In the Matter of Arbitration:

UNITED STATES PATENT AND TRADEMARK OFFICE	FMCS Case No. 250818-08896
and	
PATENT OFFICE PROFESSIONAL ASSOCIATION	Early Dismissal Grievance

BEFORE: Keith D. Greenberg, Esq., Impartial Arbitrator

APPEARANCES:

For the Agency:

Stacy Long, Esq., Senior Counsel, Office of the General Counsel
W. Christopher Horrigan, Esq., Associate Counsel, Office of the General Counsel

For the Union:

Richard J. Hirn, Esq., General Counsel

BACKGROUND

An arbitration hearing was held in this matter on April 14, 2026. The Parties were unable to stipulate to the issue presented for decision, but agreed to permit the Undersigned to define the issues presented as part of the decisional process. A transcript was prepared of the hearing and was agreed to be the official record of the hearing. The Parties timely submitted post-hearing briefs.

The Agency is a component of the United States Department of Commerce with responsibility for granting U.S. patents and registering trademarks, as well as for advising the President, the Secretary of Commerce, and other government agencies on intellectual property policy, protection, and enforcement. The Union represents a bargaining unit of all professional employees at USPTO other than Trademark professionals, subject to certain longstanding exclusions, as well as other exclusions that are the subject of more recent and ongoing disputes.

The Agency and the Union enjoy a longstanding collective bargaining relationship. This matter arose under the Parties' 2024 collective bargaining agreement ("Agreement"). The

grievance concerns the Union's challenge to the Agency's denial of early dismissal to certain teleworking bargaining unit employees in advance of the 2025 Memorial Day and Independence Day holidays, as well as subsequent federal holidays, when early dismissal was offered to bargaining unit employees working in-office, including at the Agency's Alexandria, Virginia campus.

Relevant Contractual Provisions

Article 5, Employee Rights, of the Parties' 2024 Agreement states, in relevant part, that:

> **Section 5: Fair and Equitable Treatment**
>
> Employees will be treated equitably and fairly by management. Therefore, only employees who believe they have been personally subjected to disparate treatment or unreasonable acts by management shall have the right to contest such treatment by use of the negotiated grievance procedures set forth in Article 13.

Article 16, Midterm Bargaining, of the Parties' 2024 Agreement states, in relevant part, that:

> **Section 1: General**
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> This Article applies to bargaining during the term of the Agreement, including any rollover term. All of these rules apply unless the parties expressly agree in writing to the contrary.
>
> **Section 2: Substantive Bargaining**
>
> A. The Agency agrees that it will bargain in good faith over proposals that constitute permissive subjects of negotiation under 5 U.S.C. §7106(b)(1) so long as Executive Order No. 14003, or an Executive Order that directs agencies to bargain over permissive subjects, remains in effect.
>
> B. In addition to paragraph A above, the Agency will bargain over any matters not covered by this Agreement to the extent required by law.
>
> **Section 3: Bargaining Pursuant to 5 U.S.C. §7106(b)(2) and §7106(b)(3) Notice and Submission of Proposals**
>
> Unless the parties agree otherwise, the following procedure shall be used for preparing mid-term bargaining proposals:
>
> A. The party proposing a change in conditions of employment shall present its proposed action to the other party in writing and shall include the reasons for the action and hyperlinks to relevant statutes, regulations and other relevant supporting background materials.
>
> B. Within 2 weeks thereafter, the parties shall meet to explain and clarify the proposals and answer questions regarding the proposals.
>
> C. The Agency will allow up to fifty (50) employees (or 100 employees if they are only Patent Examiners) to claim up to 1 hour of duty time for each notice to POPA to meet with affected employees. The time may be used within 1 week following the clarification meeting, if one is held, or within a week following the expiration of the time for the meeting if there is no clarification meeting.

D. Within 2 weeks after the meeting with affected employees, the party not initiating the procedure shall present its counterproposals. If no meeting is held, the counterproposals are due within 4 weeks of receiving the notice of change. Counterproposals must be limited to the scope of the initial proposal. Bargaining shall begin as soon as practical (normally the first full week after the counterproposals are presented). Initial proposals, which should endeavor to cover all issues to be raised in negotiations, should be submitted at one time, in writing.

E. Either party may request an extension of these deadlines. Requests for extensions will be considered on a case-by-case basis and will not be unreasonably denied.

. . . .

Section 8: Predecisional Involvement (PDI)

A. Predecisional involvement by the Association in matters that are traditionally considered an exercise of management rights that are subject only to impact and implementation negotiation may obviate the necessity of formal impact bargaining before implementation. Accordingly, whenever management contemplates changing conditions of employment through the exercise of management rights that would result in the need to bargain, it will first engage the Association in predecisional discussions before making a final determination of whether and how to make the contemplated change. The Agency will consider the views of the Association in deciding how to move forward. If the parties have engaged in other processes allowing the Association to share its views, such as under the Automation Article (Article 17) or through participation in the Labor Management Forum, the Agency may provide notice and move directly to bargaining. Engaging in PDI on a topic over which the Agency is not required to negotiate creates no right to formally negotiate. . . .

The record reflects a "Side Agreement between the United States Patent and Trademark Office (USPTO) and the Patent Office Professional Association (POPA) to Retain Memorandums of Understanding (MOUs)," entered into by the Agency and the Union in December 2024 (the "MOUs Side Agreement"), identifying a number of memoranda of understanding ("MOUs") which the Parties, in the December 2024 MOUs Side Agreement, agreed would remain in full effect until the expiration of the Parties' 2024 collective bargaining agreement. The Parties' MOUs Side Agreement states, in relevant part, that:

> In addition to the specific terms outlined in the 2024 Collective Bargaining Agreement (CBA), the parties have agreed to retain Memoranda of Understandings (MOUs) (linked below) that will continue in effect. With the exception of provisions related to reopening an MOU and specific expiration dates contained in the MOUs, should provisions in MOUs be inconsistent with the CBA, the provisions of the CBA will govern.
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> The list of MOUs contains agreements with and without expiration dates. For MOUs without expiration dates, the MOUs will continue until the expiration of the CBA (June 30, 2029), unless the MOUs' reopening provisions apply or by mutual agreement otherwise. Superseding any of their reopening provisions, the following telework MOUs from the list will remain in full effect until the expiration of the CBA (June 30, 2029) absent mutual agreement to the contrary:
>
> 1. Office of Government Affairs (OGA) Telework Program MOU, dated January 17, 2024
> 2. Telework Agreement for Patent Employees Hired to Work Remotely, dated November 8, 2022

3. Office of Policy and International Affairs (OPIA) Telework Program MOU, dated November 17, 2022
4. Patent Trial and Appeal Board (PTAB) Telework Program MOU, dated March 25, 2022
5. Telework Enhancement Act Program (TEAP) MOU, dated March 25, 2022
6. Office of General Counsel (OGC) Telework Program MOU, dated March 25, 2022
7. Office of the Chief Financial Officer (OCFO) and Office of the Chief Information Officer (OCIO) Telework Program MOU, March 24, 2022
8. Patents Full Time Telework Agreement, dated February 8, 2022
9. Patents Partial Telework Agreement, dated February 8, 2022

> For MOUs containing express expiration dates, the MOUs will remain in effect until an MOU expires, is renegotiated, or is superseded by a subsequent agreement.
>
> For both sets of MOUs, the parties recognize some of these agreements may contain content that is outdated or has been superseded by new practices. Additionally, nothing in this agreement waives the ability of the parties to reopen the terms of these agreements to the extent permitted by law, including the exercise of management rights (over which the Agency will bargain any required impact and implementation).
>
> Any additional MOUs between the parties that take effect before the effective date of this Side Agreement will be added to the list.
>
> Following the effective date of this Side Agreement, the parties shall meet at the request of either party to discuss any additional MOU a party has discovered that they believe should be in effect and was not identified below. The parties agree to work together to jointly address issues raised by either party with a goal of reaching a resolution to the issues acceptable to both parties within a reasonable time.
>
> Furthermore, the Agency will bargain any change to a currently effective policy concerning conditions of employment to the extent required by law. . . .

The record reflects that the Parties' Patent Trial and Appeal Board (PTAB) Telework Program MOU states, at Section I.G.3, Holidays, that:

> Participants working at the alternate worksite will generally be granted the same holidays as employees at the USPTO office, unless otherwise determined by the Office of Personnel Management. Early dismissal of USPTO employees or closure of the USPTO office for non-emergency conditions, such as on the day prior to a Federal holiday, will be granted to participants working at an alternate worksite.

The record reflects that the Parties' Office of Government Affairs (OGA) Telework Program MOU states, at Section I.G.3, Holidays, that:

> Participants working at an alternate worksite will be granted the same holidays as employees at the USPTO office, unless otherwise determined by the Office of Personnel Management. Early dismissal of USPTO employees or closure of the USPTO office for non-emergency conditions, such as on the day prior to a Federal holiday, will be granted to participants working at an alternate worksite.

The record reflects that Section III.H, Early Dismissals, Delayed Arrivals, Closures, and Unscheduled Telework, of the Parties' Patents Fulltime Telework Program Agreement, dated February 8, 2022, states in relevant part that:

> **1. General**
>
> . . . .
>
> e. Administrative leave for early dismissal not due to emergency or weather conditions, such as dismissals prior to a Federal holiday, will be granted to participants working at the approved alternate worksite.

The record reflects that Section III.E, Early Dismissals, Delayed Arrivals, Closures, and Unscheduled Telework, of the Parties' Patents Partial Telework Program Agreement, dated February 8, 2022, states in relevant part that:

> 1. **General**
>
> . . . .
>
> c. Administrative leave for early/immediate dismissal not due to emergency or weather conditions, such as dismissals prior to a Federal holiday, will be granted to participants working at the approved alternate worksite. . . .

Section I.G., Schedules and Time and Attendance, of the Parties' March 3, 2022 Memorandum of Understanding for the OCFO and OCIO Telework Program for The Office of the Chief Financial Officer and The Office of the Chief Information Officer states, in relevant part, that:

> **3. Holidays**. Participants working at an alternate worksite will be granted the same holidays as employees at the USPTO office, unless otherwise determined by the Office of Personnel Management. Early dismissal of USPTO employees or closure of the USPTO office for non-emergency conditions, such as on the day prior to a Federal holiday, will be granted to participants working at an alternate worksite.

(Spelling and emphasis as in original.)

Section I.G., Schedules and Time and Attendance, of the Parties' November 17, 2022 Memorandum of Understanding for the Office of Policy and International Affairs (OPIA) Telework Program states, in relevant part, that:

> **3. Holidays**. Participants working at an alternate worksite will be granted the same holidays as employees at the USPTO office, unless otherwise determined by the Office of Personnel Management. Early dismissal of USPTO employees or closure of the USPTO office for non-emergency conditions, such as on the day prior to a Federal holiday, will be granted to participants working at an alternate worksite.

(Spelling and emphasis as in original.)

These MOUs concerning telework by bargaining unit employees are referred to together herein as the "Parties' Telework MOUs."

Relevant Statutory Provisions

Section 7106, Management rights, of Title 5 of the United States Code states in relevant part that:

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
> (2) 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;
>
> . . .
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating—
> (1) 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;
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Section 6503, Training and monitoring, of Title 5 of the United States Code states, in relevant part, that:

> (a) In General.—The head of each executive agency shall ensure that—
> (1) an interactive telework training program is provided to—
> (A) employees eligible to participate in the telework program of the agency; and
> (B) all managers of teleworkers;
> (2) except as provided under subsection (b), an employee has successfully completed the interactive telework training program before that employee enters into a written agreement to telework described under section 6502(b)(2);
> (3) teleworkers and nonteleworkers are treated the same for purposes of—
> (A) periodic appraisals of job performance of employees;
> (B) training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;
> (C) work requirements; or
> (D) other acts involving managerial discretion; and
> (4) when determining what constitutes diminished employee performance, the agency shall consult the performance management guidelines of the Office of Personnel Management.
> . . .

Section 6329a, Administrative leave, of Title 5 of the United States Code states, in relevant part, that:

> (a) Definitions.—In this section—
> (1) the term "administrative leave" means leave—
> (A) without loss of or reduction in—
> (i) pay;

(ii) leave to which an employee is otherwise entitled under law; or
(iii) credit for time or service; and
(B) that is not authorized under any other provision of law;
(2) the term "agency"—
(A) means an Executive agency (as defined in section 105 of this title);
(B) includes the Department of Veterans Affairs; and
(C) does not include the Government Accountability Office; and
(3) the term "employee"—
(A) has the meaning given the term in section 2105; and
(B) does not include an intermittent employee who does not have an established regular tour of duty during the administrative workweek.

(b) Administrative Leave.—
(1) In general.—
During any calendar year, an agency may place an employee in administrative leave for a period of not more than a total of 10 work days.
(2) Records.—
An agency shall record administrative leave separately from leave authorized under any other provision of law.

(c) Regulations.—
(1) OPM regulations.—Not later than 270 calendar days after the date of enactment of this section, the Director of the Office of Personnel Management shall—
(A) prescribe regulations to carry out this section; and
(B) prescribe regulations that provide guidance to agencies regarding—
(i) acceptable agency uses of administrative leave; and
(ii) the proper recording of—
(I) administrative leave; and
(II) other leave authorized by law.
(2) Agency action.—
Not later than 270 calendar days after the date on which the Director of the Office of Personnel Management prescribes regulations under paragraph (1), each agency shall revise and implement the internal policies of the agency to meet the requirements of this section.

(d) Relation to Other Laws.—
Notwithstanding subsection (a) of section 7421 of title 38, this section shall apply to an employee described in subsection (b) of that section.

Section 5596, Back pay due to unjustified personnel action, of Title 5 of the United States Code states in relevant part that:

(b)
(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

> (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title . . . .

Evidence Regarding the Bargaining Unit Represented by the Union

Kathleen Duda, Ph.D., testified that she had been employed by the Agency from November 1990 until May 31, 2025, when she retired from federal service. She stated that at the time of her retirement, she had been employed by the Agency as a Primary Patent Examiner. Dr. Duda explained that, over the course of her career, she had also served as an officer of the Union, and had ultimately served as its President from March 1, 2019 until her retirement on May 31, 2025. Dr. Duda recounted that during her tenure as the Union's President, the Union's bargaining unit had not included trademark attorneys or supervisors, but had included Patent Examiners and other employees in the Agency's Patents business unit, as well as employees in the Agency's Office of the Chief Financial Officer, the Office of the Chief Information Officer, and other components of the Agency.

Dr. Duda estimated that, during her service as President, as many as approximately 90 percent of the bargaining unit represented by the Union had teleworked on a full-time basis, while others had teleworked to a lesser extent or not at all. Dr. Duda acknowledged that most of the Agency's employees on telework worked out of their homes and would not, therefore, have a commute to or from work on a regular basis.

Dr. Duda noted that a number of bargaining unit employees had participated in the Telework Enhancement Act Program ("TEAP"), pursuant to which employees could live more than 50 miles from an Agency office, and could be called back in by management to work in person, with such employees responsible for paying the round-trip expenses of one trip to the office per year. Dr. Duda estimated that at its peak, approximately 2,000 to 3,000 bargaining unit employees had participated in TEAP.

Patricia Duffy, Ph.D., a Primary Patent Examiner for the Agency, testified that she had been employed by the Agency since 1994. She stated that, during her time at the Agency, she had also served as an officer of the Union, and had become the Union's President at the start of June 2025, following Dr. Duda's retirement.

Evidence Regarding the Agency's Use of Administrative Leave for Pre-Holiday Early Dismissals

Dr. Duda testified that, from time to time, the Agency would provide its employees with early dismissal on the day prior to a federal holiday. She explained that the Agency's approach to these early dismissals had varied over time, but that, generally, an Agency-wide email would be issued letting employees know that they were being provided a two-hour early dismissal. She noted that, sometimes, the notice email would issue a few days before the holiday, while on other occasions, the notice email would be issued on the same day that early dismissal was to be granted. Dr. Duda acknowledged that, in her experience as the Union's President, she had never been consulted by management with regard to the decision to offer early dismissal before a holiday, or as to the amount of administrative leave that would be granted in connection with such an early dismissal. She further acknowledged that, on those occasions when early dismissal had not been granted before a federal holiday, she had not been consulted by Agency management before management made those decisions.

