



Consumer Financial Protection Bureau
NTEU Chapter 335

DATE: April 11, 2023

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 and Doug Wilson, Compensation Bargaining Team Member

SUBJECT: Institutional Grievance – Chief Human Capital Officer Tiebreaker Reviews

In accordance with the Collective Bargaining Agreement (“CBA”), Article 43, Section 6, the National Treasury Employees Union (“Union” or “NTEU”), Chapter 335 hereby files this institutional grievance against the Consumer Financial Protection Bureau (“CFPB or Bureau”). The Union alleges the Bureau committed an unfair labor practice and a prohibited personnel practice in violation of the Civil Service Reform Act of 1978 and its implementing regulations. 5 U.S.C. § 7114 (b)(4)(B); 5 U.S.C. § 7116 (a)(1), (5), and (8); and 5 U.S.C. § 2302(b)(12). In addition, the Union alleges the Bureau violated the parties’ “CFPB 2021 Compensation Agreement” (“Agreement”) and any other applicable statutes, regulations, CBA articles, policies, procedures, or authorities. NTEU alleges the Bureau intentionally withheld material information, during term negotiations, about the estimated implementation of new salaries for bargaining-unit employees.

I. BACKGROUND

On December 17, 2020, the parties reached a tentative agreement related to compensation. Specifically, the parties agreed on terms and conditions related to a Bureau-wide salary reset for all employees at the agency. Exhibit A. This agreement laid out the process by which NTEU and the Bureau would effectuate the salary reset, including a comprehensive review of bargaining unit employee work experience to ensure that equivalent work experiences were credited similarly.

Section 9 of the Agreement memorializes the experience crediting process the parties agreed to. The parties negotiated three steps: (1) initial crediting by the compensation team; (2) joint labor-management committee review; and (3) a tiebreak process by the Chief Human Capital Officer or their designee if the relevant committee did not reach a consensus on the crediting of a

particular experience. The tiebreak process in step 3 is limited to the review of the JCCs recommendations: “The CHCO or designee will review the two separate crediting recommendations and make a final crediting decision. The reason(s) for the decision will be made in writing and provided to the Committee and the employee.” Agreement, Section 9(E)(3).

Suffice to say, the salary reset has had its challenges. By the fall of 2022, it was clear that there were systemic problems with how the Bureau’s representatives on the examiners’ committees were crediting pre-Bureau experience.

On or before September 27, 2022, NTEU raised concerns about how the managers on the two examiner Joint Crediting Committees (“JCC”) were failing to apply the negotiated guidance. NTEU highlighted its concern that the management members of the two examiner JCCs were deviating from the job-specific guidance negotiated between the parties and how such deviation would increase the number of positions credited by the JCCs going to tiebreak. Exhibit B.

In response to NTEU’s concerns, the Bureau asked if NTEU’s members of the two examiner JCCs could first try again to resolve the dispute over the job-specific guidance between the committee members. These attempts failed.

Subsequently, the Bureau asked if NTEU could prepare a memorandum specifically identifying examples of where NTEU believed the management members of the two examiner JCCs departed from the job-specific guidance. Exhibit C.

On February 13, 2023, NTEU provided the Bureau with a memo describing the systemic violations of the jointly-negotiated crediting guidance that the managers on the examiner committees were committing. The memo included numerous examples of inconsistent and inaccurate crediting. Nonetheless, the Bureau did not attempt to correct its managers, and, despite numerous follow-ups, did not provide a response to NTEU until March, stating that they didn’t see any problems. Exhibit D.

The problems of inconsistent crediting were not limited to the examiner committees. The managers who made crediting decisions on the Miscellaneous 301 JCC committee did not credit bargaining unit employees consistently. Nor was management willing to deliberate with NTEU committee members after NTEU finished its initial crediting on February 28, 2023.

Moreover, management’s crediting decisions for the Misc. 301 committee often did not include any rationale for the crediting decision. Approximately 454 of the 2,042 positions credited by the committee had disagreements between management and NTEU. Out of those 454 positions, 333 of the positions lack any written rationale from the managers explaining the basis for their crediting.

The failures of the two examiner and Misc 301 committees led to the vast majority of tiebreaks. 88% of all of the positions that did not have a consensus crediting were from these committees. NTEU repeatedly asked management to deliberate over the Misc. 301 crediting disagreements and instruct the management members of the examiner committees to follow the negotiated guidance. The Bureau did nothing.

