



Consumer Financial Protection Bureau

NTEU Chapter 335

DATE: October 13, 2022

MEMORANDUM FOR: Sonya White, Deputy General Counsel, Legal Division,
appointed designee for Seth Frotman, General Counsel

CC: Ari Taragin, Lead, Labor and Employee Relations, Office of Human Capital; Nicole Heiser, Assistant General Counsel for Law and Ethics, Legal Division; and Erin Noble, Assistant General Counsel

FROM: Rebecca Coleman, Remote Work Bargaining Team Chair, Jasmine Hardy, Executive Vice-President, and Nelle Rohlich, Chief Steward

SUBJECT: Violation of CBA and Unfair Labor Practice – Violation of the Telework, Remote, & Hybrid Program Article.

In accordance with the Collective Bargaining Agreement (“CBA”), Article 43, Section 6, the National Treasury Employees Union (“Union”), Chapter 335 hereby files this institutional and mass grievance against the Consumer Financial Protection Bureau (“CFPB or Bureau”). The Union alleges a violation of the August 2022 Remote, Telework, and Hybrid Program Article (“Remote Work Article” or “Article”) of the CBA and an Unfair Labor Practice in violation of 5 U.S.C. § 7116, et seq, and any other applicable statutes, regulations, policies, laws, or authorities.

I. FACTS

On September 28, 2022, the Bureau sent each bargaining unit employee (“BUE”) an email informing them of their new Work Location Designation (“WLD”) under the new Remote Work Article. That same day, as required by the Article, Domenic Murgo, the Bureau’s chief negotiator during remote work bargaining, emailed a spreadsheet (the “WLD Spreadsheet”) to NTEU that identified all BUE positions, the WLD the Bureau had determined applied to the position and, if the position was not given a Remote designation, the duties of the position that must be performed onsite. Upon review of the WLD Spreadsheet, it became immediately clear to NTEU that the Bureau did not comply with the requirements of the Remote Work Article when determining WLDs.

Discussions with BUEs in different offices and divisions throughout the Bureau only confirmed this impression.

Under the Remote Work Article, BUEs could receive one of three possible designations: Office Primary; Telework Primary; or Remote. Positions designated as Telework Primary must also include information on the amount of telework for which the position is eligible or must be given a “100% Telework” designation. Remote Work Article § 3. The Article requires the Bureau to determine BUEs’ WLDs “based on the duties of the employee’s position and the extent to which those duties can be effectively performed remotely without disruption to mission, staffing or workload requirements, consistent with the provisions of this article.” Remote Work Article, § 4(A).

BUEs are eligible for the remote designation if “[t]he duties of the position can be performed effectively from a remote location with the employee *rarely* needing to perform work at or near a Bureau facility.” Remote Work Article, § 4(A)(3) (emphasis added). If the Bureau designates a BUE position as ineligible for remote work, it must “identify the duties of the position (if any) that *must* be performed onsite.” Remote Work Article, § 4(C)(1) (emphasis added). The Article identifies four examples of job duties that must be performed in person:

1. Compliance with Privacy Act, security, or health/safety requirements that cannot be adequately addressed at an alternate worksite (e.g., access to material that is only available at a Bureau Facility, may not be removed from the Bureau Facility, and/or is not accessible by computer from the alternate worksite);
2. Responsibility for security or building operations of CFPB Facilities;
3. Facilities or equipment to perform the job that cannot be made available at the alternate worksite (e.g., hands-on contact with machinery, high-volume printing or photocopying);
4. Face-to-face contact (with other employees, internal Bureau customers, external stakeholders, etc.).

Remote Work Article, § 5(E). Despite these agreed-upon standards, the Bureau designated 106 out of 262 positions as ineligible for a Remote Work Location Designation (“WLD”) or a 100% Telework WLD. The blanket denials of remote work do not square with the experience at the Bureau since the onset of Covid-19 in March 2020. Bureau Leadership has repeatedly said that the CFPB has succeeded in its mission and that its employees have been as or more productive during the pandemic than they were prior to the start of mandatory full-time telework. The Bureau’s skeptical approach to remote work is understandable only if this successful adoption of near-universal remote work is completely disregarded. If employees have effectively performed their duties remotely for nearly a quarter of the time that the Bureau has been in existence, then the burden is on the Bureau to show why employees cannot continue to do so. The designation of huge swaths of the workforce that must suddenly come into the office in

order to do their jobs is inconsistent with the Remote Work Article and the Bureau's successful work over the last two-and-a-half years.