The record reflects that in 2021, Juneteenth had not been declared a federal holiday until just before the observation of the holiday, such that it had been too late for early dismissal to be granted in advance of the new holiday. Dr. Duffy noted that the Agency had subsequently granted early dismissal in advance of the Juneteenth holiday in 2022, 2023, and 2024, but had not granted early dismissal prior to the Juneteenth holiday to any employees in 2025. She noted that the denial of early dismissal for the 2025 Juneteenth holiday was the subject of a separate grievance filed by the Union.

Dr. Duffy acknowledged that the Union had not objected to bargaining unit employees not being granted early dismissal for the Presidents' Day holiday or for the Dr. Martin Luther King Jr. holiday over a period of several years prior to 2025.

Anne Thompson Mendez, the Agency's Chief Administrative Officer, testified that she had served as the Agency's Acting Chief Administrative Officer beginning in March or April of 2025, and had been appointed to the permanent Chief Administrative Officer role in or about February 2026. She noted that, previously, after a period of time as Acting Deputy Chief Administrative Officer, she had served as the Agency's Deputy Chief Administrative Officer from 2020 until her promotion to Chief Administrative Officer. Ms. Mendez noted that, prior to serving as Deputy Chief Administrative Officer, she had been the Agency's Director of Human

Resources from 2016 until 2020, after beginning her career with the Agency in 1991 and serving in various human resources roles.

Ms. Mendez explained that as Chief Administrative Officer, she was responsible for, among other things, the Agency's human resources program, including labor relations, and the Agency's telework program.

Ms. Mendez explained that the Agency has statutory authority to make its own human resources and other decisions independent of the Department of Commerce (the "Department" or "DOC"), notwithstanding the Agency's status as a bureau of the Department. She noted, however, that the Agency does routinely follow policy set by the Department with respect to early dismissals before federal holidays.

Ms. Mendez described administrative leave as an employee's excused absence without a charge to the employee's personal leave, annual leave, or sick leave balances. She explained that when the Agency grants early dismissal to its employees, it is effectively granting them administrative leave to account for the time that the employees would otherwise be working as scheduled.

Ms. Mendez testified that the Federal Office of Personnel Management ("OPM") provides direction to federal agencies concerning the use of administrative leave.

Ms. Mendez recalled that in or about 2016, at the time of the passage of the Administrative Leave Act of 2016 (codified at 5 U.S.C. § 6329a), it had been made clear to Agency management that federal agencies were overusing administrative leave, and that such leave needed to be used more sparingly. She noted that agencies across the federal government had been asked to report on their use of administrative leave.

The record reflects that a proposed rule concerning administrative leave under OPM's authority, as set forth in the Administrative Leave Act of 2016, had been published in the Federal Register on or about July 13, 2017. The record further reflects that the final rule published by OPM concerning administrative leave had been issued on or about December 17, 2024, after the effective date of the Parties' 2024 Agreement.

The record reflects that OPM's December 17, 2024 final rule stated, in relevant part, that:

> (4) An agency must retain the discretion to grant or not grant administrative leave in any circumstance based on agency judgments regarding mission needs. Generally, administrative leave should be granted on an ad hoc, event-specific, or time-limited basis. If an agency determines that it will generally grant administrative leave under a specific set of circumstances

> that may recur (e.g., blood donations, voting-related activities), that determination must allow the agency to not grant administrative leave due to mission needs.

The record further reflects that the 2017 proposed rule had characterized administrative leave, in relevant part, as "not an entitlement, but . . . an agency discretionary authority that should be used sparingly. . . ."

Ms. Mendez testified that between the passage of the Administrative Leave Act of 2016 and the issuance of OPM's final implementing regulations in 2024, it had been her understanding – as the Agency's Director of Human Resources, and subsequently as its Deputy Chief Administrative Officer – that administrative leave was to be used sparingly at the discretion of the Agency.

Ms. Mendez testified that the Agency decides whether to grant an early dismissal before a holiday by waiting to see if the Department will approve an early dismissal. She stated that if the Department grants the early dismissal, then the Agency follows suit. She characterized the Agency's practice as one of political courtesy toward the Department; the Agency's human resources team reaches out to the Department's human resources team in advance of a federal holiday to inquire as to whether early dismissal has been approved. She explained that if the Department indicates that no early dismissal will be approved, then the Agency does not move forward with an early dismissal for its employees, but that if the Department indicates that an early dismissal will be approved, then the Agency prepares a communication to Agency employees describing the parameters of the early dismissal. She noted that the Agency does utilize different parameters for an early dismissal than does the Department.

Ms. Mendez explained that because of the Agency's production environment, every hour of administrative leave that is granted takes away from the Agency's production bottom line – for example, a grant of two hours for an early dismissal to approximately 9,000 Agency employees results in 18,000 lost production hours, equivalent to nine full-time staff years. She also noted that in order to account for the very flexible work schedules afforded to Agency employees, the Agency imposes a minimum number of hours worked on early dismissal days for an employee to qualify for the grant of administrative leave that accompanies the early dismissal.

Ms. Mendez stated that the Agency's Office of the Under Secretary of Commerce for Intellectual Property and Director of the USPTO determines whether and how early a pre-holiday early dismissal is announced.

Ms. Mendez testified that, to the best of her knowledge, the Agency had never sought input from the Union as to whether to issue an early dismissal before a particular holiday. She stated that prior to May 2025, the Union had never raised a concern about the Agency's decision to grant – or not grant – an early dismissal.

Ms. Mendez testified that in her view, the purpose of granting an early dismissal before a federal holiday is as a morale boost and "a nice thing to do" for employees, as well as to help employees with traffic, which can be particularly challenging in the Washington, D.C. metropolitan area, especially around major holidays. She acknowledged that prior to the 2025 Memorial Day holiday, the Agency had also granted administrative leave in connection with early dismissals before holidays to employees on telework, who would not have had to contend with traffic on their commutes. She explained that those grants of administrative leave to both teleworking and non-teleworking employees as part of early dismissals had been intended to provide a morale boost to all employees.

Ms. Mendez testified that the four-hour rule requiring an employee to work at least four hours on an early dismissal day in order to be eligible for administrative leave dates back at least a decade. She noted that part-time employees would have the four-hour requirement prorated to reflect their regular hours of work.

Ms. Mendez testified that, at times, the Department will provide three or four days' notice of an early dismissal ahead of a holiday but that, on other occasions, the Department does not provide notice to the Agency until the day of the early dismissal. Ms. Mendez testified that the Agency does not typically delay an announcement of an early dismissal after the Department has provided notice of its intention to grant an early dismissal. Ms. Mendez stated that the Agency's leadership does not anticipate that employees will make or change plans based on whether they are provided with an early dismissal before a holiday. She noted that, despite being among the Agency employees with the earliest notice of when the Department grants early dismissal, she does not personally make plans based on an expectation that she will have an early dismissal prior to federal holidays.

Evidence Regarding Early Dismissals Prior to 2025

Dr. Duda recounted that, in her experience, early dismissal had been granted to bargaining unit employees – in at least some years – in connection with New Year's Day, Memorial Day, Juneteenth, July Fourth, Labor Day, Veterans Day, Thanksgiving, and Christmas.

Dr. Duda noted that when these early dismissals were granted, they were available to all Agency employees, regardless of an employee's work location. Dr. Duda testified that, in her experience, there had never been an occasion prior to 2025 when bargaining unit employees working on the Agency's campus or in the Agency's offices outside of Alexandria, Virginia, had been permitted early dismissal but teleworking bargaining unit employees had not been provided early dismissal.

The record reflects a collection of notification emails sent to bargaining unit and other Agency employees in 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, and 2024 announcing two-hour early dismissals ahead of the Memorial Day holiday weekend in each of those years. These generally reflect that only Agency employees who worked at least four hours on the early dismissal day (with pro-rated minimums for part-time employees) and who were not "emergency employees" were provided with two hours of administrative leave to effectuate the early dismissal. The notifications indicated that the early dismissals were granted "in recognition" of the federal holiday and made no distinction between in-person and remote (or otherwise-teleworking) employees. The notices described above made no reference to traffic issues.

The record similarly reflects a collection of notification emails sent to bargaining unit and other Agency employees in 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, and 2024 announcing two-hour early dismissals ahead of the Independence Day holiday weekend. As with the Memorial Day emails, the Independence Day notifications indicate that the early dismissals are "in recognition" or "in observance" of the holiday, and that certain minimum eligibility requirements apply, with no distinction made between in-person and remote (or otherwise-teleworking) employees and no reference made to traffic issues.

The record additionally reflects a collection of notification emails sent to bargaining unit and other Agency employees in 2017, 2018, 2019, 2020, 2021, 2022, 2023, and 2024 announcing two-hour early dismissals ahead of the Thanksgiving holiday weekend. As with the Memorial Day emails, the Thanksgiving notifications indicate that the early dismissals are "in recognition" or "in the spirit" of the holiday, and that certain minimum eligibility requirements apply, with no distinction made between in-person and remote (or otherwise-teleworking) employees and no reference made to traffic issues.

The record further reflects a collection of notification emails sent to bargaining unit and other Agency employees in 2018, 2019, 2020, 2021, 2022, 2023, and 2024 announcing two-hour early dismissals ahead of the Labor Day holiday weekend. As with the Memorial Day emails, the Labor Day notifications indicate that the early dismissals are "in recognition" of the holiday, and that certain minimum eligibility requirements apply, with no distinction made between in-person and remote (or otherwise-teleworking) employees and no reference made to traffic issues.

Dr. Duda noted that for each of these dates, all bargaining unit employees had been granted the two-hour early dismissal, so long as they had been working for at least four hours on the respective days at issue.

Evidence Regarding the 2025 Memorial Day Holiday

Ms. Mendez testified that Coke Morgan Stewart was the Agency's Deputy Director and had served as the Agency's Acting Director and as Under Secretary of Commerce for Intellectual Property beginning in January 2025, following the change in Presidential administration. Ms. Mendez noted that the current administration had brought a significantly different perspective than had the political leadership under the prior Presidential administration.

Ms. Mendez testified that the Agency tracks the "pendency" of applications – *i.e.*, the amount of time that an application has been pending action before the Agency. She explained that it is important to stakeholders to receive action on their applications as quickly as possible, in order to protect their intellectual property; she also described prompt action by the Agency as good customer service and generating funding for the Agency. The record reflects a table summarizing the Agency's pendency statistics from Fiscal Year 2005 through Fiscal Year 2025:

TABLE 3

PATENT APPLICATIONS PENDING PRIOR TO ALLOWANCE [1]
(FY 2005–FY 2025)

Year	Awaiting Action by Examiner[3]	Total Applications Pending[2,3]
2005	611,114	885,002
2006	701,147	1,003,884
2007	760,924	1,112,517
2008	771,529	1,208,076
2009	735,961	1,207,794
2010	726,331	1,163,751
2011	690,967	1,168,928
2012	633,812	1,157,147
2013	616,409	1,148,823
2014	642,949	1,127,701
2015	592,417	1,099,468
2016	579,074	1,070,163
2017	569,088	1,082,661
2018	542,446	1,071,395
2019	600,728	1,011,201
2020	630,873	1,011,827
2021	597,742	1,034,437
2022	766,252	1,097,580
2023	822,615	1,148,601
2024	886,260	1,198,073
2025	**860,150**	**1,232,547**

[1] Includes patent applications pending at end of period indicated, and includes utility, reissue, plant, and design applications. Does not include allowed applications.

[2] Applications under examination, including those in preexamination processing.

[3] FY 2024 data has been updated with final end-of-year numbers.

Ms. Mendez explained that the increase in pending applications and applications awaiting action by examiners was a negative for Agency management, which prefers the backlog to be as low as possible as a matter of good customer service; as a matter of completing the Agency's mission; and because less favorable pendency statistics tend to invite scrutiny from Congress, the press, and others.

Ms. Mendez testified that, in the summer of 2025, John Squires had been confirmed as the Agency's Director and Under Secretary. She stated – and the Agency's FY 2025 financial report so reflects – that Director Squires had placed an emphasis on reducing pendency of applications. Ms. Mendez stated that, in her role as Acting Chief Administrative Officer, and subsequently as Chief Administrative Officer, she had understood that reducing pendency was a top priority for the Agency's leadership.

Ms. Mendez testified that prior to the COVID-19 pandemic, a large majority of Agency employees teleworked four or more days per week. She testified that, during the COVID-19 pandemic, approximately 98 percent of the Agency's employees had teleworked full-time. She explained that, after the Agency's offices reopened post-pandemic, most employees continued to telework on close to a full-time basis. She testified that, in 2025 – in connection with the change in Presidential administration – the Agency had returned approximately 3,800 employees to in-office work at its Alexandria campus on a full-time basis. She noted that most of the employees

who returned to in-office work had been non-bargaining unit employees and non-examiner employees. She noted that this change had significantly impacted the work-life balance of the employees required to return to in-office work.

Ms. Mendez recounted that with respect to the 2025 Memorial Day holiday, she had had discussions with then-Acting Director Stewart. Ms. Mendez explained that a decision had been reached, following the Department's authorization of an early dismissal, to limit the Agency's early dismissals to those employees who were on campus and who "could be spared to leave early." She stated that this more limited early dismissal reflected then-Acting Director Stewart's concerns regarding productivity and pendency.

Ms. Mendez testified that she did not know whether the Department of Commerce had excluded its teleworkers from the early dismissal provided for the 2025 Memorial Day holiday.

Ms. Mendez testified that the limitation of eligibility for the early dismissal to employees engaged in on-campus work was intended to boost the morale of those employees who had been required to return to in-office work and to recognize the challenging traffic conditions in the Alexandria, Virginia area, which had worsened since federal employees began returning to in-office work in the aftermath of the COVID-19 pandemic.

Ms. Mendez noted that the Agency takes other steps to recognize the sacrifices made by those Agency employees who have returned to in-office work, including by offering transit subsidies to reduce commuting expenses; subsidizing an on-campus gym membership; subsidizing parking at the Agency's Alexandria campus; providing a healthcare clinic and daycare on campus; and offering a substantial discount at the cafeteria on the Agency's Alexandria campus. She noted as well that, unlike employees assigned to in-office work, teleworkers are not eligible for weather and safety administrative leave.

The record reflects an email with a subject line of "Early Dismissal" from then-Acting Director Stewart, sent on May 22, 2025 at 8:04 p.m. to an email distribution list entitled "ManagementCouncil@USPTO.GOV," which stated, in relevant part, that:

> Dear Colleagues,
>
> You may grant any employees in your business unit who are working at least four hours *on campus* tomorrow two hours of early dismissal. There will be no all hands message to employees. Rob S. and Dave S. will follow up with you as needed with any additional guidance.

Ms. Mendez noted that the "Management Council" consists of all of the Agency's business unit heads and their deputies, as well as several political appointees within the Agency.

The record reflects that Robert Sorensen, then the Agency's Acting Deputy Chief Administrative Officer, forwarded then-Acting Director Stewart's email to a number of Agency managers on May 23, 2025 at 10:08 a.m.; he also wrote, in relevant part, that:

> All,
> For today's early release, do not send out broadcast/all employee emails within your Business Units.
>
> BUs should notify specific employees who they want to authorize for early release, ensuring agency operations are not impacted by the release, and only for those employees who are working on site today for at least 4 hours.
>
> Thanks-Rob

Less than an hour later, at 10:59 a.m., Mr. Sorensen sent a follow-up email which stated, in relevant part, that:

> All,
> If needed, below is a general script that can be used when notifying individual employees. Again, this is for employees who are working on site today for at least 4 hours, and ensuring agency operations are not impacted by the early release.
>
> In recognition of the Memorial Day federal holiday on Monday, May 25, USPTO employees who are scheduled to work in-person at a USPTO office on Friday, May 23 (either full-time or part-time) may take 2 hours of administrative leave for early departure on Friday, May 23. The purpose of the early dismissal is to enable employees working in-person at a USPTO office to avoid heavy traffic conditions that typically occur before a holiday weekend. Employees should use the timecode ANTIME-0000-051202 Admin/Excused Absence.

Dr. Duda testified that she had never seen the emails sent by Acting Director Stewart and by Mr. Sorensen to management on May 22 and 23, 2025 until the weeks preceding the arbitration hearing in this matter.

