Federal Mediation and Conciliation Service

ARBITRATION

In the matter of: Patent Office Professional Association, POPA Agency, and United States Patent and Trademark Office, USPTO Union.	))))))))))	FMCS No. 250707-07732 Gr: telework non-Patents employees Gr. Filed: May 29, 2025 Hearing: Dec. 2 and 3, 2025 Briefs: February 11, 2026 Award: June 8, 2026

Before: Arbitrator Blanca E. Torres

AWARD

FOR THE AGENCY: Jennifer A. Williams
Ashleigh L. Ferris
U.S. Patent and Trademark Office

FOR THE UNION: Richard Hirn
Patent Office Professional Association

ISSUE

The parties were unable to agree on the issues in this matter. Having considered the grievance, the record, and the parties' arguments, I frame the issues as follows:

1. Whether USPTO violated 5 U.S.C. § 7116(a)(1), (5), or (7), by implementing a Presidential Memorandum.
2. Whether USPTO violated 5 U.S.C. § 7116(a)(1), (5), and/or 5 U.S.C. § 5711 and/or provisions of the parties' Collective Bargaining Agreement at Article 2 and telework MOU procedures and related TEAP procedures when it implemented the May 19, 2025 telework changes affecting bargaining unit employees.
3. Whether USPTO's actions were consistent with applicable statutes governing telework and remote work programs or whether they violate any of the Congressional telework program statutes raised by the Association.
4. If violations occurred, what shall be the appropriate remedy?

RELEVANT FEDERAL STATUTES

5 U.S.C. § 7106 Management Rights

(a) Subject to Section (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

* * *

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

procedures which management officials of the agency will observe in exercising any authority under this section; or

appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 7116 Unfair Labor Practices

(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;

* * *

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

* * *

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed;

5 U.S.C. § 5711 Authority for Telework Travel Expenses Program

(f)(4) Nothing in this section is intended to limit the authority of any agency to conduct test programs.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 2 - PRECEDENCE OF LAW, REGULATION, AND OTHER MATERIAL

Section 1: Relationship of Law and Regulations

In the administration of all matters covered by this Agreement. The Agency, the Association, and bargaining unit employees are governed by:

Existing and future laws;

Government-wide rules and regulations in effect on the effective date of this Agreement, and those Government-wide rules and regulations issued after the effective date of this Agreement that do not conflict with this Agreement;

USPTO rules and regulations that do not conflict with this Agreement; and

As explained in Section 2 below, any Department of Commerce (DOC) rules and regulations applicable to USPTO employees that do not conflict with this Agreement.

ARTICLE 4 - MANAGEMENT RIGHTS AND OBLIGATIONS

Section 1: Reserved Rights

> Management officials of the Agency shall retain the right:
>
> To determine the mission, budget, organization, number of employes, and the internal security practices of the Agency.
>
> To hire, assign, direct, layoff and retain employees, or to suspend, remove, reduce-in-grade or pay, or take other disciplinary action against employees;
>
> To assign work, to make determinations with respect to contracting out, and to determine the personnel by which operation shall be conducted;
>
> * * *

E. To take whatever actions may be necessary to carry out the mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

procedures which management officials of the agency will observe in exercising any authority under this section; or

appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

ARTICLE 16 - MIDTERM BARGAINING

Section 9: Emergency or Overriding Exigency

When the Agency is required to implement pursuant to 5 U.S.C. § 7106 (a)(2)(D) or as an overriding exigency, it shall give written notification, including justification, to the Association as early as possible. If bargaining is not complete by the implementation date, the parties will continue to bargain until the issues are resolved.

INTRODUCTION

The parties stipulated the following numbered facts.

Bargaining Unit, Collective Bargaining Agreement and Memoranda:

1. The Patent Office Professional Association ("POPA" or "Association" or "Union) is the certified exclusive representative of the following bargaining unit:

Included: All professional employees at USPTO other than Trademark professionals.

Excluded: Management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, Trademark professionals, non-professionals, and supervisors.

This definition is set forth in the Department of Commerce, U.S. Patent and Trademark Office and Patent Office Professional Association, Nationwide Unit Description dated August 6, 1996. Other relevant documents have clarified the unit.

2. POPA and the USPTO are parties to a Collective Bargaining Agreement ("CBA") effective December 11, 2024. (Joint Exhibit 1).

3. POPA, the National Treasury Employees Union ("NTEU"), Chapter 243, NTEU Chapter 245, and the USPTO are parties to a Memorandum of Understanding ("MOU") concerning the Telework Enhancement Act Program ("TEAP"), dated March 23, 2022 (Joint Exhibit 5).

4. POPA and USPTO are parties to an MOU regarding the Office of Governmental Affairs ("OGA") Telework Program, dated January 17, 2024 (Joint Exhibit 10).

5. POPA and USPTO are parties to an MOU regarding the Office of Chief Financial Officer ("OCFO") and Office of Chief Information Officer ("OCIO") Telework Program, dated March 3, 2022 (Joint Exhibit 6). [OCIO currently employs bargaining unit members who have recently lost their collective bargaining rights pursuant to a presidential order.]

6. POPA and USPTO are parties to an MOU regarding the Office of General Counsel ("OGC") Telework Program, dated March 22, 2022 (Joint Exhibit 8).

7. POPA and USPTO are parties to an MOU regarding the Patent Trial and Appeal Board ("PTAB") Telework Program, dated March 24, 2022 (Joint Exhibit 7).

8. POPA and USPTO are parties to an MOU regarding the Office of Policy and International Affairs ("OPIA") Telework Program, dated October 25, 2022 (Joint Exhibit 9).[1]

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[1] The Office of the Chief Financial Officer, Office of Government Affairs, Office of Policy and International Affairs, and Patent Trial and Appeals Board still have collective bargaining rights, but the employees have lost their telework privileges. (Only the Office of the Chief Information Officer, OCIO, employs Patents bargaining unit members who lost their bargaining rights; this matter is pending in Court and is unrelated to this case. However, if the Court restores bargaining rights, the outcome of this grievance would apply to OCIO bargaining unit members. Similarly, the Office of the General Council, OGA, does not presently employ bargaining unit staff, but this award would apply to future hires at OGC. Tr. p. 11.)

USPTO Return-To-Office Directive for Non-Patents Employees:

9. On January 20, 2025, the President issued a *Return to In-Person Work* Memorandum stating,

> Heads of all departments and agencies in the executive branch of Government shall, as soon as practicable, take all necessary steps to terminate remote work arrangements and require employees to return to work in-person at their respective duty stations on a full-time basis, provided that the department and agency heads shall make exemptions they deem necessary.
>
> This memorandum shall be implemented consistent with applicable law. (Joint Exhibit 11).