II. ARGUMENT

The Remote Work Article sets forth a 2-step process that the Bureau must follow when determining WLDs for BUEs. First, it must identify the duties of the position; second, it determines to what extent those duties can be effectively performed remotely. Remote Work Article, § 4(C)(1). In determining whether a particular job duty must be performed in-person, the Bureau must use the examples set forth in Section 5(E) of the Article as a guide.

A. Denial of Remote Work

The Bureau has failed to comply with the Remote Work Article because its purported reasons for requiring in-person work for the positions deemed ineligible for remote work: (1) are not part of the position's job duties—as written or practiced; (2) do not meet the standard created by the examples in Section 5 of the Article for duties that *must* be performed in-person; (3) are duties that are usually or always performed off-site at locations that are not near the employee's assigned office; or (4) are new job duties created as a pretext to designate a position as ineligible for remote work. The Bureau's denial of a Remote WLD to a large portion of the bargaining unit based on false, inaccurate, or newly created pre-textual identifications of BUEs job duties is not only a violation of the Remote Work Article, but also a repudiation of the parties' negotiated agreement and an Unfair Labor Practice.

B. Denial of 100% Telework

The Bureau also refused to designate any BUEs as 100% Telework. Under the Remote Work Article, the Telework Primary WLD is a broad designation that encompasses all positions with job duties that allow an employee to telework more than 50% and up to 100% of the time each pay period. The Article separately identifies 100% Telework as a "distinct category of Telework Primary where an employee routinely teleworks at an alternate worksite full-time but is required to perform work at a Bureau facility occasionally and on an ad hoc basis." Remote Work Article, § 3. The Article repeatedly distinguishes between Telework Primary up to a certain percentage of time and 100% Telework, and BUEs with a 100% Telework designation are entitled to certain benefits that are not available to Telework Primary employees.¹

The bargaining unit positions the Bureau designated as Telework Primary were given one of two designations: "Telework Primary <100%" or "Telework Primary up to 100%." While the average person might not see a difference between a Telework Primary designation of "up to 100%" and a designation of "100% Telework," under the Remote Work Article, only 100% Telework is a defined term that brings with it additional rights.

¹ Among these privileges are the ability to request a printer/scanner, shredder, and locking file cabinet for the alternate worksite and reimbursement of up to \$200 for a desk and \$200 for a chair every four years.

The Bureau's use of "Telework Primary up to 100%" instead of "Telework Primary 100% Telework" puts employees with this designation creates uncertainty and puts BUE at risk of losing their ability to telework full-time (or never having the opportunity to do so).

First, while many employees who were designated as Telework Primary up to 100% have been approved for a schedule that allows them to telework 10 days per pay period, there is no guarantee that will continue to be the case. All telework requests are subject to supervisor approval. While supervisors must comply with the Remote Work Article in approving and denying telework requests, they still have some discretion to determine how often a BUE must report to the office. Because these BUEs are in positions that are only eligible to telework "up to" 100% of the time, BUEs with this WLD face the possibility that CFPB leadership, division or office leadership, or even individual supervisors will decide that the "up to" qualifier gives them the right to require these BUEs to report in-person 1 day or more every pay period. If these employees had been designated as eligible for "100% Telework," then the Bureau would not be able to force them to come in regularly without changing their WLD, the process for which contains various safeguards outlined in the Article.

Second, positions designated as 100% Telework are only required to report to the office "occasionally and one an ad hoc basis," but positions with a designation of "up to" a certain percentage of telework are not necessarily bound by those restrictions. Presumably, the Bureau chose to identify these positions as eligible to telework "up to 100%" rather than eligible for 100% Telework because it wants to require employees in these positions to report to the office more than occasionally or to for events and duties that are not ad hoc. By designating BUEs as "Telework Primary up to 100%" instead of "100% Telework" or "Telework Primary: 100% Telework," the Bureau has invented a category of Telework Primary not agreed to by the parties and created a loophole so large it not only violates the Remote Work Article it the agreement between the parties.

C. Examples

Set forth below is a discussion of the deficiencies in the Bureau's designation of specific positions as ineligible for Remote Work. The examples provided are illustrative and do not cover every bargaining unit position affected by the Bureau's improper denial of a Remote WLD. This grievance is being filed on behalf of all BUEs who the Bureau determined were ineligible for a Remote WLD, regardless of their position.