Dr. Duda testified that, by Wednesday, May 21, 2025, the Agency had not issued an early dismissal notice ahead of the 2025 Memorial Day holiday. She explained that in response, she had attempted to contact Ms. Mendez in order to determine whether early dismissal would be provided for the upcoming holiday. Dr. Duda recounted that after she had been unable to contact Ms. Mendez, she had contacted Mr. Sorensen, the Acting Deputy Chief Administrative Officer, about the matter on May 21, 2025. The record reflects Dr. Duda's email to Mr. Sorensen, with a subject line of "Memorial Day," sent at 9:53 a.m.; it stated:

> Morning,
> I saw the notice go out about the bullets. Will employees be getting 2 hour early dismissal on Friday?
> Thanks,
> Kathy

Mr. Sorensen replied approximately 20 minutes later, writing:

> Kathy,
>
> We're actively working this with our leadership, and also waiting to find out what DOC may be authorizing. No word yet on what the decision will be.
>
> Thanks-Rob

Dr. Duda explained that, thereafter, bargaining unit employees had received the following email from the Agency, sent at 11:24 a.m. on May 23, 2025:

> Remembering Our Brave Heroes
> This Memorial Day, we honor the brave service members who gave their lives in the line of duty. Their ultimate sacrifice is a reminder of the cost of the freedoms and liberties we cherish as Americans.
>
> We also extend our deepest gratitude to the families and loved ones who carry forward their memory and legacy with strength and dignity.
>
> On this day of remembrance, we reflect on their extraordinary courage and commitment to freedom and the enduring promise of our great nation.

Dr. Duda explained that at approximately 12:00 p.m. on Friday, May 23, 2025, she had received a forwarded email from an unidentified bargaining unit employee, which the employee had received from their Supervisory Patent Examiner. The email stated, in relevant part, that:

> All,
> Normally, examiners are given 2 hour admin leave on the day before a holiday, however, these are not normal times. Examiners who have reported to work on campus may take 2 hour admin leave for today after working 4 hours on campus. Examiners who are teleworking CANNOT take the 2 hour admin leave for today.

Dr. Duda recounted that, thereafter, she had contacted Mr. Sorensen again in light of the forwarded email above, as well as other outreach from other bargaining unit employees, inquiring about the potential for a two-hour dismissal ahead of the Memorial Day holiday. The record reflects Dr. Duda's email to Mr. Sorensen, with a subject line of "early dismissal," sent at 1:00 p.m.; it stated:

> Rob,
> I am hearing all sorts of rumors. Is something going to go out agency-wide?
> Thanks,
> Kathy

Mr. Sorensen responded one minute later, writing:

> Kathy,
>
> There will be no agency wide notice or DOC notice for early dismissal.
>
> Rob

One minute after that, Dr. Duda replied, writing:

> I am hearing that people on campus are getting 2 hours. How is that being conveyed?

Thereafter, at 1:16 p.m., Dr. Duda wrote to Mr. Sorensen again; her message stated:

> From POPA telework agreements:
>
> d. Administrative leave for closures not due to emergency or weather conditions will be granted to participants working at their approved alternate worksite.

Dr. Duda recalled that Mr. Sorensen had not provided any answer to her second email; she acknowledged that his earlier response had clarified that no Agency-wide notice would be forthcoming regarding early dismissal ahead of the Memorial Day holiday.

On May 23, 2025 at 1:18 p.m., Dr. Duda sent an email, with a subject line of "admin leave," to Sonya Penn, then the Agency's Acting Director of Labor Relations; Dr. Duda's email stated:

> Is 2 hours admin being granted to employees working physically in the office today? How is that being conveyed? I have people sending me emails that SPEs are sending out and Rob Sorensen says no agency-wide or DOC message is going out.

(Spelling as in original.) Ms. Penn responded two minutes later, writing:

> No agency-wide messaging is going out, you're right. It is only being granted to people physically in the office today.
>
> Sonya

Evidence Regarding the 2025 Independence Day Holiday

Ms. Mendez testified that then-Acting Director Stewart took a similar approach to the early dismissal before the 2025 Independence Day holiday, such that the only Agency employees provided with early dismissal ahead of the holiday weekend were those working at least four hours on campus on the working day prior to the holiday weekend.

The record reflects that an email, dated July 2, 2025, was sent to all Patents employees of the Agency by Valencia Martin Wallace, then-Acting Commissioner for Patents; the email stated, in relevant part, that:

> Dear Colleagues,
>
> In recognition of the holiday on Friday, July 4, 2025, the USPTO is granting an early dismissal on Thursday, July 3, 2025 for employees who are assigned to and report in-person to a USPTO campus for at least four hours on that day. USPTO employees eligible for administrative leave on Thursday, July 3, 2025, will be granted and are entitled to no more than a maximum of two hours of administrative leave. This leave cannot be combined with any other administrative leave.
>
> Employees will be excused from duty within the following parameters:

- Full-time employees who are in a duty status **for at least four hours** on Thursday, July 3, 2025, and who are working at a USPTO office, will be excused two hours prior to normal departure time. All employees, regardless of work schedules, must first work four hours before receiving the two hours of administrative leave. Supervisors may not shorten the four-hour minimum requirement or hasten the early dismissal by granting an additional 59 minutes.

    - Example: If you are scheduled to work from 8 a.m. to 5:30 p.m., you can leave at 3:30 p.m. and claim two hours of administrative leave.

- Part-time employees, working at a USPTO office, who are scheduled to work four hours or less are not entitled to administrative leave. Part-time employees scheduled to work five hours may claim one hour of administrative leave; those scheduled to work six or more hours may claim two hours.

- Employees participating in the Increased Flexitime Policy program may claim two hours of administrative leave. If you are working this schedule, you may work up to 10 hours to reach the maximum 12-hour tour of duty.

Note: If you plan to work previously authorized overtime, credit hours, or compensatory time, you may not claim the two administrative leave hours.

To claim administrative leave for the 2-hour early dismissal, please use the timecode ANTIME-0000-051202 Admin/Excused Absence on your timecard.

Because employees must be in a duty status to benefit from an early dismissal, employees on previously approved leave (e.g., annual leave, sick leave, compensatory time, credit hours, etc.) will remain in their current status and may not substitute administrative leave for other types of leave.

Evidence Regarding the Filing of This Grievance

Dr. Duffy testified that the Agency had not provided the Union with notice of the Agency's intent to change its practice of granting bargaining unit employees administrative leave in connection with early dismissal before federal holidays.

Dr. Duffy recounted that, after becoming President of the Union, she had directed the Union's Grievance Director to file an information request with the Agency to determine the parameters applied by the Agency for the early dismissal granted to certain employees for the 2025 Memorial Day holiday.

The grievance in this matter was filed on July 8, 2025; the grievance states in relevant part that:

> This is an Association grievance filed pursuant to Article 13, § 6 of the parties' 2024 collective bargaining agreement over the failure to grant all unit employees early dismissal for the Memorial Day holiday on May 23, 2025, and for the Independence Day holiday on July 3, 2025.
>
> **1. Contractual violations:**
>
> According to information provided to us by the Agency, 156 of 212 unit employees who were working on campus on May 23 were granted the customary two hours of administrative leave,

while only 43 of 6,788 unit employees who were reported to be teleworking that day were granted early dismissal. On July 2, the Acting Commissioner of Patents sent employees an email explicitly stating that only those assigned to and report in-person to a USPTO office would be granted early dismissal on July 3.

1. The failure to grant all unit employees early dismissal before the Memorial Day and Independence Day holidays violates a past practice that has been in effect for at least ten years.

2. The failure to grant all unit employees early dismissal before the Memorial Day and Independence Day holidays as it has been done for at least the past ten years was a unilateral change in conditions of employment that:

a. constitutes an unfair labor practice in violation of § 7116(a) (1) and (5) of the Federal Service Labor Management Relations Statute; and

b. a violation of Article 16, §§ 2, 3, and 8, because management failed to provide the Union with notice and an opportunity to engage in pre-decisional discussions and impact and implementation bargaining before making the change.

3. The granting of early dismissal to some, but not all bargaining unit employees violates Article 5, § 5 of the collective bargaining agreement which provides that "employees will be treated equitably and fairly by management." See *Social Sec. Admin., Baltimore, Maryland*, 58 F.L.R.A. 630, 631 & n. 2 (2003) (denying exceptions to award of arbitrator who found that granting administrative leave to some, but not all unit employees before Christmas holiday violated contract provision that provides that "all employees shall be treated fairly and equitably in all aspects of personnel management.")

4. While the overwhelming number of bargaining unit employees who were working on campus on May 23 were granted early dismissal, less than 1% of teleworking bargaining unit employees were granted early dismissal. Only those employees who were working at a USPTO Office on July 3 were granted early dismissal. This constitutes a violation of:

a. Section III.H.1.e of the February 7, 2022 "Patents Full-Time Telework Program" agreement and Section III.E. 1.d of the February 7, 2022 "Patents Partial Telework Program" agreement, which provide:

> Administrative leave for early/immediate dismissal not due to emergency or weather conditions, such as dismissals prior to a Federal holiday, will be granted to participants working at the approved alternate worksite.

b. the Telework Enhancement Act of 2010, Pub. L. No. 111-292, which provides that:

> the head of each executive agency shall ensure that -
>
> * * *
>
> (3) teleworkers and nonteleworkers are treated the same for purposes of-
>
> * * *
>
> (C) work requirements, or
>
> (D) other acts involving managerial discretion;

5 U.S.C. § 6503(a).

> **5.** On information and belief, early dismissal was uniformly granted to employees of the USPTO who were not bargaining unit employees. This discriminates and interferes with employees' right to unionize and constitutes an unfair labor practice in violation of § 7116(a)(1) and (2) of the Federal Service Labor Management Relations Statute. There is no rational basis to grant supervisors early dismissal but not their subordinates.
>
> As relief, we demand that every full-time unit employee who was on duty for at least four (4) hours, who was not granted early dismissal on May 23, 2025 and/or July 3, 2025 be granted two hours of administrative leave for each day to be taken at a time approved by their supervisor. We further demand that every part-time unit employee who was on duty and scheduled to work five (5) or more hours be granted one (1) hour of administrative leave for each day to be taken at a time approved by their supervisor, and that every part-time unit employee who was on duty and scheduled to work six (6) or more hours be granted two (2) hours of administrative leave for each day to be taken at a time approved by their supervisor. In addition, we demand that the USPTO restore its past practice of granting early dismissal before each Federal holiday, including the upcoming Labor Day holiday, and that any unit employee who is not granted early dismissal before the Labor Day holiday and any ensuing holiday until this grievance is resolved be granted the number of hours of administrative leave customarily and historically granted to unit employees before said holiday, to be taken at a time approved by their supervisor. And, because OPM regulations include "leave" as an element of back pay within the meaning of the Back Pay Act, 5 C.F.R. part 550.803, the Union also demands its attorney fees incurred in the presentation and prosecution of the grievance. . . .

(Spelling and emphasis as in original.)

The Agency denied the grievance in a decision dated July 31, 2025, which stated, in relevant part, that:

> **Summary of Grievance:**
>
> To avoid heavy traffic conditions that typically occur before certain holiday weekends, on Friday, May 23, 2025 (the Friday prior to the Memorial Day Holiday), the USPTO authorized business units to grant early dismissal and administrative leave to employees working on campus at Headquarters who were not required for time-sensitive mission-critical work. Employees working on campus for at least four (4) hours were allowed to use up to two (2) hours of administrative leave. Business units were provided the same authority to provide for an early dismissal on Thursday, July 3, 2025 (the Thursday prior to the July 4/Independence Day Holiday).
>
> On June 11, 2025, POPA filed an information request and requested an extension of time to file a grievance until 21 days following a substantive response. POPA received a substantive response to its information request on June 18, 2025.
>
> On July 9, 2025, citing Article 13 (Grievance Procedure), Section 6 of the 2024 Collective Bargaining Agreement (CBA) between the United States Patent and Trademark Office (USPTO or Agency) and POPA (collectively, the parties), POPA filed an Association Grievance concerning the Agency's early dismissal decisions for Memorial Day and Independence Day . . . .
>
> **Analysis:**
>
> The USPTO denies POPA's grievance for the following reasons.
>
> 1. <u>There has been no violation of past practice.</u>

POPA argues that there is a past practice of granting early dismissal administrative leave to all employees prior to each Federal Holiday. This argument is incorrect because there is no such past practice.

In determining whether a past practice exists, the charging party must demonstrate that the alleged practice had been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other.

Rather than consistently granting administrative leave/early dismissal prior to every holiday, the Agency has exercised its discretion in on a case-by-case basis. For example, the USPTO did not grant administrative leave/early dismissal for any employees prior to the Juneteenth National Independence Day holiday in 2021, the Presidents' Day holiday in 2025, or the Juneteenth National Independence Day holiday in 2025.

The USPTO has also consistently exercised its discretion to include or exclude certain groups of employees based on legitimate operational considerations and the necessary functioning of the agency. For example, on the occasions the USPTO grants administrative leave/early dismissal preceding a holiday, it routinely excludes fulltime employees who have not worked at least four hours and employees who are on pre-approved leave. The USPTO also reserves the right to deny administrative leave/early dismissal to employees who are required to remain at work for customer service, IT service needs, or other time-sensitive mission-critical functions, and POPA does not appear to challenge the Agency's authority to do so.

In addition to the conclusion that there was no actual past practice, the USPTO notes that a past practice concerning this subject would be impossible. Administrative leave is approved absence from duty under 5 U.S.C. § 6329a. It not an entitlement and is authorized solely at the discretion of the Agency based on mission needs. 5 C.F.R. § 630.1403(a)(4). An agency must retain the discretion to grant or not grant administrative leave in any circumstance based on agency judgments regarding mission needs.... If an agency determines that it will generally grant administrative leave under a specific set of circumstances that may recur that determination must allow the agency to not grant administrative leave due to mission needs."). Preventing the Agency from electing not to authorize administrative leave would be an illegal interference with the Agency's right to assign work and direct employees and determine its mission under 5 U.S.C. § 7106(a)(1) and (2).

In sum, the Agency used its discretion to allow two (2) hours early dismissal administrative leave ahead of the Memorial Day and July 4h holidays for employees who had worked at least four hours on campus and were expected to encounter traffic challenges. This exercise of differentiating between employees based on their particular circumstances was consistent with the USPTO's historic case-by-case decision-making and did not violate any enforceable past practice.

2. There has been no violation of § 7116(a)(1), (2) and (5) of the Statute and Article 16, Midterm Bargaining, Sections 2, 3, and 8 of the CBA.

There is no statutory or contractual violation because the USPTO had no obligation to bargain over the decision to not grant administrative leave/early dismissal to teleworking employees.

As noted above, there was no enforceable past practice. The USPTO decides whether to grant administrative leave/early dismissal prior to holidays on a case-by-case basis and regularly exercises its discretion to exclude certain groups of employees. Therefore, there was no change in the conditions of employment that resulted in a duty to engage in either substantive or impact and implementation bargaining. For the same reasons, the provision in CBA Article 16 concerning pre-decisional involvement (PDI) did not activate. Alternatively, POPA's argument - that PDI and bargaining were required prior to the USPTO determining that employees would be required to be on duty performing their official duties rather than on paid administrative leave - is an

impermissible infringement of management's right to assign and direct employees under 5 U.S.C. § 7106(a)(2), as well as its right to determine its mission under 5 U.S.C. § 7106(a)(1).

3. There has been no violation of Article 5, Employee Rights, Section 5, of the CBA

The USPTO did not treat any employee unfairly or inequitably in violation of CBA Article 5, Section 5. The relevant portion of the CBA provides:

> Employees will be treated equitably and fairly by management. Therefore, only employees who believe they have been personally subjected to disparate treatment or unreasonable acts by management shall have the right to contest such treatment by use of the negotiated grievance procedures....

Teleworking employees are not considered members of a class of employees protected by anti-discrimination laws (such as race, color, religion, sex, or national origin), so an allegation of disparate treatment is inappropriately asserted.

Furthermore, the Agency's decision to allow up to 2 hours of early dismissal for only employees working on campus in these instances was not unreasonable, unfair, or inequitable. To the contrary, the USPTO acted judiciously and soundly based on the circumstances. Teleworking employees, who do not commute to and from their approved worksites, were not similarly situated to employees working on campus on the day preceding these holidays. Teleworking employees do not experience the same traffic burden leaving their worksite compared to employees who worked on campus before a holiday. Therefore, the two groups of employees did not require the same treatment.

POPA has established no basis upon which the union can usurp management's authority to assign work, direct employees, provide for the necessary functioning of the agency, and ultimately fulfill the agency's mission. The USPTO's decision appropriately balanced the accommodation provided to relieve a burden felt only by certain employees versus the loss of productive duty time. This decision must be considered in light of the prevailing circumstances which require the USPTO to address unacceptable levels of pendency and reduce the backlog of unexamined applications.[1] By providing administrative leave/early dismissal to employees who worked on campus, the Agency maximized government efficiency while still addressing a problem faced by a limited group of employees.