10. On January 20, 2025, the Office of Personnel Management (OPM) issued *Guidance* on the Presidential Memorandum Return to In-Person Work (Joint Exhibit 12).

11. On February 3, 2025, OPM issued *Guidance on Collective Bargaining Obligations* in connection with Return to In-Person Work (Joint Exhibit 13).

12. On May 19, 2025, the USPTO provided notice to POPA that telework eligibility for all non-Patents POPA bargaining unit employees was limited to "situational telework" only, except for positions already ineligible for telework ("Telework Eligibility Notice") (Joint Exhibit 14).

13. On May 21, 2025, USPTO notified affected non-Patents employees that all non-Patents telework positions were eligible for "situational telework" only as determined by USTPO (Joint Exhibit 15). Employees would generally be required to report for in-person work on a regular basis, with exemptions for those covered by a reasonable accommodation (RA) or certain military spousal authorities. Employees would receive at least 30 calendar days advance notice prior to their report date, and notices would be sent on a rolling basis as office space became available.

14. The May 21, 2025 notification further informed employees that those living within 50 miles of USPTO headquarters would report to the main campus in Alexandria, Virginia (Joint Exhibit 15), while those within 50 miles of a USPTO Regional Office would report to their local Regional Office. For TEAP participants who were "hoteling" and not within 50 miles of a

USPTO office, USPTO was seeking office space closer to their location. If there was insufficient space for all impacted employees to return, some may be approved to continue working remotely until space became available.

15. On May 29, 2025, POPA timely filed an Association Grievance (Joint Exhibit 2).

16. On June 20, 2025, USPTO issued its decision, denying the grievance (Joint Exhibit 3).

17. On July 3, 2025, POPA timely invoked arbitration (Joint Exhibit 4).

Executive Orders 14,251 and 14,343:

18. On March 27, 2025, the President issued Executive Order 14,251: *Exclusions from Federal Labor-Management Relations Programs* ("Exclusions Executive Order").

19. The President issued Executive Order 14,343 of August 28, 2025, *Further Exclusions from Federal Labor-Management Relations Programs* ("Further Exclusions Executive Order").

20. On August 28, 2025, USPTO notified POPA that, following the issuance of the *Exclusions* and *Further Exclusions* Executive Orders, it would no longer recognize POPA as the exclusive representative of employees in OCIO.

21. On September 2, 2025, POPA filed a complaint in the District Court for the District of Columbia, *National Weather Services Organization et al. v. Donald J. Trump et al.*, Civil Action 25-2947, challenging the August 28, 2025 notice and seeking declaratory and injunctive relief against implementation of the Executive Orders for USPTO OCIO. This matter is still pending before the U.S. District Court.[2]

PROCEDURAL RULING

Union Exhibit 9 is a *"Side Agreement between the United States Patent and Trademark Office (USPTO) and the Patent Office Professional Association (POPA) to Retain Memorandums*

[2] Executive Orders 14,251 and 14,343 are not before me for adjudication.

of Understanding (MOUs).” At hearing, USPTO objected to Union Exhibit 9 arguing it could not be litigated as a separate violation because it was not raised in the grievance. Article 14, Section 4.B limits arbitration hearings to issues raised in the grievance. The Union had stated on the record that the exhibit was being offered solely to corroborate the expiration date of MOUs that were already in the record. Tr. 209. Nevertheless, in its proposed issues submitted at hearing, the Union alleged Exhibit 9 constituted a derivative violation.

Because Exhibit 9 was not raised in the grievance, pursuant to Article 14, Section 4.B it cannot be addressed as a “derivative violation” at hearing. The Agency does not dispute the accuracy of Exhibit 9 and the relevant MOUs are in evidence as joint exhibits. Accordingly, I reaffirm my ruling admitting Union Exhibit 9 for the limited purpose of corroborating the expiration date of the MOUs. Admission for this limited purpose does not contravene Article 14, Section 4.B.

FACTUAL BACKGROUND

The American Inventors Protection Act of 1999 established the USPTO as an agency within the Department of Commerce and granted the USPTO control over budget and personnel matters. In areas where the USPTO has issued policy or regulations, those policies and regulations govern USPTO employees. See CBA, Article 2, section 2: Department of Commerce Regulations and Policies. This grievance concerns policies and procedures negotiated by USPTO concerning telework and remote work.

Telework has existed at USPTO since the 1990s. The parties agreed to a telework agreement for non-Patents employees as early as 2008. In 2017 the parties agreed to an arrangement that allowed non-Patents eligible employees a limited right to telework. In 2020, during the COVID epidemic, telework was mandatory and in 2022 it became voluntary. Since 2022, a majority of USPTO employees have enjoyed telework privileges in varying degrees.

In 2021, Congress promulgated the Telework Enhancement Act Pilot Program (TEAPP), a pilot program for “remote” telework. On March 23, 2022, pursuant to the Telework

Enhancement Act (TEA),[3] the parties negotiated an MOU called the *Telework Enhancement Act Program* (TEAP). TEAP will be described more fully below.

The telework and remote work programs extend to several business units within the USPTO. All employees may volunteer for telework status. The parties negotiated a memorandum of understanding (MOU) for each business unit on the subject of telework. Each MOU lists the types of telework available and gives the requirements for eligibility to enter the telework programs. The MOUs specify that the employee's supervisor will make eligibility determinations on an annual basis and will notify the union of the names of the applicants and the type of telework assigned. Employees are permitted to withdraw from telework upon giving notice to their supervisor.

The MOU for the Office of the Chief Financial Officer (OCFO), for example, defines the various levels of telework that are available.

> "*Situational*" telework is described as episodic, intermittent and ad-hoc telework. Supervisory approval is required each time the employee teleworks and the participant's official worksite/official duty station is the USPTO office. The "official worksite" is the location where an employee regularly performs their assigned duties. It may be a USPTO regional office or a primary alternate worksite (usually at home). JX. 6, 220-221. Situational telework is defined as performing assigned duties at an approved alternate worksite (usually at home) occasionally and on a case-by-case basis. "There is no regular schedule for situational telework. Jt. 6, JX221.
>
> "*Routine*" telework allows employees to perform assigned duties at an approved alternate worksite within a 50-mile radius routinely, on an approved ongoing and regular telework schedule, teleworking one to four days a week at the alternate worksite [usually at home]. The employee must report to work at least one day per week, or more if they are eligible for more days.

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[3] 5 U.S.C. § 5711(f)(4).

There is also "*routine: hoteling*" where employees relinquish their USPTO designated office and use temporary ("hoteling) office space when reporting to the office two times biweekly. JX 6, 225-226.