Research, Markets and Regulations ("RMR")

Only seven bargaining unit positions were designated as Telework Primary < 100%. Four of these positions are entry-level Research Assistant positions in RMR's Office of Research ("OR"). The Bureau provided the following justification for refusing to designate these positions as Telework Primary: 100% Telework or Remote:

The most junior staff who are just beginning their careers and have considerable development needs and benefit from direct, face-to-face, and often informal or ad hoc interactions

with peers and managers on tasks like computer programming, memo writing, and editing.

The flimsiness of the Bureau's reasoning in this instance reflects the difficulty in articulating the need for in-person work when it does not exist and has not existed for the last two and half years. First, the Bureau has designated all other bargaining unit positions in OR as Remote-eligible and at least one OR section chief has been working remotely since before the pandemic. Assuming all, or even a significant portion, of the OR staff chooses to take advantage of working from home full-time (or even a large percentage of the time), then most, if not all, of the purported "ad hoc" interactions between these junior staff members and their peers will happen virtually. Second, BUEs currently in these positions or who have encumbered them in the past report that meetings to discuss work almost always require the meeting participants to view the memo, data set, or other work product as it is being discussed. These BUEs note that those discussions are easier to have virtually through Teams because everyone can look at and work off the same document and everyone can see what section they are discussing. When these discussions take place in-person, meeting participants must either bring a hard copy or pull the work product up on their laptop, making collaboration more difficult and less efficient.

Finally, OR managers' response when asked why these entry-level Research Assistants were denied a Remote (or even a 100% Telework) WLD belies the truth. Managers informed BUEs that employees in these positions needed to report to the office on a regular basis because the managers were required to report to the office when they started out at the Bureau and "found it helpful." And even before the WLD determination process began, OR managers frequently expressed their opinion that Research Assistants "should be in the office." A general feeling that someone *should* have to report to the office for unspecified reasons or because employees in the past found it helpful is not a valid reason to deny employees a Remote or 100% Telework designation. Under the Remote Work Article, the Bureau must identify the duties of the position that *must* be performed onsite. It is clear that the job duties the Bureau identified in this instance are merely a pretext. The CFPB did not start by reviewing the duties of the position before determining if those duties needed to be performed in-person. Instead, it decided what WLD it wanted to assign to these positions and then created reasons to justify that decision.

Consumer Education and External Affairs (CEEA)

The Bureau designated twenty-seven different BUEs in CEEA's Office of Consumer Education ("CE") as Telework Primary up to 100%. For all twenty-seven positions, the Bureau explained that the position was ineligible for a Remote WLD because

[The] position requires periodic in-person meetings with consumer advocates, partner organizations, and other engagements at headquarters and external community events expected to happen more than four times a year and may occur with little notice.

When BUE in CE asked their managers why they were not designated as remote, they were told it was because they have to meet with *external* Bureau stakeholders more than four times a year. Several employees in CE, many of whom have long tenures with the Bureau, report that they have *never* been required to attend a meeting with a stakeholder during their time at CFPB.² And those whose jobs do require attendance at stakeholder meetings noted that they have never attended one *at a Bureau facility* because these meetings have all taken place where the stakeholders are located. When BUEs pointed this out, their supervisors informed them that, in making the determination, CE leadership considered not just meetings at headquarters (“HQ”), but *all* meetings those employees are asked to attend—even if they must travel outside of Washington, D.C. to attend them.

The Remote Work Article defines the Remote WLD as follows: “[r]emote employees are rarely expected to physically report *to a Bureau facility*.” Remote Work Article, § 3 (emphasis added).³ Under the plain language of the Article, the Bureau must identify duties that require a BUE to report to a Bureau facility⁴ in order to deny that employee a Remote WLD. Job duties that require an employee to report to a location other than a Bureau facility are not relevant to this determination and is not a proper reason to deny remote work.

Additionally, the Article does not say, and the parties did not agree, that in-person work obligations more frequent than four times a year would make a position ineligible for a remote work designation.⁵ The CFPB had the opportunity to propose this type of bright-line limitation during negotiations and failed to do so. In fact, the Union bargaining team repeatedly asked the Bureau’s bargaining team to provide a list of specific criteria that it intended to use when determining eligibility for different WLDs and the CFPB refused. As a result, the Union drafted and proposed its own definitions and criteria.

² One BUE in CE notes, “Before the pandemic, I met with stakeholders in person around once a year. Those meetings were difficult to schedule and attend because they required participants to schedule travel time.”

³ This definition comes from Section 3 of the Article (Definitions), which contains the definitions for terms used in the Article. Section 4 (Designating Work Locations) provides a summary of the definition for each WLD before explaining what WLD employees in a position with that designation may choose. The summaries for Office Primary and Telework Primary accurately reflect the official definition, but the summary for Remote adds a restriction: “The duties of the position can be performed effectively from a remote location at *or near* a Bureau facility.” Remote Work Article, § 4A.3. Given that the official definition does not include the “or near” language and that Section 4 merely summarizes the definitions, the official Definition in Section 3 is controlling.