To the extent CBA Article 5, Section 5 provides only individual employees who have been "personally subjected to disparate treatment or unreasonable acts... the right to contest such treatment by use of the negotiated grievance procedures," POPA lacks standing to assert an Association Grievance. Article 5 concerns "Employee Rights" and not "Association Rights" (which are covered in CBA Article 7). This matter is not grievable as presented.

4. There has been no violation of Patents 2022 Telework Programs (Full-Time/Part-Time) MOUs and the Telework Enhancement Act of 2010, Pub. L. No. 111-292.

The USPTO has not violated any enforceable provision in any collectively-bargained agreement.

As described above, an Agency must retain its discretion to determine mission needs, direct employees, and assign work under 5 U.S.C. § 7106(a). In addition, an Agency must retain discretion over the decision to grant or not grant administrative leave. 5 U.S.C. § 6329(a); 5 C.F.R. § 630.1403 (a) (4). Because no provision of any CBA or MOU can be read in a manner that renders them lawful, POPA cannot establish that the USPTO's actions constitute a violation. See U.S. Air Force HQ, 17 F.L.R.A. 372 (1985) (agency did not commit unfair labor practice where it refused to adhere to a contract provision that was contrary to law and regulation and hence unenforceable). In other words, POPA cannot establish that the USPTO's decision-making

concerning administrative leave/early dismissal was constrained by an agreement between the parties.

The USPTO also has not violated the Telework Enhancement Act. The USPTO's administrative leave/early dismissal decisions are entirely consistent with the intent of the statute to "ensure that telework does not diminish employee performance or agency operations." 5 U.S.C. § 6502(b)(1). In light of the pendency and backlog situation, the USPTO determined that a blanket grant of administrative leave/early dismissal regardless of employees' individual circumstances was not appropriate and would have negatively impacted agency operations.

The USPTO also rejects POPA's apparent interpretation of the Telework Enhancement Act that teleworkers and non-teleworkers must be treated exactly the same for every condition or incident of employment regardless of individual circumstances. This expansive reading of 5 U.S.C. § 6503(a)(3) is unsupported and illogical.

There are many circumstances that are relevant to a teleworker that are simply not relevant to a nonteleworker, and vice versa. For example, teleworkers may be provided training on how to telework in a safe and efficient manner. The Telework Enhancement Act does not require Agencies to waste nonteleworkers' duty time on that training for the sake of treating them the "same." As another example, the USPTO provides payment for travel to campus under certain circumstances for teleworkers who participate in the Telework Enhancement Act Program (TEAP). But the Telework Enhancement Act does not require the USPTO to provide payment for travel to campus for nonteleworkers. Similarly, the USPTO offers transit subsidies to employees, but the Telework Enhancement Act does not require extending that benefit to nonteleworkers who do not incur the cost of a commute.

Here, nonteleworking on campus employees faced a problem that teleworkers did not. Employees who reported to the office preceding the Memorial Day and July 4th holidays faced traffic jams and travel delays that teleworkers did not. The Telework Enhancement Act simply does not require an Agency to provide administrative leave to teleworkers to counter circumstances that apply only to nonteleworkers.

To the extent 5 U.S.C. § 6503(a) entrusts the comparative treatment of teleworkers and nonteleworkers in matters of discretion exclusively to "[t]he head of each executive agency, this matter is not subject to the grievance procedure (or bargaining).

5. The Agency did not discriminate and interfere with employees' right to unionize, thereby violating of § 7116(a)(1) and (2) of the Statute.

The USPTO's actions did not discriminate against any employee based on bargaining unit membership or interfere with employees' right to unionize.

POPA alleges that early dismissal was uniformly granted to non-bargaining unit USPTO employees, and that the USPTO distinguished between supervisors and subordinates, but both allegations are false. In my own office — consisting entirely of non-bargaining unit employees — and in the larger Office of the Chief Administrative Officer — consisting of both bargaining unit (NTEU 243) and non-bargaining unit employees — employees who reported to campus were granted administrative leave/early dismissal and teleworkers were not. There was no distinction based on supervisory duties. There was no distinction based on bargaining unit status. I understand that those characteristics applied across the USPTO. Because bargaining unit status played no part in the USPTO's decision and bargaining/non-bargaining employees were treated similarly, there was no discrimination or interference under 5 U.S.C. § 7116(a).3

Decision:

> The USPTO denies POPA's grievance in its entirety. To the extent POPA seeks prospective relief for holidays (e.g. Labor Day 2025), it does so in error. The USPTO will continue to exercise its discretion regarding administrative leave/early dismissal preceding holidays.
>
> FN1 – The USPTO notified POPA and the other USPTO bargaining units on June 17, 2025, that due to urgent mission needs to address unacceptable levels of pendency and to reduce the backlog of unexamined applications, the Agency has ceased providing administrative leave it may have previously deemed acceptable. *See* Notice Regarding "Administrative Leave for Voting and Poll Observing."

(Spelling and emphasis as in original.)

Dr. Duffy testified that subsequent to the filing of the grievance in this matter, the Agency had denied early dismissal prior to the Labor Day and Thanksgiving federal holidays in 2025 to teleworking bargaining unit employees, while granting administrative leave for those early dismissals to bargaining unit employees performing at least four hours of in-office work on each of the relevant dates.

Dr. Duffy testified that, to her knowledge, prior to the Agency's grievance response in this case, management had never taken the position that early dismissal was granted to employees prior to a holiday in order to permit those employees to avoid traffic. She noted that bargaining unit employees had the ability to work a flexible schedule that would enable employees to leave work early to avoid holiday traffic while still working all of their regular hours in the workweek. She noted that even in 2020 and 2021, when all bargaining unit employees were teleworking, bargaining unit employees all received early dismissal before holidays, despite the fact that they were already at home and would not have encountered any traffic as part of a commute.

The Union invoked arbitration on August 14, 2025, and this proceeding followed.

The record reflects that on August 28, 2025, President Trump issued Executive Order 14,343, "Further Exclusions from the Federal Labor-Management Relations Program," asserting, among other things, that the Agency's "Office of the Commissioner for Patents and subordinate units" were excluded from coverage under Chapter 71 of Title 5 of the United States Code pursuant to, among other things, 5 U.S.C. § 7103(b), and purporting to remove those employees from the bargaining unit represented by the Union. As of the hearing in this matter, the Agency took the position that the Union was the exclusive representative only for non-supervisory patent professionals in the Agency's OPIA, in the Agency's Office of the CFO, in the Agency's Office of Government Affairs, and in the Agency's Patent Trial and Appeal Board. The record reflects

that the Union filed a civil lawsuit challenging Executive Order 14,343, and that the litigation in that matter remained pending as of the date of the hearing in this matter.

CONTENTIONS OF THE UNION

The Union proposes that the issues presented for decision be defined as follows.

1. Whether management's failure to grant teleworkers early dismissal before the Memorial Day and Independence Day holidays in 2025 as it did bargaining unit employees who were working on campus violates the parties' telework MOUs?

2. Whether management's failure to grant early dismissal to some, but not all bargaining unit employees before the Memorial Day and Independence Day holidays in 2025 violates Article 5, § 5 of the collective bargaining agreement which provides that "[e]mployees will be treated equitably and fairly by management"?

3. Whether management's failure to grant teleworkers early dismissal before the Memorial Day and Independence Day holidays in 2025 as it did bargaining unit employees who were working on campus violates the Telework Enhancement Act of 2010, 5 U.S.C. § 6503(a), which provides that:

> the head of each executive agency shall ensure that -
>
> * * *
>
> (3) teleworkers and nonteleworkers are treated the same for purposes of—
>
> * * *
>
> (C) work requirements; or
>
> (D) other acts involving managerial discretion.

4. Whether management's failure to grant all unit employees early dismissal before the Memorial Day and Independence Day holidays in 2025 violates a past practice?

5. Whether management's failure to grant all unit employees early dismissal before the Memorial Day and Independence Day holidays in 2025 was a unilateral change in conditions of employment which:

   a. constitutes an unfair labor practice in violation of § 7116(a)(1) and (5) of the Federal Service Labor Management Relations Statute; and

b. a violation of Article 16, §§ 2, 3, and 8, because management failed to provide the union with notice and an opportunity to engage in pre-decisional discussions and impact and implementation bargaining before making the change.

6. If so, what shall the remedy be?

The Agency violated the Parties' Telework MOUs; Article 5, Section 5 of the Parties' 2024 Agreement; the Telework Enhancement Act of 2010; and a binding past practice between these Parties when the Agency failed to grant all bargaining unit employees early dismissal before the Memorial Day and Independence Day holidays in 2025. Furthermore, the Agency – by its failure to grant all bargaining unit employees early dismissal before the Memorial Day and Independence Day holidays in 2025 – unilaterally changed a condition of employment, which constitutes an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5). The Agency also violated Article 16, Sections 2, 3, and 8 of the Parties' 2024 Agreement because management failed to provide the Union with notice and an opportunity to engage in pre-decisional involvement, as well as impact and implementation bargaining, before making this change in conditions of employment. The Union requests that the Arbitrator address each of these issues, rather than merely sustaining the grievance on just one basis or violation.

At the outset, the Union does not dispute the existence of well-established criteria for early dismissal – *i.e.*, that the employees at issue work at least four hours on the early dismissal day, subject to appropriate proration for part-time employees.

The Agency's failure to grant bargaining unit teleworkers early dismissal before the 2025 Memorial Day and Independence Day holidays violated the Parties' Telework MOUs as well as Article 5, Section 5 of the Parties' 2024 Agreement.

The Parties' Telework MOUs consistently provide that early dismissal for closures not due to emergency or weather conditions, such as dismissal prior to a federal holiday, will be granted to participants working at an approved alternate worksite.

Furthermore, Article 5, Section 5 of the Parties' 2024 Agreement requires the Agency to treat employees equitably and fairly. The Arbitrator should note that this is not the first dispute in the federal sector regarding the application of a requirement of fair and equitable treatment by management to bargaining unit employees concerning early dismissal before a holiday.

In *Social Security Administration, Baltimore, Maryland and AFGE Council 220*, 58 FLRA 630 (2003), the Federal Labor Relations Authority ("FLRA") denied agency exceptions to

an award of Arbitrator Irwin Kaplan in a dispute concerning an agency's grant of four hours of administrative leave to certain bargaining unit employees who worked on the day prior to the observed Christmas holiday; the agency had denied administrative leave to bargaining unit employees who had not worked on the early dismissal date. Arbitrator Kaplan held that relevant contract provisions mandating that "[a]ll employees shall be treated fairly and equitably in all aspects of personnel management as requiring management" provided for a "uniform grant of administrative leave" to all bargaining unit employees, regardless of whether they worked on the early dismissal day. The FLRA denied a number of agency exceptions, including a claim that Arbitrator Kaplan's award was contrary to 5 U.S.C. § 7106(a) and regulations addressing management's right to determine employees' "tour of duty," finding that a grant of administrative leave for holiday-related early dismissal did not affect employees' tours of duty. *Id*. at 632-33. The FLRA also denied agency exceptions asserting that administrative leave could not have been granted to the off-duty employees, noting that

> the Authority has long recognized that agencies have broad discretion to grant administrative leave to employees for brief periods of time, such as the 4 hours involved in this case. *See United States Dep't of the Air Force, 439th Airlift Wing, Westover Air Reserve Base, Mass.,* 55 FLRA 945, 949 (1999). As agencies have discretion to grant administrative leave to their employees, management can negotiate the terms under which it will exercise that discretion and such agreements are enforceable in arbitration. *See, e.g., VAMC, Asheville,* 51 FLRA at 1578. Although the Agency determined to grant administrative leave in terms of an early release on December 23, 1999, the Agency continued to have discretion to grant administrative leave for brief periods to employees for whom that day was not a scheduled work day.

Id. at 633.

Therefore, to the extent that the Arbitrator here finds that any bargaining unit teleworkers are not covered by the contractual protections of the Parties' Telework MOUs, those bargaining unit teleworkers are protected from being treated differently from other unit employees by the broad protection against disparate treatment contained in Article 5 of the Parties' 2024 Agreement. The Arbitrator should reject the Agency's assertion that bargaining unit teleworkers and bargaining unit employees performing work in-office are not similarly situated on the basis of different traffic burdens leaving their work site on the day before a holiday or holiday weekend. The Agency's argument in this respect is unsupported by the factual record. The evidentiary record demonstrates that – prior to the 2025 Memorial Day holiday – holiday traffic had never been a reason cited for why the Agency has permitted early dismissal before a holiday or holiday weekend, as reflected in the various early dismissals granted before holidays by the Agency, including during the COVID-19 pandemic, when virtually all bargaining unit

employees teleworked full time. Until 2025, none of the Agency's early dismissal notices ever mentioned traffic as a basis for the grant of early dismissal. Nor is early dismissal before a holiday understood to represent an accommodation for employees facing traffic. *Cf.*, *e.g.*, *In re A Christmas Case*, 64 Comp. Gen. 171 (1984) (permitting grant of early dismissal before Christmas holiday as a "holiday goodwill gesture").

Nor is there any evidence that employees had been told that traffic – or avoiding traffic – was the reason for an early dismissal. The July 2, 2025 notice of early dismissal issued by the Agency and challenged in this grievance failed to mention traffic as a reason for which early dismissal had been granted. Notably, in the Agency's case in particular, early dismissal is not needed to enable employees to avoid holiday traffic because all employees are on a flexi-time schedule and can adjust their own time of departure from work on any given day.

To the extent that the Agency asserts that Article 5, Section 5 of the Parties' 2024 Agreement should be limited in its application to prohibit discrimination against employees protected by antidiscrimination laws, the Arbitrator should note that Article 15, Section 2 of the Parties' 2024 Agreement provides for a prohibition against discrimination on the basis of various protected classes and other characteristics protected by federal laws. If Article 5, Section 5 of the 2024 Agreement were as limited as the Agency claims, that section would be superfluous in light of the protections provided by Article 15, Section 2. The Arbitrator should not adopt an interpretation of the Parties' negotiated language that renders any part of it meaningless. To the extent that the Agency asserts that the Union lacks standing to grieve a violation of Article 5, Section 5, on behalf of employees, the Parties' negotiated grievance procedure – at Article 13, Section 1 of the 2024 Agreement – is clear that grievances may include any complaint by the Union against the Agency concerning any matter related to the employment of any employee.

The Arbitrator should reject the Agency's argument that contractual restrictions on its discretion to grant administrative leave are unenforceable. *See Social Security Administration, Baltimore, Maryland and AFGE Council 220*, 58 FLRA 630, 633 (2003). *See also*, *e.g.*, *Department of Veterans Affairs Medical Center, Asheville, North Carolina and AFGE Local 446, AFL-CIO*, 51 FLRA 1572 (1996) ("[A]s agencies have discretion to grant administrative leave to their employees in certain situations for brief periods of time, management can negotiate over how it will exercise that discretion." (citations omitted)); *In re A Christmas Case*, 64 Comp. Gen. 171 (1984) (finding that "in the absence of statute, an agency may excuse an

employee for brief periods of time without charge to leave or loss of pay at the discretion of the agency.").

Unless Congress made clear that it intended an agency's discretion over a condition of employment to be exercised solely and exclusively by the Agency, then the Agency may exercise its discretion through negotiations. *See AFGE National Border Patrol Council and Department of Justice, Immigration and Naturalization Service*, 51 FLRA 1308, 1328-29 (1996) ("It is well established that, insofar as an agency has discretion over a condition of employment, the discretion may be exercised through negotiations unless it is clear that Congress intended the discretion to be exercised solely and exclusively by the agency." (citation omitted)). To the extent that the Agency asserts that it rationally exercised its discretion concerning granting early dismissal and administrative leave by granting early dismissal only to those who work on site and not to teleworkers because of a backlog of unexamined patent applications – *i.e.*, pendency – such argument is disingenuous. There was no showing of any distinction made based on business unit, occupation, or task in connection with either of the grants of early dismissal for the 2025 Memorial Day and Independence Day holidays. Rather, the only distinction made was on the basis of teleworking status.