"*Remote*" telework allows employees to perform assigned duties at an approved alternate worksite within a 50-mile radius, for five days per week without a requirement to routinely report to the USPTO office. If the participant decides, for their convenience, to (1) change their official duty station/official worksite from the USPTO office to the city/town and state of their primary alternate worksite, usually the participant's home, and, (2) in exchange waives any travel costs when reporting to a USPTO office - they will be eligible for permanent remote work in TEAP status.

The telework and remote work programs at USPTO have been successful with high participation and increased productivity. See "*2022 Annual Telework Report by USPTO*" (Telework was touted as "a tool that helps support the agency's mission and achieve agency's goals.") Union Ex. 7, p. 5. See also, "*2023 Annual Telework Report by USPTO*" ("At the end of 2023, over 96 percent of *eligible employees* had an approved telework agreement and 86 percent of the agency was enrolled in full time telework.") Union Ex. 8, p.3.

This reduced the need for real estate space and saved the agency millions of dollars. Telework also saved employees time and money spent on travel. It is undisputed that telework has resulted in more productivity, high employee retention, and high employee morale and in savings for the government. In 2023, there were 4,507 employees in TEAP status and 12,894 total teleworkers. Of the 156 employees represented by the Association in this grievance, 40 were in TEAP, 63 were in 50-mile remote status; and 53 were in routine telework.

On January 20, 2025, the President issued a *Return to In-Person Work* Memorandum. On January 20, 2025, the Office of Personnel Management (OPM) issued *Guidance* on the Presidential Memorandum Return to In-Person Work (Joint Exhibit 12). On February 3, 2025, OPM issued *Guidance on Collective Bargaining Obligations* in connection with Return to In-Person Work (Joint Exhibit 13).

On May 19, 2025, the USPTO provided notice to the Association that telework eligibility for all non-Patents POPA bargaining unit employees was limited to "situational telework" only, except for positions already ineligible for telework ("Telework Eligibility Notice") (Joint Exhibit On May 21, 2025, USPTO notified affected non-Patents *employees* that all non-Patents telework positions were eligible for "situational telework" only as determined by USTPO (Joint Exhibit 15). Employees would generally be required to report for in-person work on a regular basis, with exemptions for those covered by reasonable accommodation or certain military spousal authorities. Employees would receive at least 30 calendar days advance notice prior to their report date, and notices would be sent on a rolling basis as office space became available.

On May 29, 2025, POPA timely filed an Association Grievance. On June 20, 2025, USPTO issued its decision, denying the grievance (Joint Exhibit 3). On July 3, 2025, POPA timely invoked arbitration (Joint Exhibit 4). A hearing was held on December 2 and 3, 2025.

POSITIONS OF THE PARTIES

Union's position:

POPA challenges the USPTO's May 19, 2025 "Notice of Change to Eligible Positions," as a violation of contractual provisions that established telework programs in several business sections of the Agency. Included in five Memoranda of Understanding (MOUs) negotiated by the parties, procedures, definitions, responsibilities, and duties by management and the participant to telework.

Office of Chief Financial Officer and Office of Chief Information Officer

(March 3, 2022)

Office of General Counsel (March 25, 2022)

Patent and Trademark Appeals Board (March 24, 2022)

Office of Policy and International Affairs (October 25, 2022)

Office of Government Affairs (January 17, 2024)

First, the Union points out that the Presidential Order violates the Labor Relations Act at 5 U.S.C. § 7116(a)(7) which prohibits enforcement of any rule or regulation that conflicts with an existing collective bargaining agreement if the agreement was in effect before the rule or regulation was prescribed, and the memo conflicts with the rule or regulation. POPA argues that USPTO's reliance on the President's "Return to In-Person Work Memorandum" as the basis for its actions contravenes § 7116(a)(7) because the telework agreements (MOUs) between the parties were already in effect and conflict with the Presidential Order.

The Union further argues that the Agency's May 19, 2025 notice stating that the telework agreements between POPA and USPTO "are unlawful and cannot be enforced" constitutes repudiation of the telework agreements, an unfair labor practice in violation of 5 U.S.C. §7116(a)(1) and (5). POPA states that USPTO repudiated the telework MOUs by declaring the agreements unenforceable and eliminating negotiated routine and remote telework programs through unilateral action.

The Union argues that the MOUs do not authorize wholesale cancellation of the telework program by one party. The Union relies on the terms of the MOUs which contains procedures for teleworking including annual assessments by supervisors, which they say, was clearly not done here. Further, the long history of telework at USPTO, the fact that the TEAP telework program is sanctioned by Congress and the success of the program support continuation of the telework program.

The Association contends that USPTO eliminated telework for all positions, inconsistent with the MOUs' requirement for individualized, position-by-position assessments for eligibility. Also, USPTOs termination of telework for TEAP participants violates the March 23, 2022 TEAP MOU. This MOU was negotiated by the parties establishing the Congressionally mandated joint labor/management Oversight Committee to manage the TEAP telework program. The parties agreed in this MOU that the Agency would not eliminate any position on TEAP telework status without bargaining to the extent allowed by law. The Union argue that USPTO violated the TEAP MOU and 5 U.S.C. § 5711(f)(4), which states that "ineligibility" may be made only by

bargaining through the joint labor-management Oversight Committee, and not by the unilateral action of one party.

The Union does not dispute Agency claims that under the terms of the negotiated MOUs, management has the right to make annual individualized assessments and determine telework eligibility. However, there is no evidence that the Agency made annual assessments prior to its determination that a change to only situational telework was necessary. The Union proposes that the Agency's assertion is a pretext to hide the fact that management implemented the Presidential Memorandum. This is contrary to law which disallows implementation of a rule of regulation that conflicts with a collective bargaining agreement that is already in effect.

The Association argues that the USPTO violated its duty to bargain in good faith under §7116(a)(1) and (5) and Article 16, section 9 of the CBA, by implementing the telework changes before bargaining. The Union states that management presented the Union with a fait accompli and thus the union had no duty to bargain, as it would have been futile since the change in telework was already implemented.

The Association disputes Agency's claim that exigent circumstances required immediate implementation of the new policy without first bargaining, stating that this is unsupported by any facts. The Union could have been required to bargained under Article 16, Section 9 of the collective bargaining agreement, "mid-term bargaining" which allows the parties to finish bargaining after implementation if there had been exigent circumstances. However, as there was no exigency that would warrant bargaining under the terms of Article 16, Section 9, the Association argues that there was no duty to bargain.

Agency's position:

The USPTO states the legal authority for implementing the change is 5 U.S.C. §7106(a), the Management Rights clause. The Agency relies on statutory management rights under 5

U.S.C. §7106(a) to make substantive determinations regarding the amount of telework the agency authorizes and which positions will be eligible for telework.