Instead, on March 14, 2023, the Bureau emailed NTEU with an “Update on Tiebreaker process” which stated, in relevant part:

Vickki Johnson, Deputy CHCO, will be serving as the CHCO’s designee for the purposes of Section 9(E)(3) of the December 17, 2020 compensation agreement (i.e., tiebreakers). **Given the extraordinary volume of tiebreakers and the limited time window in which they will need to be resolved** (in order for us to ensure that we meet the PP13 implementation date), the Bureau has determined that **Vickki will be provided additional management-side employees to conduct initial reviews** of the crediting recommendations from the JCC, the employee’s experience information, and the employee’s position description. **Those management-side employees will provide a recommended resolution to Vickki.** Vickki will still review the compensation team’s initial crediting, the crediting recommendations from the JCC, the employee’s experience information, the employee’s position description, and independently make final determinations on each individual tiebreaker. All final tiebreaker decisions will be rendered simultaneously, in part to ensure consistency across Vickki’s decisions.

Exhibit E (emphasis added).

After NTEU expressed concerns about this project and asked for additional details, the Bureau provided an additional response on March 21, 2023. The email from Labor Relations explained its actions by stating:

To be clear, it is simply not possible for a single individual to complete this **unforeseen** volume of work, without any assistance, in the limited time we have. **Requiring the CHCO designee to work completely independently, without any assistance or input, would require, at a minimum, several months of continuous work and would render a PP 13 implementation impossible.**

Exhibit F (emphasis added). Note: As described above, the volume of tiebreaks from the two examiners committees was not unforeseen, it was identified, repeatedly, by NTEU in 2022.

In the same email where the Bureau claimed that “it is simply not possible for a single individual” to complete the agreed-upon tiebreak work, the Bureau claimed that “CFPB is **in no way further delegating** the tiebreaker decision maker’s authority or decisions.” *Id.* (emphasis added). Yet in the same email the Bureau claimed that:

Vickki will review the initial crediting from the Comp Team, crediting recommendations from the JCC, the employee’s experience information, the employee’s position description, the recommended resolution, and the recommended reason(s) for the recommended resolution.

and

Vickki will independently reach a final determination on crediting for each individual tiebreaker.

Id.

Nothing in the email attempted to explain how Vickki both (1) could not “complete” the tiebreaks by herself; and yet (2) would be making an “independent[.]” determination for all tiebreaks. *Id.*

After receiving this email, NTEU discussed this scheme on March 27, 2023 with the Bureau during its regular weekly meeting about pay reset issues. When asked to explain the obvious inconsistency in its position that the designed tiebreaker could not possibly complete her work without the aid of additional management-only reviewers and yet would still “independently reach a final determination,” management had no answer. Instead, the Bureau representatives merely insisted that the email said what it said.

At the same meeting, NTEU also asked the Bureau what training the new manager reviewers would receive before engaging in their crediting review. For comparison, the Bureau and NTEU members of the six JCCs all received substantial, multi-day training about the crediting process, the negotiated crediting guidance, and the risks of implicit bias. The Bureau told NTEU that these new managers would not receive any training but would be provided the written guidance the parties negotiated in 2021.

On March 29, 2023, the Bureau canceled the weekly salary reset meeting with NTEU despite NTEU’s requests to continue meeting to discuss the numerous outstanding issues, including the proper resolution of experience crediting under the contract. NTEU identified many outstanding issues we continue to need to discuss, including the crediting status of bargaining unit employees who switched career ladders before May 2022.

II. ARGUMENTS

A. The Bureau violated the 2021 Comp Agreement and committed an unfair labor practice by creating a second-layer of management recommendations to determine the crediting tiebreak process for bargaining-unit employees.

The Bureau cannot alter the terms of the 2021 Comp Agreement’s crediting review process without NTEU’s consent. NTEU has been warning the Bureau for six months that the crediting process was not working for certain JCCs. But instead of working with the union to resolve the issues, the Bureau decided to ignore the terms of the 2021 Comp Agreement and taint the entire tiebreak process with extraneous management “recommendations.” This is not allowed by the Agreement and needs to stop immediately.

There are more tiebreaks than expected when the salary reset process was first negotiated. But the solution is not for management to create additional crediting recommendations that redo the role of JCC managers and provide additional, unavoidably prejudicial recommendation to the

CHCO's designee. The Agreement gives the CHCO or their designee the right to select between the Bureau JCC and NTEU JCC's crediting recommendations for bargaining unit employees' work experiences where the relevant JCC was unable to reach consensus. This is the bargained-for process in the Agreement. NTEU has expressed a willingness to explore mediation or other dispute resolution mechanisms to fix the JCC crediting issues. But the solutions must be negotiated.

