



Consumer Financial Protection Bureau
NTEU Chapter 335

DATE: October 26, 2022

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

CC: Ari Taragin, Director, Labor and Employee Relations, Office of Human Capital and Nicole Heiser and Erin Noble, Assistant General Counsels for General Law & Ethics

FROM: Jasmine Hardy, Executive Vice-President

SUBJECT: Unfair Labor Practice – Repudiation of the Work Schedule Agreement

In accordance with the Collective Bargaining Agreement (“CBA”), Article 43, Section 6, the National Treasury Employees Union (“Union”), Chapter 335 hereby files this institutional grievance against the Consumer Financial Protection Bureau (“CFPB or Bureau”). The Union alleges a violation of the Work Schedules Article of the CBA, an unfair labor practice committed in violation of 5 U.S.C. § 7116 et seq., and any other applicable statutes, regulations, CBA articles, policies, laws or authorities. NTEU contends the Work Schedule Article precludes any division-wide or office-wide policies or blanket pronouncements about what types of schedules will be allowed or which flex days employees can take.

I. FACTS

On September 27, 2022, SEFL Assistant Directors Lorelei Salas sent an email entitled “CFPB Next Policies for Examiners”.¹ The email presented to employees restricted custom work schedules that the Union believes is in violation of the negotiated agreement between the parties.²

¹ Exhibit A

² See, Office of Supervision Examinations: Work Schedules Flexibilities for Regional Personnel During Supervisory Events, Section V Policy Statement(s), SEFL-SUP-01-2022, at p. 2.

II. ARGUMENTS

- A. The Bureau committed an unfair labor practice when it repudiated the agreement by issuing the CFPB Next Policies for Examiners.

Certain breaches may be so serious that they rise to the level of a repudiation. Under the Statute, it is bad faith bargaining for an agency to repudiate a negotiated agreement. The parties should not have to bargain over matters contained in or covered by an existing agreement between the parties if the subject matter of the change is “covered by” an existing agreement.³ The changes to conditions of employment created by the office-wide policy are covered by the existing agreement between the Bureau and NTEU, goes to the heart of the agreement and the collective bargaining relationship itself and, therefore, amounted to a repudiation of the obligation imposed by the agreement's terms. As such, the Bureau’s breach of its obligations imposed by the parties’ agreement and the nature and scope of the breach rises to the level of bad faith bargaining in violation of 5 U.S.C.7116(a)(1) and (5).

1. The policy places restrictions on work schedules that are available to all bargaining-unit employees, subject to supervisory approval and that should be based on the factors and procedures outlined in the parties’ agreement.

The FLRA has held that not every breach of contract is an unfair labor practice.⁴ But certain breaches may be so serious that they rise to the level of a repudiation. To determine whether a breach rises to the level of repudiation, the FLRA has held that there has to be a breach of obligation imposed by the parties’ agreement.⁵ Next, we must look to the nature and scope of the breach. The Authority has laid out a two-prong test to determine the nature and scope. First, was the breach clear and patent? Second, did the provision in question go to the heart of the parties’ agreement?⁶ Here, NTEU argues that the Bureau’s breach meets both prongs. The parties’ agreement state, in relevant part, work schedules must be based on the following factors:

1. Work requirements;
2. Ensuring adequate staff coverage during CFPB official business hours;

³ *U.S. Dept. of the Army Armament Research, Dev. & Eng’g Ctr. Picatinny Arsenal, N.J.* 56 FLRA 686, 689 (2000).

⁴ *Marine Corps Logistics Base, Barstow, Cal.*, 33 FLRA 626, 642 (1988).

⁵ *Dep’t of Def., Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 40 FLRA 1211, 1219 (1991).

⁶ *Id.* at 1218-19.

3. Whether the position of the employee requires hours that coincide with a supervisor's hours or assignment;
4. Equity among staff; and
5. Employee performance or conduct issues including, but not limited to, proper leave usage, adherence to leave procedures and whether an employee is on leave restriction.

The parties' agreement also affords employees with the ability to submit *their* requested schedule. Work Schedules §4(A) (emphasis added). In submitting their requested schedules for supervisory approval, employees must provide the days they will work each pay period, the number of hours they will work each day, and their Flex Days, if any. *Id.* Subsequently, the procedures outlined in the parties' agreement call for the supervisor to review an employee's request and determine whether to approve or deny the request and when denying a request for a regular work schedule, the supervisor must document the reason(s) for denial. Work Schedules §4(B). A copy of the documentation will also be retained by the Office of Human Capital (OHC). Work Schedules §4(C). Moreover, the agreement states within 30 days of completion of the one-time reset process referenced in the Remote, Telework, and Hybrid Program Article and annually at the end of the first quarter the year thereafter, OHC will provide NTEU records of all denials of employee requests for a regular work schedule made during the one-time reset process or, for regular annual submissions, all denials of employee requests for a regular work schedule made between January and December of the previous year. Work Schedules §4(D). The blanket pronouncement about what types of schedules will be allowed or which flex days employees can take in the email in question, go to the heart of the parties' agreement and the collective bargaining relationship itself as it forecloses employees from even requesting a custom schedule, forecloses the supervisory review of the employee's request, forecloses employees from obtaining documentation with the reason for the denial, and forecloses the Union from obtaining accurate records of all denial of employee requests. Thus, the breach is clear and patent and the provision(s) that were breached go to the heart of the agreement.

2. The policy places restrictions on work schedules without following proper procedures in direct violation of the Work Schedules Article.

Even if the policy restriction does not rise to the level of repudiation, it is in direct violation of the parties' agreement. Incorporating the allegations set forth above, the policy

directly conflicts with procedures outlined in the Work Schedules Article. Once again, the parties' agreement affords employees with the ability to submit *their* requested schedule, the supervisor to review an employee's request and determine whether to approve or deny the request, and if denying a request for a regular work schedule, the supervisor to document the reason(s) for denial, and to submit a copy of the documentation to the OHC. Moreover, the agreement also affords NTEU to obtain records of all denials of employee requests for a regular work schedule made during the one-time reset process or, for regular annual submissions, all denials of employee requests for a regular work schedule made between January and December of the previous year.

III. REQUESTED REMEDY

NTEU hereby requests the following remedies:

- The Bureau rescind any and all division-wide or office-wide policy announcements that directly conflict with the parties' agreement;
- The Bureau cease and desist from violating the Statute and/or Work Schedules Agreement;
- Notice to all employees about the violation;
- Permit an opportunity for all affected employees to submit their requested work schedule for consideration;
- Grant NTEU any and all other appropriate remedies to which it may be entitled under law, rule or regulation, including attorneys' fees.