Also, management has a right under the TEAP Operating Procedures and all the MOUs to determine the eligibility of the employees for telework and to determine whether there is any telework available at all, and/or whether telework is best for the Agency.

In its June 25, 2025 grievance response, USPTO stated that determining telework eligibility for specific positions is a lawful exercise of management rights. Limiting non-Patents POPA bargaining-unit employees to "situational telework" is also a management right authorized by 5 U.S.C. § 7106(a), including the right to determine the Agency's mission and organization; direct employees; and assign work.

The Agency states that the right to determine its mission includes choosing where it provides services, conducts operations, and maintains duty stations. Citing *Int'l Fed. of Prof. and Tech. Engineers & U.S. Dep't of the Navy*, 74 F.L.R.A. 59 (2024). USPTO also claims that management has the statutory authority to decide when, to whom, and which positions work is assigned. *See Int'l Ass'n of Fire Fighters & U.S. Dep't of the Navy*, 59 F.L.R.A. 832 (2004); *Veterans Admin. Hosp. & AFGE*, 11 F.L.R.A 193 (1983).

Part of USPTO's business-related reason for wanting non-Patent POPA bargaining unit employees in the office is the increased collaboration, teamwork, and interaction. See *Dep't of the Treasury, Office of the Comptroller of the Currency*, 68 FLRA 835 (FLRA 2015), where the agency's reason for wanting an employee present was their desire for "collaboration, teamwork, and interaction" and the Authority found this to be "a rational, business-related reason for its decision." The USPTO asserts that the new telework eligibility levels set by Management help employees perform well and meet the Agency's primary mission.

Further, the MOUs provide that if USPTO determines that work duties can *only* be performed effectively in person on a regular basis, the position will not be eligible for routine or full-time telework. The Agency insists that it has exercised its valid authority to find all these positions ineligible for routine or full-time telework.

USPTO also opposes any requirement that the Agency provide a minimum telework level, or preserve eligibility for certain positions or individuals, as this would negate management's ability to exercise its statutory rights to ensure that telework does not negatively impact Agency operations.

The Agency disputes POPA's assertion that only the joint labor-management Oversight Committee may change the terms of TEAP and insists that such involvement is not required here. The Agency argues that the TEAP MOU is based on a change to legislation, which establishes that USPTO has permanent authority to allow employees to live and work in geographically diverse areas for their convenience, in exchange for waiving reimbursement for travel expenses. *See* 5 U.S.C. § 5711(f)(3).

Management argues that because TEAP is included in each business unit MOU telework provisions, and the MOUs have negotiated language regarding eligibility determinations, USPTO has no additional obligation to make eligibility changes through the TEAP Oversight Committee. While the Agency may allow employees to participate in a TEAP program, the USPTO has the authority to make this determination to grant eligibility or not.

The USPTO argues that the union did not request midterm bargaining under Article 16, section 9 "Midterm Bargaining." This contract provision states that if the Agency implements an action *due to an emergency or overriding exigency*, it is required to give written notification, including justification, to the Association as early as possible. It allows that "if bargaining is not complete by the implementation date, the parties will continue to bargain until the issues are resolved."

The Agency also argues that there was an overriding exigency to terminate routine telework and remote work, once management determined that these changes were necessary for the proper functioning of the Agency. Agency contends that a delay in implementation would have impeded its ability to effectively and efficiently carry out its mission.

Furthermore, the Agency states that the President's Order carries the weight of a government-wide rule and claims that management can immediately implement government-

wide rules that do not conflict with lawful CBA provisions *after* providing notice of the change and an opportunity to bargain after implementation. (p. JX193.)

Furthermore, the Agency requested bargaining proposals for impact and implementation bargaining. To date POPA has not provided any proposals. Therefore, the Agency claims that POPA waived its right to bargain.

DISCUSSION AND ANALYSIS

Presidential Memorandum:

The Union argues that the President's Memorandum constitutes a government-wide rule or regulation that contravenes the collective bargaining agreement. USPTO argues to the contrary that the President's Memorandum constitutes a government-wide rule or regulation that the Agency was obligated to implement.

Under 5 U.S.C. § 7116(a)(7), an agency commits an unfair labor practice if it enforces "any rule or regulation ... which is in conflict with any applicable collective bargaining agreement, if the agreement was in effect before the date the rule or regulation was prescribed." The Presidential Memorandum itself expressly states that it "shall be implemented consistent with applicable law." Applicable law includes 5 U.S.C. § 7116(a)(7), and the parties' negotiated agreement.

Article 2, Section 1.B of the parties' collective bargaining agreement, entitled *Relationship of Law and Regulations*, provides that the Agency, the Association, and bargaining unit employees are governed by existing and future laws; and

> B. Government-wide rules and regulations in effect on the effective date of this Agreement, and *those Government-wide rules and regulations issued after the effective date of this Agreement that do not conflict with this Agreement.* (emphasis added).

The Authority has consistently held that executive orders are treated as government-wide rules or regulations for purposes of the Statute and may not be enforced where they conflict with preexisting collective bargaining agreements. *See* U.S. Dep't of Veterans Affairs, 72 FLRA 287,

289 (2021); *Amer. Fed'n of Gov't Emps., Nat'l Citizenship & Imm. Servs. Council 119*, 73 FLRA 490, 492 (2023).

The telework MOUs at issue here became effective in 2022 and 2024, well before issuance of January 20, 2025 Presidential Memorandum. The MOUs contain negotiated terms governing telework and remote work arrangements for bargaining-unit employees. The Agency's directive requiring employees to return to in-person work and limiting telework to a narrow "situational" framework plainly conflicts with those negotiated provisions.

Accordingly, because the telework MOUs were in effect before issuance of the January 20, 2025 Memorandum, and because USPTO implemented policies that directly conflicted with these agreements, I conclude that USPTO's implementation of the return-to-office directive violates 5 U.S.C. § 7116(a)(7) and Article 2, Section 1 of the CBA.

This conclusion, standing alone, can resolve this case. However, both parties have made arguments concerning management rights and duty to bargain, among others. Therefore, I will address these alternative arguments.

Impact And Implementation Bargaining - Exigent circumstances:

Article 16, section 9 allows that when the Agency is required to implement pursuant to 5 U.S.C. § 7106(a)(2)(D) or as an *overriding exigency*, it shall give written notification, including justification, to the Association as early as possible. "If bargaining is not complete by the implementation date, the parties will continue to bargain until the issues are resolved."

The Agency claims that there were exigent circumstances warranting immediate implementation of the Agency's decision. USPTO relies upon Article 16 alleging that overriding exigencies required immediate implementation. However, no facts were presented in support of this assertion. The challenged implementation occurred several months after issuance of the Presidential Memorandum, undermining the Agency's claim of emergency circumstances requiring immediate action. I find that no exigent circumstances have been proven in this case.