As a threshold matter, the Bureau's explanation for what it is doing is incoherent. The Bureau told the NTEU that it created this extra level of review because "it is simply not possible for a single individual to complete" the tiebreak process. Yet the Bureau also says that the Deputy CHCO will come to an independent determination for each crediting dispute. Both of these assertions cannot be true because for the Deputy CHCO to make an "independent" determination requires the same amount of work. If she is reviewing all of the information that the Bureau says she will be reviewing, there's literally no time saved by giving new managers the opportunity to provide an additional recommendation.

If the Deputy CHCO defers to the new managers' recommendations she will be abdicating her responsibility as tiebreaker. Management insists that this is not the case, but that raises the question of why do this second review if the Deputy CHCO isn't going to give these recommendations deference? If the recommendations aren't supposed to be influential, why do them?

Moreover, these recommendations, coming from handpicked managers, cannot but have additional weight in the process. To take just one example, Mark Samburg is Deputy Director Martinez's chief of staff and nominally running the pay reset process this year. He is now also one of the managers reviewing the tiebreaks. It is hard to imagine that his "recommendations" won't be given deference by Deputy CHCO Johnson.

The risk of such deference is particularly acute for those hundreds of tiebreaks where managers on the Misc. 301 JCC failed to provide any rationale for their crediting decision. It is unfair for management to now take a second crack at drafting a rationale to justify their crediting decision. It is a violation of the Agreement for management to buttress its own shoddy work during the tiebreak process. The Bureau needs to cease violating the Agreement and adhere to the bargained for process. If it wants to propose solutions that vary from the Agreement, it needs to bargain with us.

Next, the Bureau pointed to their right to assign work to these management-side employees as a basis for formulating a second-layer of management recommendations. This argument fails for several reasons. First, managements' assertion of its statutory right to assign is untimely. The agency failed to raise this argument during the bargaining of ground rules but now attempts to advance this argument after a contract has been fully executed. The agency has effectively waived its right to assign or bargain by agreeing to do so in the Agreement.¹ Once

¹ If the agency is exercising a management right, the effects of the agency's action may be within the duty to bargain, see e.g., Pension Benefit Guaranty Corp., 59 FLRA 48, 50 (2003).

parties have reached agreement on a permissive subject, it is binding on the parties and agency heads may not disapprove permissive topics upon review under section 7114 (c).

Second, the basic tenets of contract interpretation require an arbiter to apply the “four corners test”. The possible fact that a party to a contract bargained foolishly, over provisions where no obligation existed, should not be taken into consideration. Even assuming *arguendo* that the agency’s right to assign is relevant in this case, which it is not, if upheld the parties’ Agreement would have been rendered worthless. The agency could essentially assign any employee work that would directly contradict or fundamentally undermine any agreement entered into between the parties and the Union would not have any recourse.

Third, the Bureau was a party that wrote the applicable provision and therefore had the opportunity to make the contract very clear.

And finally, the contract is unambiguous. Even if the contract may be burdensome to a party, it should still be enforced.

B. The Bureau committed a prohibited personnel practice when it unilaterally made a decision concerning pay that resulted in an unfair labor practice.

Incorporating the allegations set forth above, the Bureau’s decision to insert an additional management-side employees to conduct initial reviews of the crediting recommendations from the JCC, the employee’s experience information, and the employee’s position description is a personnel action concerning pay. The section of the Agreement in question is regarding the salary review and reset process the parties established. The contract set forth rules the parties would adhere to administer the salary review and reset. If allowed to proceed, employees would not receive fair and equitable treatment in terms of the salary reset for the reason stated above. Employees would not receive equal pay for work of equal value. It would subject the additional management-side employees and Ms. Johnson from maintaining high standards of integrity and conduct. Lastly, it would fail to protect employees against arbitrary action from the second-layer of management recommendations. The Agreement and its provisions directly concern these merit system principles that were negotiated between the parties. The Union believes the Bureau’s actions or inaction was unwarranted and unjustified and therefore should entitle all affected employees to back pay under the Back Pay Act.

III. REQUESTED REMEDY

NTEU hereby requests the following remedies:

- The Bureau cease its unilateral manager review of the JCC tiebreak process;
- Rescind any tiebreak decisions by the Deputy CHCO that used this process and accepted management's lower crediting recommendations;
- Identify a new tiebreaker to make an actually independent crediting decision untainted by the new manager review and recommendations;
- Provide notice to all employees about the violations;
- Complete relief, including lost compensation, interest and all other benefits of employment resulting from the agency's violations; and;
- Grant NTEU any and all other appropriate remedies to which it may be entitled under law, rule or regulation, or authorities, including attorneys' fees.