The Agency's reliance on the Administrative Leave Act of 2016 and the OPM regulations issued on December 17, 2024 should be rejected. Congress's objective in enacting the Administrative Leave Act was not to limit the use of administrative leave before holidays, but to restrict the use of extended administrative leave granted over periods of months and years to employees under investigation for disciplinary offenses, *see* 114 P.L. 328, 130 Stat. 2000, 2016 Enacted S. 2943, 114 Enacted S. 2943. Nothing in the Administrative Leave Act of 2016 addresses the use of administrative leave for pre-holiday early dismissals. Indeed, in issuing the final regulations implementing the Administrative Leave Act, OPM made clear – in response to a commenter who argued that agencies should not grant administrative leave prior to a holiday – that "Administrative Leave is an agency discretionary authority; therefore each agency makes determinations regarding when and for what purposes (including as a goodwill gesture to address employee morale) it provides administrative leave." 89 Fed. Reg. 102264 (Dec. 17, 2024).

To the extent that the Agency asserts that the non-discrimination (with respect to teleworking employees) provisions of the Parties' Telework MOUs and of Article 5, Section 5 of the Parties' 2024 Agreement constitute unenforceable restraints on the Agency's management

rights under the Federal Service Labor-Management Relations Statute, the Arbitrator should reject such arguments, as discussed above. The FLRA has found grants of administrative leave to be appropriate or a negotiable condition of employment in a variety of situations. *See*, *e.g.*, *Department of Veterans Affairs Medical Center, Asheville, North Carolina and AFGE Local 446, AFL-CIO*, 51 FLRA 1572 (1996). The Parties' Telework MOUs, and particularly their non-discrimination provisions, do not interfere with management's right to assign work, direct employees, or determine the Agency's mission, because they do not compel the Agency to grant administrative leave in the first place. They require only that if the Agency grants early dismissal to bargaining unit employees before a holiday, all bargaining unit employees are treated equally on the basis of teleworking status. *Cf. Social Security Administration, Baltimore, Maryland and AFGE Council 220*, 58 FLRA 630, 633 (2003).

In this case, in particular, the Agency's denial of early dismissal was clearly not about its need to assign – for example – Patent Examiners to continue working in order to reduce pendency, because the Agency granted early dismissal to Patent Examiners who worked at the Agency's Alexandria campus but denied early dismissal to Patent Examiners (and to other teleworking professionals in the bargaining unit who were not Patent Examiners) based simply on their teleworking or in-office status.

Furthermore, the Telework Enhancement Act of 2010 mandates that "teleworkers and nonteleworkers are [to be] treated the same for purposes of . . . work requirements or other acts involving managerial discretion." Because the provisions of the Parties' Telework MOUs – which the Union seeks to enforce in this case – do nothing more than require the Agency to act in accordance with the Telework Enhancement Act when exercising discretion in this manner, the non-discrimination provisions necessarily do not interfere with management's rights under 5 U.S.C. § 7106(a), as the exercise of management rights is limited by applicable law. In other words, proposals or provisions which require an agency to exercise its management rights in accordance with applicable law do not interfere with such rights and are within the duty to bargain. *See*, *e.g.*, *National Weather Service Employees Organization and Department of Commerce, National Oceanic and Atmospheric Administration, Marine and Aviation Operations, Aircraft Operations Center, Tampa, Florida, et al.*, 63 FLRA 450, 452 (2009).

Even if, however, the non-discrimination provisions of the Parties' Telework MOUs interfere with management's rights under 5 U.S.C. § 7106(a), those non-discrimination

provisions are enforceable because they were negotiated pursuant to 5 U.S.C. § 7106(b), which constitutes an exception to Section 7106(a). *Consumer Financial Protection Bureau and NTEU Chapter 335*, 73 FLRA 670, 678 (2023) ("[I]f a provision is lawfully negotiable under § 7106(b), then it is binding on the parties who agree to it -- and enforceable in arbitration."). Furthermore, because the Parties have properly addressed arguments concerning management rights, the Arbitrator should address those arguments directly.

In particular, the matters covered by 5 U.S.C. § 7106(b)(1) are not mandatory subjects of bargaining, but are negotiable only at the election of the Agency. However, once the Agency elects to negotiate over a permissive subject and the Parties reach agreement on that subject of bargaining, the negotiated provisions become fully enforceable through the Parties' negotiated grievance procedure, despite the possible effect of the provision on management's right to assign work or on management's other statutory rights. *See*, *e.g.*, *Department of Transportation, Federal Aviation Administration, Alaskan Region and NATCA*, 62 FLRA 90, 92 (2007) ("As Section 9 is a permissive subject of bargaining, the Agency was not obligated to bargain on it. However, once it agreed to that provision, it became fully enforceable through the negotiated grievance procedure notwithstanding its possible effect on management's right to assign work."); *Department of the Navy, Navy Region Mid-Atlantic Fire & Emergency Services, Naval Weapons Station Earle, New Jersey and IAFF Local F-147*, 74 FLRA 384 (2026) (denying agency's exceptions alleging that award conflicted with management's rights to determine agency's mission and organization under § 7106(a)(1) of the Statute, and to assign work under § 7106(a)(2)(B) of the Statute, and finding that "[w]here an agency has elected to negotiate a § 7106(b)(1) matter, and agreed to a provision, that provision is fully enforceable at arbitration.").

Here, early in his term, President Biden issued Executive Order 14,003, *Protecting the Federal Workforce*, 86 Fed. Reg. 7231 (Jan. 22, 2021), which directed agency heads and their subordinates to "elect to negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1)." Consistent with that direction, the Agency, in its negotiations with the Union, entered into the various non-discrimination provisions found in the Parties' Telework MOUs.

Among the subjects of bargaining over which an agency may negotiate at its election are the technology, methods, and means of performing work. This includes telework. *Cf. AFGE Local 723 and Department of the Interior, U.S. Geological Survey, Great Lakes Science Center, Ann Arbor, Michigan*, 66 FLRA 639, 646 (2012) ("In determining whether a proposal concerns

the methods or means of performing work under § 7106(b)(1), the Authority has construed . . . 'means' to refer to any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or furtherance of the performance of its work."). Here, in particular, the Parties' Telework MOUs and their non-discrimination provisions address the means by which work is performed, because they concern a policy used by the Agency for the accomplishment or furtherance of the performance of its work.

Section 7106(b)(1) includes "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[.]" Here, the non-discrimination provisions in the Parties' Telework MOUs reflect the Agency's agreement to dismiss bargaining unit teleworkers early if those who work on campus are dismissed early, affecting the teleworkers' tours of duty. Specifically, the FLRA has held that:

> [A]n employee's daily tour of duty consists of the hours that the employee works; that is, from the time when the employee starts work until he or she ends work. A decision as to what will constitute an employee's tour of duty is a decision by management as to when and where an employee's services can best be used. When an agency changes an employee's hours, that change, under applicable statutory and regulatory provisions, results in a new tour of duty for the employee. The degree of the change--whether it is a 1-hour change or an 8-hour change--does not alter the fact that the change results in a new tour of duty for the employee. A change in employees' starting and quitting times is a change in their tours of duty.

Department of the Air Force, Scott Air Force Base, Illinois and NAGE Local R7-23, 33 FLRA 532, 541-42 (1988), *aff'd*, 893 F.2d 380 (D.C. Cir. 1990).

Even if the non-discrimination provisions of the Parties' Telework MOUs were not permissive subjects of bargaining over which the Agency elected to negotiate, the Telework MOUs – and, in particular, their non-discrimination provisions – reflect a procedure that management has agreed to follow whenever it exercises its right to grant administrative leave in connection with early dismissal before a holiday, such that they constitute procedures for purposes of 5 U.S.C. § 7106(b)(2).

Even if, however, the non-discrimination provisions of the Parties' Telework MOUs were not permissive subjects of bargaining over which the Agency elected to negotiate or procedures under 5 U.S.C. § 7106(b)(2), they would nevertheless constitute appropriate arrangements, as permitted under 5 U.S.C. § 7106(b)(3), for employees adversely affected by the exercise of management's rights. These provisions do not excessively interfere with management's rights under the Federal Service Labor-Management Relations Statute. *See Consumer Financial*

Protection Bureau and NTEU Chapter 335, 73 FLRA 670, 678 (2023) ("[I]f a provision is lawfully negotiable under § 7106(b), then it is binding on the parties who agree to it -- and enforceable in arbitration.") (*citing NAGE Local R14-87 and Kansas Army National Guard*, 21 FLRA 24 (1986) for the proposition that, under the applicable "excessive-interference standard, the FLRA weighs the benefits that the arrangement affords employees against the arrangement's burdens on management's rights. If the benefits outweigh the burdens, then the arrangement is appropriate; if the burdens outweigh the benefits, then the arrangement is not appropriate."). The non-discrimination provisions of the Telework MOUs are clearly an appropriate arrangement for employees who would otherwise be adversely affected by the Agency's potential exercise of a right to provide early dismissal to those who work on campus. The benefit to the bargaining unit teleworkers outweighs the burden on management because management ultimately retains the right to keep everyone working – that is, to deny early dismissal and the accompanying administrative leave if it so chooses. Indeed, Congress has already balanced the benefits and burdens of these non-discrimination provisions when it enacted the non-discrimination provisions of the Telework Enhancement Act, as discussed above. The only burden placed on Agency management is a restriction on its ability to discriminate against teleworkers.

The Agency's disparate treatment of teleworkers and non-teleworkers with respect to early dismissal before holidays violates the Telework Enhancement Act of 2010, at 5 U.S.C. § 6503(a)(3)(C) and (D). Although the Agency may attempt to justify its violation of this section of the Telework Enhancement Act by claiming that non-teleworking employees performing work on the Agency's Alexandria campus face traffic jams and travel delays that teleworkers did not ahead of the 2025 Memorial Day and Independence Day holidays so as to warrant early dismissal for the on-campus employees, this is clearly unsupported by the record evidence, for the reasons discussed above. Furthermore, to the extent that the Agency claims that the Telework Enhancement Act entrusts the comparative treatment of teleworkers and non-teleworkers in matters of discretion exclusively to each agency head, the Telework Enhancement Act requires that teleworkers and non-teleworkers be treated the same, especially as to work requirements. Nothing in the Telework Enhancement Act or its legislative history establishes that claimed violations of the Telework Enhancement Act are excluded from the scope of a negotiated grievance procedure. To the extent that the Agency argues that its new approach to early dismissals is consistent with the Telework Enhancement Act's requirement to ensure that

telework does not diminish employee performance or Agency operations, that argument is irrelevant to the facts presented here. The fact remains that, pursuant to the Telework Enhancement Act, teleworkers must be treated the same as non-teleworkers for purposes of "work requirements."

In the alternative, and specifically in the event that the relevant provisions of the Telework MOUs were found to be unenforceable here, management's failure to grant bargaining unit teleworkers early dismissal before the 2025 Memorial Day and Independence Day holidays violates a binding past practice between the Parties. A past practice requires "a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other." *United States Patent and Trademark Office and Patent Office Professional Association*, 57 FLRA 185, 191 (2001). Here, the record reflects that the Agency had a well-established practice of granting early dismissal to bargaining unit employees, teleworkers, and non-teleworkers alike. Whenever the Agency had granted early dismissal to its employees before or in connection with a holiday – as Ms. Mendez's testimony reflects – this was done, among other things, as a morale boost for Agency employees. As a result, this past practice provides a basis to grant the grievance, regardless of whether there was a proven contractual violation or a violation of the Telework Enhancement Act. The Union does not dispute that there is no past practice of consistently granting administrative leave and early dismissal prior to every holiday. The past practice alleged to have been violated in this case was one under which, when early dismissal had been granted before a holiday, both teleworkers and non-teleworkers were provided early dismissal.

Additionally, the Agency's failure to grant all bargaining unit employees early dismissal in connection with the 2025 Memorial Day and Independence Day holidays was a unilateral change in conditions of employment, which constituted an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5). An agency's practice of granting administrative leave is a condition of employment, and a unilateral change to that practice violates the Agency's duty to bargain in good faith. *See*, *e.g.*, *Department of the Treasury, Internal Revenue Service and NTEU, Chapter 19*, 62 FLRA 411, 413-415 (2008) (denying exceptions to arbitration award finding that agency violated collective bargaining agreement through its unilateral change in past practice of granting four hours of administrative leave for Employee Appreciation Day).

Even if the Agency's decision to grant administrative leave is inherent in management's right to assign work or determine its mission, the Agency still must bargain before changing its practices and policies. *Army Adjutant General Publication Center, St. Louis, Missouri and AFGE AFL-CIO, Local 2761*, 35 FLRA 631, 634 (1990) ("Even if the subject matter of a change in conditions of employment is outside the duty to bargain, an agency must bargain about the impact and implementation of a change that has more than a *de minimis* impact on unit employees.").

Notably, the Parties' 2024 Agreement, although it includes an article on administrative leave, does not cover the topic of early dismissal before holidays. Nor was this matter addressed during bargaining, because the Union was satisfied with the past practices that had arisen within the Parties' bargaining relationship. Nor is there a zipper clause in the Parties' 2024 Agreement that would extinguish past practices, because past practices are typically regarded as a part of a collective bargaining agreement. The issue of early dismissal is therefore covered by the Parties' 2024 Agreement via the relevant past practice.

The Agency's failure to grant all bargaining unit employees early dismissal before the 2025 Memorial Day and Independence Day holidays constituted a unilateral change in conditions of employment and a violation of Article 16, Sections 2, 3, and 8 of the Parties' 2024 Agreement, because management failed to provide the Union with notice and an opportunity to engage in pre-decisional involvement, as well as impact and implementation bargaining prior to the Agency's change. Admittedly, this allegation concerning a failure to bargain over a change in practice only becomes germane to the outcome of the grievance if the Arbitrator were to determine that the non-discrimination provisions of the Parties' Telework MOUs are unenforceable. The Union nevertheless requests that the Arbitrator address this issue as an alternative basis for sustaining the grievance.

The Agency violated Article 16, Section 8 of the Parties' 2024 Agreement when it failed to discuss its contemplated change to the policy of granting early dismissal to teleworkers and non-teleworkers alike prior to management making the final decision to change that policy. The Parties agreed to include in Article 16 of the 2024 Agreement a section requiring pre-decisional involvement as a first informal step before formal midterm bargaining, applicable particularly when the substance of a decision is outside the duty to bargain. Here, management failed to honor this contractual commitment when it did not discuss its proposed change to its policy of

granting early dismissal to both teleworking employees and non-teleworking employees. While management may claim that this provision was not relevant because there was no applicable past practice or change in conditions of employment – or because pre-decisional involvement itself is an allegedly impermissible infringement on management's right to assign and direct employees under the Federal Service Labor-Management Relations Statute – there is no case law or rationale that supports the proposition that the mere solicitation and consideration of a union's opinion on a contemplated exercise of management rights interferes with those rights, where (as under the 2024 Agreement) management retains the ultimate freedom to act as it chooses on these subjects.

While President Trump rescinded Executive Order 14,119, which President Biden had issued in order to encourage the use of pre-decisional involvement, the rescission of Executive Order 14,119 does not permit the Agency to violate the provisions of the 2024 Agreement that require pre-decisional involvement. As a result, the Agency is required to comply with the pre-decisional involvement provisions of Article 16 until the expiration of the 2024 Agreement in 2029. In particular, the Agency is required – whenever it contemplates changing conditions of employment through the exercise of management rights that would result in the need to bargain – to engage the Union in pre-decisional discussions before making a final determination of whether and how to make the contemplated change, and to consider the Union's views in deciding how to proceed. The Agency clearly violated this contractual commitment when it terminated its practice of granting early dismissal to teleworkers when it granted early dismissal to non-teleworkers. The contractual requirement to provide the opportunity for pre-decisional involvement by the Union is not an impermissible infringement on management's right to assign and direct employees under 5 U.S.C. § 7106(a). Nor should the Arbitrator credit the Agency's assertion that there was no past practice and, therefore, no change in conditions of employment that would trigger an obligation for the Agency to engage in pre-decisional discussions with the Union.

Additionally, the Agency violated Sections 2 and 3 of Article 16 of the Parties' 2024 Agreement when it failed to provide the Union with notice and an opportunity to bargain over the impact and implementation of management's change to the policy of granting early dismissal to teleworkers.