Duty to bargain in good faith when exercising a Management right, and fait accompli:

This Arbitrator does not dispute that management retains substantial authority under 5 U.S.C. § 7106(a). However, the exercise of those rights remains subject to the bargaining obligations, negotiated procedures, and appropriate arrangements preserved by § 7106(b). Accordingly, the relevant question is not whether USPTO possesses management rights, but whether the Agency exercised those rights in a manner consistent with its contractual and statutory obligations.

FLRA precedent supports the premise that an agency must engage in impact and implementation bargaining with the Union *before* implementing management rights. Even when an agency lawfully implements a management right, the failure to engage in impact bargaining before implementing the change is a violation of law.

Agency argues that POPA waived the right to implementation bargaining over the change in telework because USPTO gave notice and opportunity to bargain over the back-to-work order, but POPA failed to respond. However, in its May 19 notice to the Union, Management stated that it would "immediately implement the return to office initiative ... and any bargaining that is not concluded by the return to office date will be completed post implementation." Joint ex. 14, p. 3 (JX 434). Two days later, employees received the notice canceling remote telework.

A union must be given notice sufficiently in advance of implementation to permit meaningful bargaining. The duty to bargain in good faith arises *before* an employer changes conditions of employment. Post implementation bargaining does not satisfy the duty to bargain under section § 7116(a)(5). A union must be given notice sufficiently in advance of implementation to permit meaningful bargaining. Changes may not be implemented until bargaining is complete. *NLRB v Katz*, 369 U.S. 736 (1962).

The obligation to request bargaining, and the issue of waiver, is not triggered if the change in employment conditions is presented as already having been decided upon. The Authority has found that "when an agency gives the impression that it is futile for the union to attempt negotiations over its proposals, the agency has failed to engage in good faith bargaining in violation of the Statute. *Fed. Bureau of Prisons Fed. Corr. Inst. Bastrop, Texas*, 55 FLRA 848, 855 (1999).

Further, the fact that the Association filed a grievance, does not result in a waiver of the right to bargain. *Dep't of Homeland Sec., Customs & Border Prot*., 64 FLRA 916, 921 (2010) citing *POPA v. F.L.R.A*., 872 F.2d 451 at 455-56 (D.C. Cir 1989). Here, I find that the Association has not waived its right to bargain over the impact and effects of the change announced by USPTO.

The Union need not submit a bargaining demand, nor does it waive its bargaining rights by failing to submit proposals when doing so would be futile. The obligation to request bargaining and the issue of waiver is not triggered if the change in employment conditions is presented as already having been decided upon, ie., a fait accompli. *Dep't of Air Force, Willow Grove ARS and NAGE local R3-32*, 57 F.L.R.A. 852, 856 (2002), reconsideration *granted, result unchanged*, 58 F.L.R.A. 277 (2003); *U.S. Dep't of Labor, Washington, D.C.*, 44 F.L.R.A. 988, 990 (1992). (1999).

In this case, USPTO presented the Union with a fait accompli when it announced the termination of routine and remote telework and sought post-implementation bargaining. Even when an agency lawfully implements a management right, the failure to engage in impact bargaining before implementing the change is a violation of law.

I find that the USPTO effectively cancelled telework privileges without *first* giving the Association timely notice and opportunity to negotiate over the impact the change to telework privileges would have on the affected employees. This constitutes a failure to bargain in good faith in violation of 5 U.S.C. § 7116(a)(1) and (5). The FLRA has found that implementation bargaining must occur before the change is made.

Management rights:

The Agency states that its actions fall within the statutory and contractual management rights clauses. As stated in their notice, the legal authority for implementing the change is 5 U.S.C. §7106(a), the statutory Management Rights clause. Thus, the Agency relies on statutory

management rights under 5 U.S.C. §7106(a) to make substantive determinations regarding the amount of telework the agency authorizes and which positions will be eligible for telework.

The USPTO maintains that the termination of telework does not violate the MOUs or the law because management rights are conferred by Federal Statute and the parties' collective bargaining agreement. The Agency asserts the *right to determine its mission* includes choosing where it provides services, conducts operations, and maintains duty stations. Citing *Int'l Fed. of Prof. and Tech. Engineers & U.S. Dep't of the Navy*, 74 F.L.R.A. 59 (2024). USPTO also claims that management has the statutory authority to decide when, to whom, and which positions work is assigned. *See Int'l Ass'n of Fire Fighters & U.S. Dep't of the Navy*, 59 F.L.R.A. 832 (2004); *Veterans Admin. Hosp. & AFGE*, 11 F.L.R.A 193 (1983).

Telework and right to assign work:

However, based on the discussion that follows, I find nothing in the MOUs that interferes with management's right to determine its mission, assign employees or direct the workforce. The FLRA has held that t*elework does not interfere with an agency's right to assign work and direct work,* except in one case that has since been vacated by the Court of Appeals. (*Dep't of Agr. Food and Nutrition Serv*., 71 FLRA 3 (2020) vacated by the *Court of Appeals in Nat'l Treas. Emps. Union v. FLRA,* 1 F.4th 1120 (D.C. Cir. 2021). Thus, the FLRA has held that contract provisions which provide for telework do not infringe on management's right to assign work.

> With one exception the Authority has held that the geographical location where the work of a position will be performed does not involve an assignment of work within the meaning of § 7106(a)(2)(B) of the Statute. *See NAGE Local R1-109*, 53 FLRA 526, 535 (1997) and cases cited therein. With respect to the exception the authority has stated that, if management establishes that a relationship exists between the job location and job duties then a proposal governing the job location would be found to violate management's right to assign work.

U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, Baltimore, Maryland, 57 FLRA 704, 707 (2002) accord *Patent Office Prof. Assn.*, 41 F.L.R.A. 795, 835 (1991) (right to assign work "does not normally encompass the decision as to where

employees will perform duties previously assigned to their position.") "The right to assign work includes the right to determine the particular duties to be assigned, when the work will occur, and to whom or what positions the duties will be assigned." *U.S. Food and Drug Admin., Detroit Dist*., 59 F.L.R.A.679, 682 (2004). Only when "an agency establishes a relationship between job location and job duties" will the right to assign work be implicated. *Id.*

Also, a telework or flexi-place arrangement is permissible so long as it does not preclude the agency from assigning an employee duties that could only be performed in the office setting and modifying a flexi-place agreement accordingly. *Id.* at 683. Here, the record shows that each of the five MOU's permit management to cancel telework and report to the USPTO headquarters when duties that can only be performed in the office.

