OHO and its prior incarnations have the longest history of telework in the Agency, going back almost 20 years. Telework is a part of a hearing office's DNA. Legal assistants enjoyed telework from its inception until the late 2000s, when paper cases were increasingly replaced by electronic cases, which were not considered portable. In June 2015, ODAR and the Union agreed to reinstate telework for legal assistants as the majority of their workloads became portable with available technology. Legal assistants could work up to three days per week. Hearing offices were able to cover non-portable workloads when legal assistants were present at the office on non-telework days, and by assigning backup functions (like reception and VHR duties) on a rotation or other schedule. This allowed most legal assistants to have at least two days of telework per week. Many offices, through collaboration between management, the union, and the employees, were able to get *all* of their legal assistants three days of telework per week.

Indeed, much of that was based upon ODAR (now OHO) leadership's determination that hearing offices could accomplish their work with 50 percent in-office coverage on any given day, and giving local offices the discretion to allow more than 50 percent of their legal assistants to telework on any given day. Management had the flexibility to temporarily suspend telework, or to call back employees, when bona fide business needs required (such as high leave periods, high numbers of non-portable workloads, mandatory trainings and meetings, etc.), but the use of this flexibility was the exception and not the rule. Indeed, OHO successfully worked down a hearings backlog under these conditions. Further, given the limited contact that systems, RO, and HQ positions have with the public, telework was never an issue.

The above discussion illustrates the baseless, arbitrary, and capricious nature of the decision to make such draconian cuts to OHO telework. For legal assistants, the cuts represent an agency determination that 90+ percent in-office coverage is necessary for maintaining service, which is completely contrary to experience and the nature of the work they perform. Similarly, there is no rational basis for the cuts to systems, RO, and HQ staff. Indeed, OHO has eliminated backlogs and is generally current or on-track on its workload indicators, as indicated by national workload data, *with existing telework policies.* OHO has no overtime allocation because OHO is considered to be "on top" of its workloads. The irony here is that the Agency's telework cuts may very well *cause* the workload crisis they claim to want to avoid, because many employees may leave. Given the Commissioner's hiring freeze, there will be no replacing those employees. Even absent the hiring freeze, OHO will not be able to compete with other agencies or sectors with better telework and work-life benefits. Employee morale in OHO is already poor, which will lead to lower productivity. This is not crisis management; it is managing to create a crisis.

This change is going to fall hard on affected employees, who utilized telework to realize significant savings in commuting costs, parking, child and other dependent care, etc., especially in expensive metropolitan areas, **for no discernible reason based on evidence.** In recent years, commutes to some offices have significantly increased due to office relocations. Management also did not consider that, in some offices, there simply are not enough workstations to house the employees that will not be teleworking. The Agency gave no consideration of the harsh, devastating impact that its cuts would have on employees, especially lower-graded employees. Further, given that the Agency has failed to consider or has ignored history with respect to telework and factors like the nature of the work performed, effects on the organization, and effects on service, it is clear that the Agency has violated Article 3, Section 2.A and Article 41, Section 1.

2. <u>The Agency's decision to so drastically reduce and eliminate telework for AFGE bargaining unit employees in OHO is retaliation for AFGE Council President and GC Spokesperson Richard Couture's recent protected activity, as well as AFGE's protected activity elsewhere in the Agency, in violation of Article 3, Section 1; Article 3, Section 2.A; and 5 U.S.C. §§ 7102 and 7116(a)(1) and (2).</u>

The telework decision was made on January 27, 2020. On January 22, 2020, Couture filed an unfair labor practice charge against the Agency for its coercion and misrepresentation at the contract bargaining table. On January 16, 2020, Couture submitted a comment to the Federal Register opposing SSA's proposed regulation changes to its medical continuing disability review rules. On January 8, 2020, Couture opposed the Agency's decision to impose an Executive Order 13387 ban on the use of official time for lobbying, despite the Agency's earlier assurances that the Agency would not impose any of the

Orders if the Union agreed to a contract (under duress), and despite having a contract. Couture has also been vocal in opposing other actions taken by the Agency with respect to its violations of the contract since implementation in October 2019. Additionally, Couture and other AFGE leaders at SSA have been quoted in press articles criticizing the Agency's attacks on telework in other components, and other actions the Agency has taken against the Union and employees since October 2019. Further, AFGE and AFGE Council 220 were successful in convincing Congress to include language requiring SSA to provide Congress with a plan to reinstate telework in Operations. Indeed, SSA's decision to cut telework flies in the face of the spirit of Congress's wishes for a robust telework program for SSA employees. Taken together, it is clear that the Agency is not enamored with Couture and with AFGE, and that the Agency punished AFGE OHO bargaining unit employees with punitive telework cuts in retaliation for their recent protected activity.

3. The Agency's decision to reduce and eliminate telework for AFGE bargaining unit employees in OHO constitutes anti-AFGE discrimination, as same or similar positions in the NTEU bargaining unit will not see similar reductions or eliminations, in violation of Article 3, Section 1; Article 3, Section 2.A; and 5 U.S.C. §§ 7102 and 7116(a)(1) and (2).