⁴ “Bureau Facility refers to any location managed by the Bureau, including headquarters and all regional offices.”

⁵ The Bureau is well aware this standard is not in the Article and has admitted so publicly. An information sheet posted on the CFPB Next wiki page titled, “Position Designation Matrix,” specifically notes that the four times a year limit is “not explicit in agreement.” A copy of this document is included as Attachment A to this grievance.

After bargaining over and making changes to the Union’s proposed language, the Bureau agreed to the current language. The Bureau did not propose, and the Union would not have agreed to, defining “rarely” as 4 times or less per year.

Under the Bureau’s reading, “rarely” would not apply to an employee needing to be in the office a mere five days out of the approximately 250 days in a work year—i.e., two percent of the time. Merriam Webster’s dictionary defines “rarely” as “not often,” and surely a person required by their job duties to come into the office, for example, just 25 days a year (*i.e.*, ten percent of the time) is an employee who does not often come to the office.

Supervision, Enforcement, and Fair Lending (“SEFL”)

Every position in SEFL’s Office of Enforcement (“ENF”) was deemed ineligible for remote work,⁶ mostly relying on rationales about twice-annual in-person training and incredibly rare trial preparation obligations.⁷ These designations do not comport with the duties of ENF BUEs.

For example, E-Law Litigation Support Specialists were deemed ineligible due to: “(1) attendance at in-person training twice a year at HQ; (2) in-person attendance at meet and confers, which frequently occur at HQ; and (3) in-person attendance at trial and litigation prep at HQ.” These reasons are inadequate.⁸ All, or nearly all, meet-and-confers with opposing counsel occur telephonically or via teleconference—this was true before the pandemic and will certainly continue to be the case. Further, trials and trial preparation are exceedingly rare events. Given that the standard practice is to perform this job duty telephonically there is no reason an employee must do it at a Bureau facility. Most E-Law Litigation Support Specialists will go years without participating in trial prep. Moreover, those support obligations can be done remotely (as they have been during the pandemic). In fact, because E-Law Litigation Support Specialists are assigned to various different litigation teams, they are often providing support to attorneys who are duty-stationed at one of the Regional Offices (“ROs”). In those instances, they have always performed their litigation support duties remotely. If those duties must be performed remotely in some instances, they are clearly not duties that must be performed in-person.

⁶ Tellingly, the Bureau designated the one position (PD #141640) that has been performed remotely since its creation in 2014 as only eligible for Telework: up to 100%. The employee was able to get the designation changed back to Remote by contacting the CFPB Next team directly, but the initial error serves as additional evidence that the Bureau did not consider the actual job description and duties of each position prior to determining WLDs.

⁷ Trials occur in the court where the case is filed, which can be in any federal district court across the country. Cases are very rarely filed in Washington, D.C.

⁸ The justifications that Enforcement managers provided for other BUE positions all suffer from the same or similar inaccuracies and are clearly just pretextual reasons to justify denying all Enforcement BUE a Remote WLD.

Finally, the twice-yearly in-person training requirement did not exist prior to the implementation of the Remote Work Agreement. And while ENF may have had occasional mandatory training in the past, in most cases it still provided a way for staff to at least attend telephonically. The very few trainings that actually required in-person attendance took place before the Bureau had the ability to easily set up virtual or hybrid meetings and trainings. During the COVID-19 pandemic, CFPB invested a great deal of time and money updating its technology to make it possible for staff to effectively conduct and attend internal and external meetings, symposiums, webinars, depositions, and even court hearings remotely.⁹ Because of this investment, ENF has successfully and effectively provided hybrid (or entirely remote) training multiple times in the past three years. Further, requiring staff to report to HQ for training would be incredibly costly. ENF has staff in all the ROs and the number of staff assigned to those offices has increased in recent years. If it requires employees to attend in-person training at HQ, ENF will have to pay travel costs (i.e., flights, hotels, per diem) for every employee duty stationed at an RO. But if ENF offers hybrid training, then it would eliminate those costs. It is curious that ENF would create a new, expensive, in-person training requirement at a time when Bureau Leadership is cutting travel budgets and generally trying to rein in spending. The Bureau offers no explanation why ENF is unable to offer hybrid or remote mandatory training going forward, especially given that in-person training would be more expensive. Further, the fact that ENF did not have a bi-annual training requirement before the pandemic, suggests this requirement was created as a pretext to justify denying a Remote WLD to all BUEs in Enforcement.