To remedy the Agency's contractual and statutory violations, in this case, the Arbitrator should direct the Agency to restore the *status quo ante* and make affected employees whole for the loss of administrative leave. It is clear that a *status quo ante* remedy is appropriate. *See*, *e.g.*, *Department of the Treasury, Internal Revenue Service and NTEU, Chapter 19*, 62 FLRA 411, 415 (2008) (denying exceptions challenging, among other things, arbitrator's status quo ante remedy, including time-off awards). Moreover, Arbitrator Kaplan's decision, as upheld in *Social Security Administration, Baltimore, Maryland and AFGE Council 220*, 58 FLRA 630, 633 (2003), makes clear that an award of administrative leave to be taken at a mutually agreeable time is also an appropriate remedy where an agency has improperly denied administrative leave, including in connection with early dismissal before a holiday. Because administrative leave is a form of back pay within the meaning of the Back Pay Act, the Arbitrator is empowered to grant this remedy. *See AFGE Local 1592 and Department of the Air Force, Hill Air Force Base, Utah*, 64 FLRA 861, 862 (2010) ("[T]he Authority has held that awards of paid leave, including annual leave or administrative leave, constitute awards of backpay because paid leave constitutes pay, allowances, or differentials.").

The same qualification requirements that had to be met by non-teleworking employees to be eligible for early dismissal before the Memorial Day and Independence Day 2025 holidays should be applied to the remedial award here. To the extent that any teleworkers were inadvertently granted early dismissal on either date, those teleworkers should be excluded from the award of retroactive administrative leave here.

Although the Agency's position on the composition of the bargaining unit has changed significantly since the grievance here was filed, the Arbitrator is nevertheless empowered to make whole any Agency employees who were in the bargaining unit at the time that the grievance was filed. The August 28, 2025 issuance of Executive Order 14,343 purported to exclude all employees in the Office of the Commissioner for Patents from the coverage of the Federal Service Labor-Management Relations Statute; a number of bargaining unit employees in the Agency's Office of The Chief Information Officer were also purportedly excluded from the bargaining unit as of August 28, 2025. The Arbitrator nevertheless has authority to award retroactive relief to all affected employees who were in the bargaining unit on Memorial Day and Independence Day 2025. *See*, *e.g.*, *IAFF Local 13 and Panama Canal Commission, General Services Bureau, Balboa, Republic of Panama*, 43 FLRA 1012, 1024 (1992) ("The grievance in

this case concerns the Union's claim that past and present employees are entitled to overtime pay they were denied. The Agency has not shown that the Arbitrator exceeded his authority by awarding relief to past employees who were denied the overtime pay to which they were entitled. Those employees were in the bargaining unit at the time the violations complained of occurred and they are entitled to relief under the Arbitrator's award."), *reconsideration denied*, 44 FLRA 954 (1992). The prospective relief sought by the Union in this case should be made contingent on the outcome of the Union's pending legal challenges to the Executive Orders excluding bargaining unit employees from coverage under the Federal Service Labor-Management Relations Statute.

For all of these reasons, the grievance should be sustained in its entirety.

CONTENTIONS OF THE AGENCY

The Agency proposes that the issues presented for decision be defined as:

1. Whether management's failure to grant teleworkers early dismissal before the Memorial Day and Independence Day holidays in 2025 as it did bargaining unit employees who were working on campus violates Section III.H.1.e of the February 7, 2022 "Patents Full-TimeTelework Program" agreement and Section III.E.1.d of the February 7, 2022 "Patents Partial Telework Program" agreement?

2. Whether management's failure to grant early dismissal to some, but not all bargaining unit employees before the Memorial Day and Independence Day holidays in 2025 violates Article 5, § 5 of the collective bargaining agreement which provides that "[e]mployees will be treated equitably and fairly by management"?

3. Whether management's failure to grant teleworkers early dismissal before the Memorial Day and Independence Day holidays in 2025 as it did bargaining unit employees who were working on campus violates the Telework Enhancement Act of 2010, 5 U.S.C. § 6503(a), which provides that:

> (a) the head of each executive agency shall ensure that —
>
> * * *
>
> (3) teleworkers and nonteleworkers are treated the same for purposes of —
>
> * * *
>
> (C) work requirements; or
>
> (D) other acts involving managerial discretion.

4. Whether management's failure to grant all unit employees early dismissal before the Memorial Day and Independence Day holidays in 2025 violates a past practice?

5. Whether management's failure to grant all unit employees early dismissal before the Memorial Day and Independence Day holidays in 2025 was a unilateral change in conditions of employment which:

a. constitutes an unfair labor practice in violation of § 7116(a)(1) and (5) of the Federal Service Labor Management Relations Statute; and

b. a violation of Article 16, §§ 2, 3, and 8, because management failed to provide the union with notice and an opportunity to engage in pre-decisional discussions and impact and implementation bargaining before making the change.

6. If so, what shall the remedy be?

The Agency did not violate the Parties' 2024 Agreement or any law, rule, or regulation when, as a gesture to employees required to work on campus prior to federal holidays in 2025, it granted early dismissal to give those employees a head start on pre-holiday traffic. The Union's attempt to usurp the Agency's authority to determine when and to whom to grant (or not grant) administrative leave should be rejected.

Under the Federal Service Labor-Management Relations Statute, certain functions and decisions are reserved to management and removed from the duty to bargain. *See* 5 U.S.C. § 7106(a). If the Agency's actions were found to violate a contract term constraining any of these reserved functions, that term would be unenforceable under FLRA precedents. *See, e.g., Consumer Financial Protection Bureau and NTEU Chapter 335*, 73 FLRA 670, 675-76 (2023).

When Congress passed the Administrative Leave Act of 2016, it sought to address concerns of administrative leave abuse across federal agencies and directed OPM to implement new regulations in connection with the Administrative Leave Act. Those regulations make clear that administrative leave is not an entitlement, but is an authority entrusted to the discretion of federal agencies that should be used sparingly.

It is clear that the decision to grant or not grant administrative leave has long been recognized as a management right. *See*, *e.g.*, *Department of Veterans Affairs Medical Center, Asheville, North Carolina and AFGE Local 446, AFL-CIO*, 51 FLRA 1572, 1576-79 (1996) ("[A]gencies have discretion to grant administrative leave to their employees in certain situations for brief periods of time."). Therefore, any requirement that the Agency grant administrative leave necessarily precludes management from directing its employees to remain on duty to perform work, and would therefore directly interfere with the Agency's right to assign work. *See*, *e.g.*, *NFFE and Department of the Army, Rock Island Arsenal, Rock Island, Illinois*, 49 FLRA 151, 161 (1994) ("Because the proposal preserves the Agency's right to approve the use of administrative leave, we find that there is no direct interference with the right to assign

work."); *AFGE Local 2022 and Department of the Army, Headquarters, 101st Airborne Division, Fort Campbell, Kentucky*, 40 FLRA 371, 380-81 (1991).

In one dispute, the FLRA found that a proposal that all bargaining unit employees be granted administrative leave whenever administrative leave was granted to all non-essential military personnel would prevent the agency in question from retaining on duty those employees whose services were required to perform assigned work, which directly interfered with the Agency's right to assign work. *NFFE Local 3 and Department of Transportation, United States Coast Guard, Milwaukee, Wisconsin*, 45 FLRA 805, 809-810 (1992). The situation here is markedly similar, with the Union seeking to require the Agency to provide early dismissal to all teleworkers any time that early dismissal is provided to employees working on campus. This would prevent the Agency from keeping teleworking employees on duty, and directly interferes with the Agency's right to assign work.

The evidentiary record reflects the Union's failure to establish that the Parties have developed a past practice concerning the granting of early dismissal by the Agency before federal holidays. While the Union nevertheless claims the existence of such a past practice, nothing in the record at arbitration provided any specifics as to this claimed practice, including its purported duration, how it developed, or the evidence that is asserted to prove the existence of the practice.

Notably, even if the record were more complete with respect to the claimed practice here, the FLRA has determined in recent years that parties may not establish a past practice that modifies the terms of a written agreement. *Small Business Administration and AFGE Local 3841*, 70 FLRA 525, 528 (2018) ("[W]e find that certain concerns specific to the federal sector support reversing our existing precedent and holding that arbitrators may not modify the plain and unambiguous provisions of an agreement based on parties' past practices.").

Here, the Parties have explicitly addressed in their 2024 Agreement the types of activities for which administrative leave would be granted – notably, for activities like voting, blood donation, court leave, taking the bar examination, and other enumerated circumstances. Under current FLRA precedent, however, the Parties could not have established a past practice that deviates from the provisions of the 2024 Agreement governing the specific circumstances in which administrative leave would, in fact, be granted.

Even if, however, the Arbitrator were to proceed to analyze the claimed past practice according to traditional standards, it is clear that those standards are not met in this case. For a claimed past practice to be found binding, it must be shown to have been consistently exercised for an extended period of time with the other party's knowledge and express or implied consent. *Department of Labor, Office of the Assistant Secretary for Administration and Management, Dallas, Texas and AFGE, National Council of Field Labor Locals, Local 2139*, 65 FLRA 677, 679 (2011) (finding that a "practice must be 'consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other.'").

Here, the evidence reflects that early dismissal was not consistently granted by the Agency prior to federal holidays. For example, in 2022, 2023, 2024, and 2025, early dismissal was not granted for the Martin Luther King, Jr. or Presidents' Day holidays; nor was early dismissal provided prior to Columbus Day in 2022 or 2025. For these reasons, the Union has failed to demonstrate a past practice that the Agency has always granted two-hour early dismissals to bargaining unit employees before federal holidays. To the contrary, the record could support a finding by the Arbitrator that – for over a decade – the Agency not only decided whether to grant or not grant early dismissal before each federal holiday, but would also determine the criteria controlling which employees were entitled to early dismissal, without protest by the Union.

Furthermore, the Agency has not violated any enforceable provision in any of the Parties' Telework MOUs. Although the Telework MOUs provide generally that administrative leave for early dismissal or other closures not due to emergency or weather conditions will be granted to participants working at approved alternate work sites, the Agency's right to limit administrative leave – or to decline to provide administrative leave – is preserved by law. These provisions in the Telework MOUs would impermissibly constrain that right, contrary to 5 U.S.C. § 7106(a) and OPM's regulations implementing the Administrative Leave Act of 2016, found at 5 C.F.R. § 630.1403(a).

In general, the management rights set forth in 5 U.S.C. § 7106(a) may not be waived. Nor is there evidence that the Agency agreed to bargain over a permissive subject, pursuant to 5 U.S.C. § 7106(b)(1), with respect to grants of administrative leave.

Furthermore, because these provisions in the Telework MOUs directly interfere with management rights, they cannot be considered to be a negotiable procedure for purposes of 5 U.S.C. § 7106(b)(2).

While the Parties may also negotiate appropriate arrangements for employees adversely affected by the exercise of a management right, pursuant to 5 U.S.C. § 7106(b)(3), an appropriate arrangement may not excessively interfere with a management right. *NFFE Local 3 and Department of Transportation, United States Coast Guard, Milwaukee, Wisconsin*, 45 FLRA 805, 811 (1992) ("In order to determine whether a proposal constitutes an appropriate arrangement under section 7106(b)(3) of the Statute, it is first necessary to determine whether the proposal is intended as an arrangement for employees adversely affected by the exercise of a management right. If the proposal is intended as an arrangement, the Authority next examines whether the arrangement is appropriate because it does not excessively interfere with the exercise of that management right."). Here, because the Union asserts that the Agency must always provide early dismissals to all bargaining unit teleworkers any time that it is granted to employees working on campus, the Union's interpretation of the relevant language of the respective Telework MOUs would limit the Agency's right to assign work in a way that is disproportionate to the adverse effects on employees of management using its discretion to deny such administrative leave. As a result, these provisions excessively and unlawfully interfere with management's statutory rights.

Additionally, the individual bargaining unit employees at issue here have suffered no true adverse effects from management's exercise of its right to grant or deny administrative leave prior to federal holidays. There is no entitlement to administrative leave, and so no employee could have assumed that the Agency would have granted administrative leave for any of the holidays at issue. Nor is there a consistent time frame within which administrative leave for early dismissals before holidays has been given such that there is any basis to find that bargaining unit employees changed their schedules in anticipation of an early dismissal on any of the days at issue here, or that they had any reasonable expectation that early dismissal would be granted. The record does not reflect that the effect of the Agency's decision not to offer administrative leave to certain teleworking bargaining unit employees had more than a *de minimis* effect on those employees. The Union's assertion that management must grant administrative leave to teleworkers any time that it is granted to employees on campus fails to

account for the Agency's workload needs or priorities, such that the burden placed on the Agency would be disproportionate to any adverse effects suffered by the bargaining unit employees who did not receive early dismissal here. *See*, *e.g.*, *NFFE Local 3 and Department of Transportation, United States Coast Guard, Milwaukee, Wisconsin*, 45 FLRA 805, 811-12 (1992).

By contrast, the FLRA has found that the balance weighed in favor of employees where grants of administrative leave were provided to a limited number of individuals for particular purposes, and where the Agency retained the ability to deny administrative leave if doing so would severely affect workload. *NTEU and Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 41 FLRA 1106, 1127-29 (1991).

The Agency's actions in this case complied with the Telework Enhancement Act of 2010. The Agency has not subjected teleworkers and non-teleworkers to different work requirements by granting a two-hour early dismissal to on-campus employees. There is no difference in the performance standards applied to teleworking employees and on-campus employees. Furthermore, while the Union asserts that the Telework Enhancement Act precludes teleworkers from ever being required to work when non-teleworkers are not, the Parties' Telework MOUs themselves anticipate that teleworkers and non-teleworkers will be treated differently in the event of a closure of the government due to emergency or weather conditions. Indeed, just as the Agency may deny weather and safety leave to teleworkers who can continue to work when the office is closed, the Agency may similarly deny early dismissal leave to teleworkers where they have no commute.

Moreover, the Telework Enhancement Act cannot be reasonably understood to mean that managers can never treat teleworkers and non-teleworkers differently in situations where they are not similarly situated. For example, on-campus employees receive transit subsidies, subsidized gym memberships, subsidized parking, a healthcare clinic, daycare, and a discount at the on-campus cafeteria that teleworking employees do not receive. The Agency's actions were therefore consistent with the statutory intent of the Telework Enhancement Act to ensure that telework does not diminish employee performance or Agency operations. *See* 5 U.S.C. § 6502(b)(1).

Even if, however, the Agency were found to have violated any provisions of the 2024 Agreement, the Telework MOUs, or applicable law, rules, or regulations, the remedy sought by

the Union in this case is inappropriate. While the Union seeks a *status quo ante* remedy that would grant administrative leave to affected employees in connection with the early dismissal before the 2025 Memorial Day and Independence Day holidays, the Union has failed to demonstrate that the remedy sought is appropriate. Indeed, the bargaining unit employees at issue were not actually harmed by the Agency's decision to grant administrative leave to employees working on campus. Even assuming, for the sake of argument, that the Union proves some harm, the requested remedy here would provide an inappropriate windfall, particularly because – as discussed above – administrative leave is not an entitlement, and no employee could have any reasonable expectation that they would receive an early dismissal in advance of the federal holidays at issue.

Furthermore, the Agency cannot retroactively grant employees administrative leave that they did not take on days that have already passed and on which they performed work. *Department of Veterans Affairs Medical Center, Asheville, North Carolina and AFGE Local 446, AFL-CIO*, 51 FLRA 1572, 1580 (1996) (finding that a status quo ante remedy was inappropriate because "it is not possible to recreate events that have already happened").

Contrary to the Union's claims, the early dismissals at issue here were intended to provide employees who were working at least four hours on the early dismissal day with the ability to avoid traffic on the day before the holiday or holiday weekend. The early dismissals were targeted at a specific subset of the employee population based on, among other things, mission needs. Not all of the bargaining unit teleworkers at issue here would have been entitled to administrative leave on the dates at issue.

Moreover, a *status quo ante* remedy would excessively interfere with management's rights by awarding administrative leave to employees who may not have met the mission- or hours-worked criteria to receive administrative leave in connection with those holidays. If the Arbitrator were to usurp the Agency's discretion in determining whether and to whom to grant administrative leave, he would excessively interfere with the Agency's right to assign work, and the award would be unenforceable.

The Arbitrator also should not grant any remedy related to a holiday other than the 2025 Memorial Day and Independence Day holidays. The Union had ample opportunity to file a grievance concerning any holiday after Independence Day 2025; this grievance does not, however, raise such claims. The Union's grievance here should not be interpreted to cover

alleged violations of contract, law, rule, or regulation that have not yet occurred. *See*, *e.g.*, *Social Security Administration and Local 3571*, 71 FLRA 798 (2020) (finding that "[w]here an arbitrator expressly limits the issues before him to an employee's performance assessments for two specific years, we find that the arbitrator exceeds his authority by directing an agency to take additional actions when conducting future assessments of the employee.").