AFGE and NTEU both represent employees who hold the same or similar positions who perform the same or similar duties, such as decision writers, legal assistants, regional office staff, and systems staff. Per an order of the Federal Service Impasses Panel, NTEU legal assistants, RO staff, and systems staff will maintain their current telework eligibility, based in part upon a Panel finding that the current workload situation did not support the Agency's claim that it needed greater flexibility, and that Panel's finding that managers maintain the flexibility to temporarily suspend telework.[2] Such a factual finding supports AFGE's arguments above, and shows that a third party found that OHO could not establish that gutting telework was necessary to keep up with its workloads. OHO cannot argue that the Panel order excuses it to destroy telework for AFGE when an apples-to-apples comparison of the facts show that AFGE unit employees are similarly situated to their NTEU counterparts, and because that Panel order came after the May 2019 Panel order on AFGE which included numerous components other than OHO. Indeed, managers of NTEU legal assistants will have to find a way to make telework of up to three days per week work in their offices, and if it can work there, it can work in offices represented by AFGE.

Simply put, any Agency assertion that the two unions are in different situations based on panel orders is merely trying to give itself license to be cruel and vindictive to AFGE OHO employees for no other reason than they are represented by AFGE. This is unlawful discrimination based on union status, plain and simple.

4. The Agency's arbitrarily short timeframes for submission of new telework agreements are not found in the contract, and are merely a way to remove more eligible employees from telework, in violation of Article 3, Section 2.A and Article 41, Section 5.B.

Article 41, Section 5.B states that employees may submit telework requests in the months of February and August, and that employees do not have to resubmit unless there is a change in the

[2] *Social Security Administration, Office of Hearings Operations and National Treasury Employees Union, Chapter 224*, 2019 FSIP 023 (2019).

request/agreement, request in change in schedule, or otherwise directed by management. The contract is clear that the two periods when this occurs for scheduled telework are the entire months of February and August, with decisions made in March and September, respectively. Thus, the Agency's edict that employees must submit a new telework agreement between January 27, 2020 and February 7, 2020 is in direct violation of the contract, and unfairly deprives employees of the full month of February to consider their options before submitting the agreement. Indeed, the result will be the unfair, unnecessary removal of employees from telework if they fail to meet the pointless, extracontractual deadline.

Further, there is confusion as to whether AFGE decision writers must submit the form simply because the form changed with the new contract, or whether managers will change their established schedules per the contract. Couture received an unofficial assurance that the Agency would not change any writer's schedules, but just wanted to update the forms. This will cause unnecessary angst for decision writers, in addition to the unnecessary angst for all OHO employees affected by the Agency's telework decision. Indeed, there is no provision in the contract for removal of an employee from telework for a simple administrative change.

5. <u>The Agency's highly coordinated and choreographed approach to announcing the telework changes in OHO and in other components on January 27, 2020 shows that the Commissioner of Social Security directed these changes, and not the Deputy Commissioner for Hearings Operations, in violation of Article 3, Section 2.A and Article 41, Section 3.</u>

Article 41, Section 3 clearly invests a component's Deputy Commissioner with authority to make determinations to propose changes to telework programs. However, it appears from the circumstances of the January 27, 2020 announcement that the various Deputy Commissioners were instructed to make these changes from above, by Commissioner Saul. This would be in violation of the contract, as the Agency's own language (as imposed by the Federal Service Impasses Panel) clearly delegated that authority to the Deputy Commissioners. Here, the facts show the following. At the direction from someone above the Deputy Commissioners, SSA's Press Office informed the media on the morning of January 27, 2020 that the Agency decided to make further changes to its telework programs. James Julian, Associate Commissioner for Labor Relations, sent Couture a barebones notice to that effect at noon, exactly. Julian informed Couture that he had no additional information to share about the substance of the changes, or even the affected components. John Kuhn, an OHO labor relations official, informed Couture that he was not authorized to share any information. Rather, all Deputy Commissioners (including OHO's Theresa Gruber) were instructed to share their changes with their respective component's employees beginning at the same time, 1pm EST and continuing, that day. This was clearly orchestrated to deprive AFGE of any real advance notice of the changes, and their substance. DC Gruber and the other DC's were following their orders, which had to come from above. Given the prior elimination of the Operations telework pilot in November 2019, it is clear that the Agency has an anti-telework agenda that starts at the top, and that the DCs carried out that agenda with little or no discretion.

REQUESTED RELIEF

1. Immediate restoration of previously existing telework policies for affected AFGE OHO bargaining unit employees, including but not limited to the number of telework days, eligibility, etc.
2. Immediate clarification to all AFGE OHO employees that they have the full month of February 2020 to submit their telework requests and agreements to management, consistent with Article 41.
3. All affected employees will be made whole for any adverse impacts that result from the Agency's decision to cut telework.
4. A posting to be conspicuously placed in all OHO installations represented by AFGE Council 215, acknowledging that the Agency violated the contract and committed unfair labor practices in violation of the law, consistent with the above discussion. This posting will also be shared via agency email with all AFGE OHO employees. The Union or the arbitrator will determine the language of the posting.
5. Attorney fees, if applicable.
6. Any other relief as mutually agreed upon or as ordered by an arbitrator.

The Union requests an oral presentation, to be held within 10 workdays from the date the Union receives the information requested in conjunction with the Union's January 28, 2020 bargaining demand to DC Gruber regarding the telework changes. The Union reserves the right to amend this grievance.

Please contact me to make necessary arrangements. Thank you.

Sincerely,

/S/

Richard F. Couture
President
AFGE Council 215

CC: AFGE Council 215

STATEMENT OF SERVICE

I hereby certify that this grievance was served upon the addressee via electronic mail on this date, consistent with Article 24, Section 14 and the Article 24 Sidebar regarding electronic grievances.

/S/

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Richard F. Couture

January 29, 2020