I note that the following phrase or similar language can be found in the MOUs,

> "Participants may be required to report to the USPTO office to address business needs and office coverage for non-portable work activities, attend training, meeting or other individual team- office- or business- unit-wide events."

See Jt. Ex 6, at 10.

The 50-mile program incorporated into the MOUs has similar language. Therefore, I find that telework does not interfere with USPTO' right to assign work because the language in the MOUs preserves management's right to assign an employee duties that can only be performed on site. *See Nat'l Treas. Emps. Union Chap. 296 &336*, 74 F.L.R.A. 299, 301 (2025)

Right to direct employees:

The *right to direct employees* in § 7106(a)(2)(A) means *to supervise and guide employees* in the performance of their duties on the job. This right is exercised through supervising employees and determining the quantity, quality and timeliness of work production, establishing

priorities for its accomplishment and requiring employees to account for their duty time. *Nat'l Ass'n of Gov't Emps. Local R1-109,* 53 FLRA 526 534-535 (1997). *Amer. Fed'n of Govt. Emps. Council 224*, 60 FLRA 278, 279 (2004).

It is a matter of record that USPTO's right to direct employees is preserved by the 2017 MOU "*USPTO Policy on Time and Attendance Tools, Communication and Collaboration.*" This MOU applies to all bargaining unit employees and essentially provides that employees' time and attendance and other aspects of supervision are conducted the same way, whether employees are working on-site or at home. Jt. Ex. 16, attachment 4, p. 4 (JX 502).

Also, the five MOUs relevant to this case preserve management's right to supervise employees while teleworking. All employees use the same collaboration tools, their time and attendance are monitored electronically, and they have agency-supplied laptops. The record shows that collaboration tools include instant messaging, video conferencing and document/desktop sharing and whiteboard features which allow the supervisor and the employee to work together.

In sum, I find that the parties have made provisions to preserve management's right to determine its mission and operations, assign work, and direct the workforce. However, even when an agency lawfully implements a management right, the failure to engage in impact bargaining before implementing the change is a violation of law.

Procedures and Appropriate Arrangements:

The Agency argues that determining eligibility for telework is a management right. Assuming for argument's sake, that there the MOUs imposed an infringement on USPTO's management rights, the Agency would still have an obligation to bargain under 5 U.S.C. § 7106(b), the exceptions to § 7106(a), because the MOUs in this case were negotiated as *procedures* and *appropriate arrangements* for telework.

In determining whether a proposal is an *appropriate arrangement*, the Authority follows the analysis set forth in *NAGE Local R14-87*, 21 FLRA (1986) (*KANG*). Under this analysis the authority first determines whether the proposal is intended to be an "arrangement" for employees

adversely affected by the exercise of a management right. *See also United States Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service V. FLRA*, 960 F.2d 1068, 1073 (D.C. Cir. 1992). To establish that a proposal is an arrangement, a union must identify the effects or reasonable foreseeable effects on employees that flow from the exercise of management's rights and how those effects are adverse. *See KANG* 21 FLRA at 31. Proposals that address purely speculative or hypothetical concerns, or that are unrelated to management's exercise of its reserved rights, do not constitute arrangements. *See e.g. NAGE, Local R1-100*, 39 FL RA762, 766 (1991). The claimed arrangement must also be sufficiently tailored to compensate only those employees suffering adverse effects attributable to the exercise of management rights. *See id.*

In this case the procedures and appropriate arrangements were negotiated when 100 percent of the workforce at USPTO was on mandatory telework during the COVID epidemic and then the employee were called back to work on-site. Employees were returning to time and money spent on travel. The Agency actually received no detriment, as there was increased production, and savings on real estate rentals. All the MOUs but one were negotiated in 2022, when employee returned to their offices. It was the parties intent to alleviate travel conditions for the employees by making procedures and appropriate arrangements to solve the return to the office after COVID. The program has been successful with high participation and the Agency receive appropriations from Congress to continue and expand teleworking.

TEAP program:

The provision below establishes that the Agency has a duty to bargain before declaring an encumbered position ineligible for TEAP. The TEAP Operating Procedures provide as follows:

TEAP Program and Oversight Committee- Eligibility and Participation:

Participation in TEAP is voluntary, and pursuant to 5 U.S.C. § 5711(f)(3)(c),

it must be for reasons of the employee's convenience.

"Eligibility. In order to apply to participate in TEAP, an employee must

meet the following criteria:

> Be in a position designated as TEAP-eligible by management. *The Agency will not convert TEAP-eligible positions to ineligible before bargaining to the extent required by law*."

Jt. 5, JX 203. "Procedures of the TEAP Joint Oversight Committee," Sec. 3.ii and Sec. 2.

Thus, the parties previously agreed to engage in bargaining, to the extent required by law, when management converts TEAP-eligible positions to ineligible. This was negotiated in Operating Procedures that set forth the framework for TEAP and the Joint Oversight Committee under 5 U.S.C. §§ 5711(f), (g), the Telework Enhancement Act Program (TEAP), the source of authority for the TEAP program.

The Agency argues that the involvement of the TEAP joint labor-management Oversight Committee is not required here. The Agency claims that because TEAP is included in the telework MOU for each business unit, and the MOUs also contain negotiated language regarding eligibility determinations, USPTO has no additional obligation to make eligibility changes through the TEAP Oversight Committee after giving proper notice of the change in position eligibility.

The record does not support this assertion for several reasons. First, TEAP is not only an MOU negotiated by the parties. The TEAP programs was mandated by Congress at 5 U.S.C. 5711(f)(4), giving authority for the creation of the TEAP Oversight Committee to administer the TEAP program. The terms of the TEAP program apply here because the program was authorized by Congress to endorse and expand and preserve telework at USPTO.

Furthermore, the MOUs reference and apply the TEAP Operating Procedures in all other telework MOUs. TEAP does not apply to a stand-alone business unit, it applies to all eligible business units. The TEAP program is available for employees in general, bargaining unit and non-bargaining unit. The Operating Procedures allow for this difference as the bargaining obligations differ for each employee group. The terms of TEAP have been incorporated into the other four MOUs, effectively making it part of the collective bargaining agreement.

Nevertheless, I see nothing in the program that prevents management from changing the status of a TEAP-eligible position, if the parties follow the Operating Procedures. There is a procedure in place for this eventuality.

There is a difference between exercising management rights and exercising management rights that are subject to contractual provisions requiring negotiation, such as in the TEAP Operational Procedures for when "eligible" is changed to "ineligible" I find that while determining telework eligibility for specific positions is a lawful exercise of management rights, this right is specific to individuals, not entire bargaining units. At least, that is how the MOUs and TEAP procedures are worded.