Finally, any remedy awarded herein should be limited to employees who are currently in the bargaining unit represented by the Union. Executive Orders 14,251 and 14,343 resulted in the exclusion of numerous employees from the bargaining unit represented by the Union here. The Agency's exclusions of those employees from the bargaining unit are currently the subject of litigation in federal district court. While the Union may assert that the Arbitrator can and should assert jurisdiction over former employees or employees who were formerly within the bargaining unit, the Agency disagrees. Section 7103(b) of Title 5 of the United States Code, if properly applied, unequivocally excludes certain federal agency divisions and the positions therein from coverage under the Federal Service Labor-Management Relations Statute on the basis that they have intelligence or national security functions, and empowers the President to make those exclusionary determinations at any time via executive order. Section 7103(b) operates differently than 5 U.S.C. § 7112(b), which identifies certain types of jobs that are not appropriate for inclusion in a bargaining unit. Nor can the Union point to any cases where an arbitrator has been deemed to have jurisdiction over employees excluded from coverage under the Federal Service Labor-Management Relations Statute by Section 7103(b). As a result, if any remedy is awarded here, the Arbitrator should limit the award to bargaining unit employees currently in the bargaining unit represented by the Union, pending the outcome of the relevant litigation, and further limit the remedy to a direction to the Agency to comply with the Parties' collective bargaining agreement on a prospective basis.

For all of these reasons, the grievance should be denied in its entirety.

DISCUSSION AND OPINION

After careful consideration of the entire record, I find that the issues presented for decision are properly defined as:

> 1. Whether the Agency violated the Patents Full-Time Telework Program MOU and the Patents Partial Telework Program MOU when it failed to grant early dismissal to otherwise-eligible teleworkers before the Memorial Day and

Independence Day holidays in 2025 when it granted early dismissal to otherwise-eligible bargaining unit employees who were working on campus;

2. Whether the Agency violated Article 5, Section 5 of the Parties' 2024 Agreement when it failed to grant early dismissal to otherwise-eligible teleworkers before the Memorial Day and Independence Day holidays in 2025 when it granted early dismissal to otherwise-eligible bargaining unit employees who were working on campus;

3. Whether the Agency violated the Telework Enhancement Act of 2010 when it failed to grant early dismissal to otherwise-eligible teleworkers before the Memorial Day and Independence Day holidays in 2025 when it granted early dismissal to otherwise-eligible bargaining unit employees who were working on campus;

4. Whether the Agency's failure to grant all unit employees early dismissal before the Memorial Day and Independence Day holidays in 2025 violated a past practice;

5. Whether the Agency's failure to grant all unit employees early dismissal before the Memorial Day and Independence Day holidays in 2025 was a unilateral change in conditions of employment which:

a. constitutes an unfair labor practice in violation of Section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute; and

b. constitutes a violation of Article 16, Sections 2, 3, and 8, because the Agency failed to provide the Union with notice and an opportunity to engage in pre-decisional discussions and impact and implementation bargaining before making the change.

6. If so, what shall the remedy be?

I further find that:

1. The Agency violated the Patents Full-Time Telework Program MOU and the Patents Partial Telework Program MOU when it failed to grant early dismissal to otherwise-eligible teleworkers before the Memorial Day and Independence Day holidays in 2025 when it granted early dismissal to otherwise-eligible bargaining unit employees who were working on campus;

2. The Agency violated Article 5, Section 5 of the Parties' 2024 Agreement when it failed to grant early dismissal to otherwise-eligible teleworkers before the Memorial Day and Independence Day holidays in 2025 when it granted early dismissal to otherwise-eligible bargaining unit employees who were working on campus; and

3. The Agency violated the Telework Enhancement Act of 2010 when it failed to grant early dismissal to otherwise-eligible teleworkers before the Memorial Day and Independence Day holidays in 2025 when it granted early dismissal to otherwise-eligible bargaining unit employees who were working on campus.

4. The Agency violated an established past practice reflecting the Parties' interpretation of the Telework MOUs and Article 5, Section 5 of the Parties' 2024 Agreement when it unilaterally discontinued the practice of granting teleworking bargaining unit employees early dismissal via administrative leave before holidays when otherwise similarly situated non-teleworking coworkers were granted such early dismissal.

5. The record does not support a finding that the Agency violated a freestanding past practice of granting teleworking bargaining unit employees early dismissal via administrative leave before holidays when otherwise similarly situated non-teleworking coworkers were granted such early dismissal.

6. The record does not support a finding that the Agency violated Article 16 of the Parties' 2024 Agreement when it failed to provide the Union with the opportunity for pre-decisional involvement before making the change, or with notice and an opportunity to bargain over impact and implementation before discontinuing the practice.

7. The record does not support a finding that the Agency violated 5 U.S.C. § 7116(a)(1) and (5) by failing to provide the Union with notice and an opportunity to bargain impact and implementation.

The grievance is, therefore, sustained in part and denied in part to the extent consistent with the foregoing, with the appropriate remedy discussed below. A summary of the principal reasons for these holdings follows.[1]

The analysis in this grievance begins with the Parties' collective bargaining agreement – specifically, the 2024 Agreement and their Telework MOUs, which – pursuant to the MOUs Side Agreement – remain in effect until the expiration of the 2024 Agreement on June 30, 2029. I note that the grievance here specifically referenced only two of the Parties' Telework MOUs. The Parties' Patents Fulltime Telework Program Agreement provides that:

> Administrative leave for early dismissal not due to emergency or weather conditions, such as dismissals prior to a Federal holiday, will be granted to participants working at the approved alternate worksite.

[1] I note that the Agency did not raise in its brief – or at the arbitration hearing – the contentions originally noted in its grievance response concerning the grievability of violations of Article 5, Section 5 other than in the form of individual employee grievances**;** or that Article 5, Section 5 of the Parties' 2024 Agreement is limited in application to employees who are members of a class of employees protected by anti-discrimination laws. I find that, even if preserved and presented at arbitration, neither of these arguments would have been persuasive on this record.

Similarly, the Parties' Patents Partial Telework Program Agreement provides that:

> Early dismissal of USPTO employees or closure of the USPTO office for non-emergency conditions, such as on the day prior to a Federal holiday, will be granted to participants working at an alternate worksite.

The factual record makes clear that, in connection with the 2025 Memorial Day and Independence Day holidays, the Agency failed to grant early dismissal ahead of the holiday to bargaining unit employees covered by these Telework MOUs who worked at an alternate worksite but who otherwise met the criteria for early dismissal (i.e., working at least four hours – prorated for part-time employees – on the day at issue) (as a group, "Eligible Teleworking Employees") where bargaining unit employees in the same business units who performed the same work on the Agency's campus (as a group, "Eligible On-Campus Employees") were granted early dismissal via administrative leave. These failures unambiguously violate Section III.H of the Patents Fulltime Telework Program Agreement and Section III.E of the Patents Partial Telework Program Agreement, with respect to the bargaining unit employees covered by those agreements.

Although the Union did not cite the remainder of the Parties' Telework MOUs in this grievance, I find that the allegation that the Agency violated Article 5, Section 5 of the Parties' 2024 Agreement encompasses the Union's allegations that the Agency violated each of the Telework MOUs for affected bargaining unit employees when it failed to grant early dismissal ahead of the holiday to Eligible Teleworking Employees where Eligible On-Campus Employees were granted early dismissal via administrative leave. The requirement that bargaining unit employees "be treated equitably and fairly by management" encompasses the Agency's obligation to comply with the Parties' negotiated agreements concerning the fair and equitable treatment of groups of bargaining unit employees, including those agreements in the Telework MOUs concerning the equal treatment of teleworking and non-teleworking bargaining unit employees. No basis was shown on this record to limit the requirement of equitable and fair treatment to only certain protected classes of bargaining unit employees; nor was it shown that inequitable and/or unfair treatment of teleworking employees relative to non-teleworking employees in violation of the Parties' negotiated agreements was a matter excluded from Article 5, Section 5.

I reject the Agency's claim that Eligible Teleworking Employees should not be treated as similarly situated to Eligible On-Campus Employees for purposes of early dismissal. First, the Parties have specifically agreed, in their Telework MOUs, that teleworking and non-teleworking employees are to be treated identically for purposes of early dismissal. Second, while the Agency asserts that the early dismissals provided for the 2025 Memorial Day and Independence Day holidays were offered specifically for purposes of alleviating holiday weekend travel for bargaining unit employees working on campus, the record reflects that all of those Eligible On-Campus Employees had the ability to work a flexible schedule that would allow the on-campus employees to leave work early to avoid holiday weekend traffic. Moreover, even the Agency's own announcement of the early dismissal for the 2025 Independence Day holiday omitted any mention of traffic as a reason for the grant of early dismissal to on-campus employees only. For these reasons, the record does not reflect the understanding of the Parties that teleworking and non-teleworking employees in the same business units and performing the same work were differently situated for purposes of early dismissal.

Under these contractual provisions, the Agency retains the right to determine whether *any* bargaining unit employees are granted early dismissal. Nor, on this record, were the relevant contractual provisions shown to limit the Agency's right or ability to determine which business units – or smaller subunits – of the Agency would be granted early dismissal. Indeed, nothing was shown on this record that would preclude the Agency from determining that certain offices would be granted early dismissal while others would not, due to workload or other mission needs. The sole limitation placed on the Agency is that if non-teleworking employees are granted early dismissal before a federal holiday, then their otherwise similarly situated teleworking coworkers are also to receive such early dismissal.

For these reasons, the record fails to establish that the negotiated requirement of equal treatment with respect to holiday early dismissal for Eligible Teleworking Employees and Eligible On-Campus Employees conflicts with the Agency's statutory management rights pursuant to 5 U.S.C. § 7106(a). Because – notwithstanding the relevant provisions of the Telework MOUs – the Agency retains the right to hire, assign, and direct its employees, and to assign work, including the determination of whether any early dismissal is granted at all, the record fails to demonstrate how the bargained requirement that Eligible Teleworking Employees also be granted early dismissal when Eligible On-Campus Employees are granted early dismissal

conflicts with management's Section 7106(a) rights, including the right to assign work, as asserted by the Agency here. Rather, in addressing the negotiability of proposals addressing grants of administrative leave similar to those at issue here, the FLRA has held, in interpreting the administrative leave provisions of the now-abolished Federal Personnel Manual, that, "as agencies have discretion to grant administrative leave to their employees in certain situations for brief periods of time, management can negotiate over how it will exercise that discretion." *Department of Veterans Affairs Medical Center, Asheville, North Carolina and AFGE Local 446, AFL-CIO*, 51 FLRA 1572 (1996).

As OPM noted in its regulations implementing the Administrative Leave Act of 2016,

> Administrative Leave is an agency discretionary authority; therefore each agency makes determinations regarding when and for what purposes (including as a goodwill gesture to address employee morale) it provides administrative leave.

89 Fed. Reg. 102,264 (Dec. 17, 2024). The evidentiary record suggests that these regulations, which came into effect after the effective date of the Parties' 2024 Agreement, are not enforceable to the extent that they conflict with the 2024 Agreement and the Telework MOUs incorporated therein. Even if, however, one were to find that the regulations were enforceable even to the extent that they conflict with the 2024 Agreement, one notes that the bases for providing administrative leave under the implementing regulations, at 5 C.F.R. § 630.1403, are framed in the disjunctive and include, as occurred here, when an "absence is officially sponsored or sanctioned by the agency." *Id*. This is a ground consistent with the Parties' negotiated constraints on the Agency's exercise of its discretion in granting administrative leave for early dismissal which require the Agency to grant early dismissal without discriminating among teleworking and non-teleworking bargaining unit employees on the basis of their teleworking status.

Indeed, the FLRA has identified numerous other circumstances where it found "grants of administrative leave to be a negotiable condition of employment," including for:

> time off in connection with blood donation, *American Federation of Government Employees, Local 1345 and U.S. Department of the Army, Headquarters, Fort Carson, et al.*, 48 FLRA 168, 182 (1993); leave for employees who are prevented from performing duties due to circumstances beyond their control, *American Federation of Government Employees, Local 2902 and U.S. Department of the Army, Army Garrison, Fort A.P. Hill, Virginia*, 44 FLRA 3 (1992) (Provision 1); periods of holiday shutdown, *National Federation of Federal Employees, Local 2119 and U.S. Department of the Army, Rock Island Arsenal, Rock Island, Illinois*, 42 FLRA 993 (1991); and participation in counseling and/or treatment sessions relating to an agency's drug testing program, *BATF*, 41 FLRA at 1126-27.

Department of Veterans Affairs Medical Center, Asheville, North Carolina and AFGE Local 446, AFL-CIO, 51 FLRA 1572, 1578-79 (1996). *See also Social Security Administration, Baltimore, Maryland and AFGE Council 220*, 58 FLRA 630, 633 (2003) ("[T]he Authority has long recognized that agencies have broad discretion to grant administrative leave to employees for brief periods of time, such as the 4 hours involved in this case. *See United States Dep't of the Air Force, 439th Airlift Wing, Westover Air Reserve Base, Mass.,* 55 FLRA 945, 949 (1999). As agencies have discretion to grant administrative leave to their employees, management can negotiate the terms under which it will exercise that discretion and such agreements are enforceable in arbitration. *See, e.g., VAMC, Asheville,* 51 FLRA at 1578.").

The circumstances here differ meaningfully from those in *NFFE Local 3 and Department of Transportation, United States Coast Guard, Milwaukee, Wisconsin*, 45 FLRA 805 (1992). In that case, the FLRA considered the negotiability of two proposals seeking to tie the entitlement of bargaining unit employees to administrative leave to grants of administrative leave to various groups of military personnel. *Id*. at 806. The FLRA found that:

> Proposals 1 and 2 require the Agency to grant administrative leave to bargaining unit employees whenever nonessential military personnel are granted such leave. As such, the proposals prevent the Agency from retaining on duty those bargaining unit employees whose services are required to perform assigned work. Therefore, the proposals directly interfere with the Agency's right to assign work.

NFFE Local 3 and Department of Transportation, United States Coast Guard, Milwaukee, Wisconsin, 45 FLRA 805, 809-810 (1992). In considering whether the proposals constituted an appropriate arrangement for purposes of 5 U.S.C. § 7106(b)(3), the FLRA held that:

> The benefits to be afforded employees under the proposal are time off work without charge to leave, the likelihood of increased morale and the elimination of employee security concerns if employees are not required to report for work. While these benefits are significant, they do not outweigh the burden imposed on management's right to assign work. The proposals require the Agency to grant administrative leave on all occasions when nonessential military personnel are granted such leave. The proposals mandate administrative leave without regard to the need for employees' services and the necessity of performing work. We view this intrusion on the Agency's ability to assign work as outweighing the benefits to employees of time off work and increased morale.

Id. at 811.

By contrast, under the provisions of the Telework MOUs and Article 5 at issue here, the Agency retains the right to determine which employees are granted early dismissal before federal holidays on every permissible basis other than on teleworking status. There was no showing that teleworking employees were more or less able to meet the Agency's mission needs, including the

need to maintain productivity, than their otherwise similarly situated coworkers assigned to report to the Agency's campus.

Even if the language of the Telework MOUs concerning the entitlement to early dismissal of Eligible Teleworking Employees where Eligible On-Campus Employees were granted early dismissal was viewed as conflicting with the Agency's rights under 5 U.S.C. § 7106(a), the record supports a finding that the relevant language of the Telework MOUs is enforceable under 5 U.S.C. § 7106(b). Although the record does not support a finding that these grants of administrative leave constitute a change in employees' tours of duty, the Telework MOUs plainly relate to telework – i.e., a technology, method, and means of performing work, which falls within the scope of the permissive subjects of bargaining identified in 5 U.S.C. § 7106(b)(1). *See Social Security Administration, Baltimore, Maryland and AFGE Council 220*, 58 FLRA 630, 633 (2003) ("The Arbitrator's grant to these employees of 4 hours of administrative leave does not establish the tour of duty of these employees or change their regularly scheduled administrative workweek. The award also has no retroactive effect on the working relationship and the tour of duty of these employees on December 23, 1999."). The Agency elected to bargain over these matters, including reaching agreement in the Telework MOUs to treat teleworkers in the same manner as non-teleworkers for purposes of early dismissal before holidays. As the Agency elected to bargain over these matters, no basis was shown to find that the enforcement of these provisions of the Telework MOUs conflict with the Agency's statutory management rights. *See*, *e.g.*, *Department of Education, Federal Student Aid and AFGE Local 3899*, 71 FLRA 1166, 1167 (2020) (dismissing exceptions to arbitration award finding that parties' collective bargaining agreement precluded agency from making agency-wide unilateral changes to the availability of telework, based upon FLRA's holding that "[b]ecause the Arbitrator's award simply requires the Agency to abide by the procedures to which it agreed in the CBA, it does not excessively interfere with its management rights.").