Legal Division (“Legal”)

The Legal Division’s blanket designation of all of its attorneys as ineligible for a Remote WLD defies the actual practice of the Division. The rationale in the WLD Worksheet states:

All attorneys in the Legal Division on a permanent appointment have the same PD, according to their grade-level and bargaining unit status. Some of the attorneys on this PD engage in litigation and/or oversight activities that require them to be in the office or other DC locations to attend external meetings, including with external stakeholders and parties, and to perform litigation activities, including taking and defending depositions, attending labor or settlement negotiation and mediation, oral arguments, arbitration and other judicial or administrative hearings.

⁹ During the afternoon bargaining session on June 29, 2002, the bargaining teams discussed face-to-face contact because the Union wanted clarification on what job duties and positions would require face-to-face contact. In that session, Bureau representatives specifically noted they expected in-person training to be very rare in a hybrid environment.

By its own terms, this rationale fails. It creates a rule for all attorneys when, by its own admission, only “some” attorneys have duties that purportedly must be done in the office. Moreover, as with CE, the justification conflates the need to travel for litigation—often nowhere near a Bureau facility—with the need to be in-person at a Bureau facility. Further, as management in Legal is surely aware, the PD for attorneys in the Legal Division is divided into subsections that identify job duties that are specific to each office within Legal (e.g., Law and Policy, General Law and Ethics, and Litigation and Oversight). Thus, the rationale that all attorneys have the same PD and therefore must have the same WLD does not hold water because the PD itself identifies different job duties for attorneys in different offices. If, as required by the Remote Work Article, the Bureau reviewed the PD before determining WLDs, then it should be able to identify job duties specific to attorneys in each office that justify the denial of a Remote WLD. Further, as in ENF, the job duties Legal has identified are not generally completed at a Bureau facility. Litigation activities such as oral arguments, court and administrative hearings, and depositions almost always occur in the place where the case is filed or the witness or opposing party is located, not at a Bureau facility. And negotiations, mediations, and external meetings are usually conducted via teleconference or require travel to the location of the external party or stakeholder.¹⁰

* * *

These examples are only the tip of the iceberg. The required in-person duties identified for all or nearly all BUE deemed ineligible for a Remote WLD follow a similar pattern: the identified duties that have never required in-person attendance at a Bureau facility in the past; the justification conflates the need for in-person attendance at a Bureau facility with the need to travel to a temporary duty station; the identified duties may have been done in-person in the past, but upgrades to Bureau systems and changes in the way both internal and external parties do business have eliminated the need; and the denial was based, at least in part, on the grounds that the BUE must report to their assigned office more than four times per year.

III. CONCLUSION AND REQUESTED REMEDY

After seven months of contentious negotiations over ground rules and the substance of the Remote Work Article and some major concessions by both parties, the Union believed that the parties were both dedicated to implementing the Article fairly and in accordance with the agreed-upon terms. Instead, the Bureau gave division and office leaders broad discretion to determine WLDs for their staff and now attempts to justify these managers' denial of Remote work to a large number of BUEs using made-up criteria, false or inaccurate descriptions of BUEs' job duties, and dubious in-person requirements created after the designation process began. In doing so, the Bureau is attempting to accomplish through the implementation of the Remote Work Article that

¹⁰ It is worth noting that the specific job duties identified as reasons attorneys in the Legal Division were not given a Remote WLD are just as flimsy as the ones identified by Enforcement and conflate the requirement to perform work in-person at a Bureau facility and the need to travel for hearings, depositions, negotiations, and other duties.

which it failed to secure during bargaining. The Bureau's implementation of the WLD determination process in the Remote Work Article violates the letter and spirit of the Article, is an Unfair Labor Practice, and is so widespread that it amounts to a repudiation of its agreement with the Union.

- As remedies for the Bureau's rampant violations of the Remote Work Article, NTEU requests that:
- The Bureau complete the Workplace Location Designation process anew and determine WLDs for all BUE in compliance with the Remote Work Article;
- The Bureau permit all BUE to continue optional full-time situational telework until the Bureau completes the WLD determination process in compliance with the Remote Work Article;
- The Bureau cease and desist from disseminating false or misleading information about The Remote Work Article and all other CBA articles that were negotiated in conjunction with the Remote Work Article; and
- Any and all other appropriate remedies to which the Union may be entitled under law, rule, or regulation, including attorneys' fees.