I find that the May 19, 2025 notice ending telework under the Telework Enhancement Act Program violates the March 23, 2022 MOU that created the TEAP joint labor-management Oversight Committee, as well as the TEAP provisions referenced in the other MOUs in the collective Bargaining agreement.

The TEAP MOU requires collaborative management of the TEAP Program, not unilateral action by one party. The Agency did not follow these Operating Procedures in the TEAP MOU, nor the negotiated procedures found in any other MOU provisions, such as annual individual assessment. Rather, USPTO made a wholesale change to telework eligibility without collaborating with the TEAP Committee nor the Association regarding the other types of telework. Agency implemented the change without first engaging in implementation bargaining with the Association. This is a refusal to bargain in good faith, in violation of 5 U.S.C. § 7116(a)(1) and (5).

Reason for implementing situational telework only:

Part of the Agency's alleged business-related reason for wanting non-Patents POPA bargaining unit employees in the office is the desire for increased collaboration, teamwork, and interaction. *See Dep't of the Treasury, Office of the Comptroller of the Currency*, 68 F.L.R.A. 835 ("where the agency's reason for wanting an employee present was their desire for "collaboration, teamwork, and interaction and the FLRA found this to be a rational, business-related reason for its decision.") I find that USPTO's reliance on the *Treasury* case is misplaced because the agency

in that case made an individual assessment, unlike here where there is a wholesale termination of telework and no individual assessments have been conducted.

Here, the decision to eliminate "routine" and "remote" telework lacks a convincing rationale. This determination is particularly questionable given the documented history and proven success of USPTO's telework program. The telework initiative resulted in several positive outcomes, including increased productivity and efficiency among employees and economic savings for the Agency. The record contains no probative evidence that telework adversely affected its mission. The evidence does not establish that the agency telework programs negatively affected Agency operations or operational effectiveness.

Management has not provided a reasonable explanation or justification for shifting away from telework, nor have they addressed the achievements and benefits that the program brought to both the agency and its employees. The record contains no supporting evidence for the decision to effectively terminate telework. I find that the Agency has not established that telework was detrimental to the efficiency of the agency, nor that returning employees to work on-site has is based on any demonstrable rationale.

Agency Eligibility Determinations:

The Arbitrator agrees that management retains substantial authority under 5 U.S.C. § 7106(a) concerning the assignment of work, direction of employees, and operation of the Agency. The Authority has recognized that agencies possess legitimate interests concerning where work is performed and how agency operations are conducted.

However, management rights under § 7106(a) are not absolute. Section 7106(a) expressly provides that those rights are subject to subsection (b), which preserves bargaining concerning procedures management will observe in exercising its authority and appropriate arrangements for employees adversely affected by the exercise of management rights.

The telework MOUs and TEAP Operating Procedures at issue here constitute negotiated procedures and arrangements within the meaning of § 7106(b)(2) and (3). The agreements do not eliminate management's ability to assess operational needs, determine whether particular duties

must be performed in person, or evaluate employee eligibility for telework. Rather, they establish negotiated processes governing how eligibility determinations are made and how employees affected by such determinations are treated.

The MOUs contemplate individualized supervisory assessments based on operational considerations and employee duties. The agreements also preserve management's authority to require employees to report to Agency facilities when operationally necessary and to recall teleworking employees for business-related reasons.

The record, however, does not establish that USPTO conducted the individualized assessments contemplated by the negotiated agreements. No position-by-position analyses, supervisory assessments, or comparable documentation were produced. Nor did the Agency provide the Association with the results of individualized reviews as provided in the negotiated procedures.

Instead, the evidence demonstrates that USPTO implemented a categorical determination affecting entire groups of non-Patents bargaining unit employees. Approximately 160 employees received substantially identical determinations limiting telework eligibility to situational telework. Such a broad policy determination differs materially from the individualized eligibility reviews contemplated by the parties' negotiated agreements.

The Agency's reliance upon annual review provisions is similarly unpersuasive. The OPIA MOU and others provide for annual review of telework participation and eligibility but does not authorize the wholesale elimination of routine or remote telework programs. The PTAB MOU contains no annual review provision at all, and likewise provides no basis for unilateral elimination of negotiated telework arrangements.

Accordingly, I conclude that USPTO's May 19, 2025 directive was not an individualized eligibility determination contemplated by the parties' agreements. Rather, it constituted a substantial change in negotiated conditions of employment requiring compliance with bargaining obligations and negotiated procedures. By implementing that change without satisfying those obligations, USPTO violated 5 U.S.C. § 7116(a)(1) and (5).

Repudiation:

An agency repudiates a negotiated agreement when its conduct constitutes a clear and patent breach of provisions going to the heart of the parties' agreement. *U.S. Dep't of Commerce, Patent and Trademark Office*, 65 FLRA 290, 296 (2010), *rev'd on other grounds sub nom*. *U.S. Dep't of Commerce, Patent and Trademark Office v. FLRA*, 672 F.3d 1095 (D.C. Cir. 2012). In determining whether a repudiation has occurred, the Authority examines both the nature and scope of the alleged breach and the significance of the contractual provisions affected.

Here, the parties negotiated multiple agreements governing telework eligibility, routine telework, remote work participation, reporting obligations, supervision, equipment, duty-station arrangements, TEAP administration, and employee participation rights across several business units.

The scope of the Agency's action extended far beyond ordinary administration of negotiated telework provisions. This was not a minor modification, procedural adjustment, or refinement of existing telework practices, nor was it based on individual assessment of the employee's work duties.

The Agency's May 19, 2025 directive effectively eliminated negotiated routine telework and remote work programs for affected non-Patents bargaining unit employees and replaced those programs with situational telework. In doing so, the Agency dismantled telework frameworks established through multiple negotiated MOUs, including TEAP.

The practical effect of the Agency's action was not merely to alter how employees participated in telework, but to extinguish significant categories of negotiated telework participation that had existed for years and upon which employees had relied in structuring their work, commuting, relocation, and living arrangements. Accordingly, the nature and scope of the breach weigh heavily in favor of finding repudiation.

Telework Appropriations Statutes:

Department of Transportation and Related Agencies Appropriations Act 2001, Pub. L. No. 106- 346, 114 Stat. 1356A-36:

SEC. 359. *Each executive agency shall establish a policy under which eligible employees of the agency may participate in telecommuting to the maximum extent possible without diminished employee performance.* Not later than 6 months after the date of the enactment of this Act, the Director of the Office of Personnel Management shall provide that the requirements of this section are applied to 25 percent of the Federal workforce, and to an additional 25 percent of such workforce each year thereafter.

b. *Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2004*, Pub. L. No. 108-199, 111 Stat. 99:

SEC. 627. The Departments of Commerce, Justice, State, the Judiciary, and the Small Business Administration shall each *establish a policy under which eligible employees may participate in telecommuting to the maximum extent possible without diminished employee performance: Provided*, That, not later than 6 months after the date of the enactment of this Act, each of the aforementioned entities shall provide that the requirements of this section are applied to 100 percent of the workforce:

c. *Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2005*, Pub. L. No. PL 108-447, 118 Stat. 2919:

SEC. 622. The Departments of Commerce, Justice, State, the Judiciary, the Securities and Exchange Commission and the Small Business Administration shall, not later than two months after the date of the enactment of this Act, *certify that telecommuting opportunities are made available to 100 percent of the eligible workforce*:

d. *Science, State, Justice, Commerce and Related Agencies Appropriations Act, 2006*, PL 109—108, 119 Stat. 2340-2341: SEC. 617. The Departments

of Commerce, Justice, and State, the Securities and Exchange Commission and the Small Business Administration shall, not later than two months after the date of the enactment of this Act, *certify that telecommuting opportunities have increased over levels certified to the Committees on Appropriations for fiscal year 2005*:

e. *Telework Enhancement Act of 2010*, Pub. L. No. 111-192, 124 Stat. 3165, Title 5 U.S.C. § 6501 et seq.:

"[T]he head of each executive agency shall . . . establish a *policy under which eligible employees of the agency may be authorized to telework. . . and . . . notify all employees of the agency of their eligibility to telework.*"

f. *Telework for U.S. Innovation Act*, as contained in the *National Defense Authorization Act for FY 2021*, Pub. L. No. 116-283, 134 Stat. 3893, Title 5 U.S.C. § 5711(f):

"The Patent and Trademark Office *shall* conduct a program under this section." (emphasis added).

"*The Oversight Committee shall develop and maintain the operating procedures for the program under this subsection to . . . ensure that . . . the program is applied consistently and equitably throughout the Patent and Trademark Office and an optimal operating standard is developed and implemented for maximizing the use of the telework arrangement described under paragraph (2) while minimizing agency travel expenses and employee travel requirements."*

The cited appropriations acts and the Telework Enhancement Act demonstrate a longstanding congressional policy favoring telework and encouraging agencies to maximize telework opportunities for eligible employees. I refrain from making any finding with regard to telework.

> *The Oversight Committee shall develop and maintain the operating procedures for the program under this subsection to . . . ensure that . . . the program is applied consistently and equitably throughout the Patent and Trademark Office and an optimal operating standard is developed and implemented for maximizing the use of the telework arrangement described under paragraph (2) while minimizing agency travel expenses and employee travel requirements."*

To the extent that provisions from this program are incorporated or referenced in USPTO and POPA's collective bargaining agreement, through the MOUs, I find that the Agency's action of decreasing and virtually dismantling routine and remote telework, is not in keeping with the Statute. While this may subject those contractual provisions to the FSLMRS, I will refrain from making that determination in this case, where the Association has prevailed on other grounds.

- Eligible employees should have telework opportunities.
- Agencies should maximize telework where performance is not diminished.
- Agencies should identify eligible employees and notify them of eligibility.
- Agencies should expand rather than restrict telework opportunities.

Accordingly, I do not find a separate statutory violation. Nevertheless, the statutes provide relevant context for interpreting the parties' negotiated telework agreements and assessing the Agency's actions in this case. I find that the USPTO's actions, reducing telework to "*situational telework*" is not in keeping any of these Statutes, especially the last one, directed at USPTO. I find a violation of the TEAP provisions to the extent they are incorporated in the parties' MOUs.

CONCLUSIONS

The evidence establishes that USPTO implemented the May 19, 2025 illegally implemented a Presidential Memorandum. The telework MOUs and TEAP Operating Procedures were in effect before issuance of the Presidential Memorandum and remained

enforceable thereafter. The Memorandum did not relieve the Agency of its obligation to comply with applicable law, collective bargaining agreements, negotiated procedures, or bargaining obligations.

The Agency possessed substantial management rights under 5 U.S.C. § 7106(a). Those rights, however, remained subject to the negotiated procedures and appropriate arrangements preserved by § 7106(b). The telework MOUs and TEAP procedures constituted enforceable agreements negotiated pursuant to those provisions.

The record does not establish that USPTO conducted the individualized assessments contemplated by the negotiated agreements. Instead, the Agency implemented a categorical determination affecting approximately bargaining-unit employees across multiple business units.

The Agency further failed to satisfy its bargaining obligations before implementation, failed to establish an overriding exigency excusing pre-implementation bargaining, failed to comply with TEAP Oversight Committee procedures, and improperly presented the Association with a fait accompli.

Finally, by effectively eliminating negotiated routine telework, remote work, and TEAP participation through unilateral action, the Agency committed a clear and patent breach of provisions that went to the heart of the parties' agreements.

For all of these reasons, I conclude that USPTO violated 5 U.S.C. § 7116(a)(1), (5), and (7), violated the parties' collective bargaining agreement, and negotiated telework MOUs as well as the negotiated TEAP procedures. The grievance is sustained. USPTO shall provide the remedies set forth in this Award.

ORDER

1. This **ORDER** shall apply to bargaining unit employees in the Office of Chief Financial Officer and Office of Policy and International Affairs and the Patent Trial and Appeal Board. It shall also apply to any bargaining unit employees assigned to the Office of General Counsel in the future, as well as all bargaining unit employees in the Office of

the Chief Information Officer, if and when those employees are restored to the bargaining unit as a result of pending litigation.

2. USPTO violated 5 U.S.C. 7116(1) and (5) and 5 U.S.C. 7116(7) and 5 U.S.C. § 5711 (to the extent of the provisions referenced in the MOUs) by effectively terminating routine and remote telework in violation of these provisions and without engaging in impact and implementation bargaining.
3. USPTO shall rescind the May 19, 2025 Notice as applied to POPA-represented non-Patents bargaining unit employees and any other orders to return.
4. USPTO shall restore the telework and remote-work status quo ante that existed immediately before implementation.
5. USPTO shall restore TEAP participants to the status they held immediately before implementation.
6. USPTO shall continue to comply with the terms of all the negotiated telework agreements including TEAP.
7. Upon request, USPTO shall bargain in good faith concerning any future changes to telework eligibility, participation, administration, or TEAP.
8. USPTO cease and desist from implementing changes inconsistent with negotiated agreements and bargaining obligations.
9. USPTO shall post a notice acknowledging the violations.
10. I retain jurisdiction until Friday, June 12, 2026, to discuss the notice with the parties.

Blanca E. Torres

Blanca E. Torres, Arbitrator June 8, 2026.