Alternatively, the record evidence supports a finding that the early dismissal language of the Telework MOUs is enforceable as a Section 7106(b)(2) procedure. The early dismissal language of the Telework MOUs establishes the procedure under which the Agency will grant administrative leave for early dismissal before holidays in the event that the Agency makes the decision to grant administrative leave under those circumstances. No reason was shown why the

Parties should not be held to their bargain regarding the procedures to be applied to the Agency's decisions granting early dismissal.

Even if they were not within the scope of a permissive subject of bargaining under Section 7106(b)(1) over which the Agency elected to negotiate, or a procedure under Section 7106(b)(2), the early dismissal provisions of the Telework MOUs were shown to be an appropriate arrangement under Section 7106(b)(3) for employees who would otherwise be adversely affected if the Agency were to determine that only on-campus bargaining unit employees were entitled to early dismissal before a federal holiday. The evidentiary record here provides no basis to conclude that such arrangements excessively interfere with the Agency's exercise of its management rights in this context, as the Agency agreed to negotiate these parity provisions, and the modest burden placed on the Agency by its agreement to comply with these provisions – where the Agency retains full authority to decide whether early dismissal is granted and to which units and subdivisions of the Agency early dismissal will be afforded – is outweighed by the benefit provided to bargaining unit employees by their receipt of fair and equitable treatment from the Agency, as well as promoting increased morale. *Cf. Consumer Financial Protection Bureau and NTEU Chapter 335*, 73 FLRA 670, 678 (2023) ("[I]f a provision is lawfully negotiable under § 7106(b), then it is binding on the parties who agree to it -- and enforceable in arbitration.") (citing *NAGE Local R14-87 and Kansas Army National Guard*, 21 FLRA 24 (1986) for the proposition that, under the applicable "excessive-interference standard, the FLRA weighs the benefits that the arrangement affords employees against the arrangement's burdens on management's rights. If the benefits outweigh the burdens, then the arrangement is appropriate; if the burdens outweigh the benefits, then the arrangement is not appropriate."). The early dismissal provisions of the Parties' Telework MOUs are therefore enforceable as appropriate arrangements under Section 7106(b)(3). As discussed above, the situation here differs meaningfully from the proposals in *NFFE Local 3 and Department of Transportation, United States Coast Guard, Milwaukee, Wisconsin*, 45 FLRA 805 (1992), which were found not to constitute appropriate arrangements, because the proposals in *NFFE* would "require the Agency to grant administrative leave on all occasions when nonessential military personnel are granted such leave. The proposals mandate administrative leave without regard to the need for employees' services and the necessity of performing work." *Id.* at 811. The language here provides the Agency with broad authority to determine to whom – if anyone – it

will grant early dismissal before a federal holiday, other than with respect to unequal treatment of teleworking and non-teleworking bargaining unit employees.

Ultimately, it is not necessary to determine whether the relevant language of the Telework MOUs and Article 5, Section 5 of the Parties' 2024 Agreement is best classified as a permissible exception to 5 U.S.C. § 7106(a) under 5 U.S.C. § 7106(b)(1), (2), or (3). On this record, under any of those statutory exceptions to the Agency's statutory management rights, those contractual provisions do not conflict with the Agency's management rights, and they are valid, legal, and should be given full force and effect. There has been a violation of the identified contract provisions; those provisions affect management's right to assign work under 5 U.S.C. § 7106(a); the provisions are enforceable under 5 U.S.C. § 7106(b); the cease-and-desist, *status quo ante*, and make-whole remedies, as discussed below, affect a management right by requiring the Agency to abide by its contractual obligations to treat Eligible Teleworking Employees in the same manner as Eligible On-Campus Employees if Eligible On-Campus Employees are granted early dismissal before a holiday; and the remedies, as addressed below, reasonably correlate to the provision at issue. *Cf. Consumer Financial Protection Bureau and NTEU Chapter 335*, 73 FLRA 670, 676-81 (2023).

For these reasons, the record evidence supports a finding that the Agency violated Section III.H. of the Patents Full-Time Telework Program Agreement and Section III.E. of the Patents Partial Telework Program Agreement, as well as Article 5, Section 5 of the Parties' 2024 Agreement.

The evidentiary record also supports a finding that the Agency violated the Telework Enhancement Act of 2010 when it failed to grant Eligible Teleworking Employees early dismissal before the Memorial Day and Independence Day holidays in 2025 as it did Eligible On-Campus Employees. A violation of the Telework Enhancement Act may be challenged via a negotiated grievance procedure. *Department of Education, Federal Student Aid and AFGE Local 3899*, 71 FLRA 1166, 1167 (2020) (upholding arbitrator's finding of violation of Telework Enhancement Act). The Telework Enhancement Act provides, at 5 U.S.C. § 6503, that "[t]he head of each executive agency shall ensure that . . . teleworkers and nonteleworkers are treated the same for purposes of . . . training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees; . . . work requirements; or . . . other acts involving

managerial discretion." The plain text of the statute mandates that the agency head ensure equal treatment, rather than vesting the agency head with discretion to ignore the statutory mandate.

There was no showing that the Agency's denial of early dismissal to teleworkers was justified by the need to ensure that telework did not diminish employee performance or Agency operations. The Agency does not dispute that it permitted employees performing certain types of work on-campus to leave early before the 2025 Memorial Day and Independence Day holidays, while denying administrative leave for the early dismissal to teleworking employees performing the same work and in the same organizational units as the on-campus employees. The record makes clear that the denial of administrative leave for early dismissal was based on status as a teleworker; if it had been based on an operational need to maintain production standards, one would have expected all employees performing toward the relevant production standards to be denied early dismissal – instead, the denial affected only those performing such work away from an Agency campus.

Whether early dismissal before federal holidays is viewed as a morale-improving reward, as a difference in work requirements, or merely as an act involving managerial discretion, the Agency was shown to have treated Eligible Teleworking Employees differently from Eligible On-Campus Employees solely on the basis of their teleworking status.

While one could envision examples of benefits offered to non-teleworking employees – and the Agency has identified some, such as transit subsidies, cafeteria discounts, or subsidized on-campus childcare – which would be of more limited relevance to teleworkers at their alternate duty station, particularly those who live a significant distance from the Agency's campus, there was no showing that teleworkers are actually denied such benefits. Rather, those benefits are simply of less (or no) utility to many teleworkers. It is not necessary, however, to determine the precise contours of the Telework Enhancement Act's requirement of equal treatment. The evidentiary record here amply shows the Agency's reliance on alleged traffic issues to be wholly unsubstantiated as a valid basis for treating teleworkers differently from non-teleworkers for purposes of early dismissal before holidays. Nor is this a situation shown to be comparable to differences in the treatment of teleworking and non-teleworking employees for purposes of weather or other emergencies. On this record and under these circumstances, I conclude that the Agency's disparate treatment of employees on the basis of whether they telework for purposes of these early dismissals contravenes the plain text of the Telework Enhancement Act. The

Agency, therefore, violated the Telework Enhancement Act of 2010 when it failed to grant Eligible Teleworking Employees early dismissal before the Memorial Day and Independence Day holidays in 2025 as it did Eligible On-Campus Employees.

The next issue raised in the Union's grievance suggests, at first glance, a dispute over whether the Agency violated a binding past practice that obligated the Agency to grant **all** bargaining unit employees early dismissal before the 2025 Memorial Day and Independence Day holidays. To the extent that the Union claims the existence of a past practice pursuant to which the Agency was required to grant early dismissal prior to the 2025 Memorial Day and Independence Day holidays, such claim is rejected. Among other things, the record reflects that the decision to grant early dismissal was one made independently of either of the Parties, as it was prompted by the decisions of the Department of Commerce. While the record reflects that early dismissal was typically granted on a repeated basis in advance of certain federal holidays, the record fails to support a mutual understanding of the Parties that mandatory grants of administrative leave for early dismissal were the "understood and accepted way of doing things." Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017, 1019 (1961).

The Union, in its brief, clarified that "[t]he past practice at issue here is that *when* early dismissal has been granted before a holiday, both teleworkers and non-teleworkers alike were dismissed early." (Emphasis in original.)

I find that the Agency violated a past practice of granting Eligible Teleworking Employees early dismissal via administrative leave before holidays when their otherwise similarly situated non-teleworking coworkers were granted such early dismissal.

A binding past practice is one that reflects the Parties' understood and accepted way of doing things over an extended period of time. *See*, *e.g.*, Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017 (1961). Traditionally, arbitrators consider various factors in determining whether, under a collective bargaining agreement, a mutual and binding past practice exists. These include whether the claimed practice has existed for a reasonably long time; whether the practice has been applied repeatedly; whether the application of the practice has been clear and consistent; and whether the practice was known to and accepted by both the employer and the union. The factors also include an analysis of whether the underlying circumstances that gave rise to the practice remain

present, as "a practice must be carefully related to the conditions from which it arose." *Id.* at 1042.

Here, the evidentiary record demonstrates that, over a period of years, the Parties' course of conduct reflected their mutual understanding of the provisions of the Telework MOUs addressing the entitlement of Eligible Teleworking Employees to early dismissal when Eligible On-Campus Employees were granted early dismissal by the Agency in connection with certain holidays. The record reflects that, prior to the 2025 Memorial Day and Independence Day holidays, the Parties' practice was clear and consistent, applied repeatedly, and known and accepted by both Parties over time. This demonstrated past practice reinforces the plain language of the Telework MOUs and of Article 5, Section 5 of the Parties' 2024 Agreement, which each reflect the Parties' agreement that Eligible Teleworking Employees and Eligible On-Campus Employees are to be treated equally on this basis.

Because the practice here reinforces – rather than modifies – the plain and unambiguous provisions of the Parties' Telework MOUs, the Agency's citation to *Small Business Administration and AFGE Local 3841*, 70 FLRA 525, 528 (2018), is inapposite.

To the extent that the Union asserts the existence of a binding freestanding past practice addressing the entitlement of Eligible Teleworking Employees to early dismissal when Eligible On-Campus Employees were granted early dismissal by the Agency in connection with certain holidays, the record fails to establish the existence of such a freestanding practice independent of the contractual language addressed above.

The record does not support a finding that the Agency violated Sections 2, 3, and 8 of Article 16 of the 2024 Agreement by failing to provide the Union with an opportunity for pre-decisional involvement or an opportunity to bargain over impact and implementation in this case. As the evidentiary record reflects, the issue of equal treatment of Eligible On-Campus Employees and Eligible Teleworking Employees was, in fact, bargained by the Parties. Given the facts of this case, the Agency was under no obligation to provide the Union with pre-decisional involvement or notice and an opportunity to bargain impact and implementation – because the Agency did, in fact, bargain with the Union over the decision to grant early dismissal to Eligible Teleworking Employees when early dismissal was granted to Eligible On-Campus Employees. I further note that there is no evidence, on this record, of a request by the Union for the Parties to engage in impact and implementation bargaining concerning these issues.

For the same reasons, I find that the evidentiary record does not support a finding that the Agency violated 5 U.S.C. § 7116(a)(1) and (5) in this case.[2]

For all of these reasons, I find that the Agency violated: 1) the Parties' Telework MOUs – either directly and/or via a violation of Article 5, Section 5 of the Parties' 2024 Agreement; 2) the Telework Enhancement Act of 2010; and 3) the Parties' past practice when it failed to grant Eligible Teleworking Employees early dismissal before the Memorial Day and Independence Day holidays in 2025 as it did Eligible On-Campus Employees. Each of these violations stands independently, and each independently warrants the full scope of remedies described below.

The Agency's claim that the remedy in this case should be limited only to the 2025 Memorial Day and Independence Day holidays is rejected. The grievance here makes clear that it challenges not only the denial of early dismissal to Eligible Teleworking Employees for the 2025 Memorial Day and Independence Day holidays on the basis of telework status, but also any subsequent denials of early dismissal to Eligible Teleworking Employees on the basis of telework status.

The Agency's argument that a *status quo ante* remedy is inappropriate here is rejected. Such remedies are common in the event of proven contractual or statutory violations, such as those here. The Agency's reliance on *Department of Veterans Affairs Medical Center, Asheville, North Carolina and AFGE Local 446, AFL-CIO*, 51 FLRA 1572, 1580 (1996) (finding that a *status quo ante* remedy was inappropriate because "it is not possible to recreate events that have already happened") overlooks the FLRA's discussion, in that decision, that it did not believe that a *status quo ante* remedy was appropriate in the particular circumstances of that case but instead directed the parties in that case to bargain and expressed its expectation that the agency involved "will make every effort to redress employees who were harmed by the Respondent's unlawful conduct" as part of that bargaining. I am not persuaded, on these facts, that a *status quo ante* remedy is inappropriate here; to the contrary, I find that *status quo ante* relief is appropriate to remedy the Agency's contractual violations and its violations of the Telework Enhancement Act here.

I am therefore persuaded that the usual *status quo ante* and make-whole remedies are appropriate here.

[2] I note that neither of the Parties here argued that the violations of the Telework MOUs or the 2024 Agreement constituted a repudiation of the Parties' collective bargaining agreement in violation of 5 U.S.C. § 7116.

The Agency is directed to cease and desist from violation of: 1) the Parties' Telework MOUs – either directly and/or via a violation of Article 5, Section 5 of the Parties' 2024 Agreement; 2) the Telework Enhancement Act of 2010; and 3) the Parties' past practice, until such time as the Telework MOUs and the 2024 Agreement are no longer in effect or for any earlier periods as to which the Union is determined – as a matter of law – to not be the exclusive representative of this bargaining unit, subject to final determinations as to exclusions from or other modifications to the bargaining unit.

The Agency is further directed to restore the *status quo ante* and to grant Eligible Teleworking Employees early dismissal before federal holidays when the Agency elects to offer early dismissal before such holidays to Eligible On-Campus Employees.

A denial of administrative leave in violation of the provisions of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action within the meaning of the Back Pay Act. *Department of the Treasury, Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania and National Treasury Employees Union Chapter 53*, 53 FLRA 1697, 1700 (1998) ("It is well established that a violation of a collective bargaining agreement that results in the loss of leave constitutes an unjustified or unwarranted personnel action within the meaning of the Back Pay Act." (citations omitted)).

The Agency is, therefore, also directed to make the affected bargaining unit employees appropriately whole – in accordance with the Parties' collective bargaining agreement and applicable law, including the Back Pay Act – for the Agency's improper denial of administrative leave for the 2025 Memorial Day and Independence Day holidays, and for any holidays thereafter on which the Agency has committed similar violations, until such time as the Telework MOUs and the 2024 Agreement are no longer in effect or for any earlier periods as to which the Union is determined – as a matter of law – to not be the exclusive representative of this bargaining unit, subject to final determinations as to exclusions from or other modifications to the bargaining unit.

As the record reflects, the definition of the bargaining unit represented by the Union is the subject of significant dispute. Given the uncertainty in light of pending unresolved litigation between these Parties and others in other forums regarding the legality and effect of Executive Orders 14,251 and 14,343, the determination of the individuals entitled to a make-whole remedy here is remanded to the Parties in the first instance. Jurisdiction is retained to address any

matters related to remedy that the Parties are unable to resolve on remand. Jurisdiction is also retained to entertain an application for attorney fees to the extent consistent with the Back Pay Act, 5 U.S.C. § 5596.

In the event of a dispute over remedy, the Parties are directed to contact the Undersigned to schedule a conference to address the disputed remedial matters and the state of any relevant pending litigation or other developments.

The grievance is sustained in part and denied in part to the extent consistent with the foregoing.

AWARD

The Agency violated: 1) the Parties' Telework MOUs – either directly and/or via a violation of Article 5, Section 5 of the Parties' 2024 Agreement; 2) the Telework Enhancement Act of 2010; and 3) the Parties' past practice when it failed to grant Eligible Teleworking Employees early dismissal before the Memorial Day and Independence Day holidays in 2025 as it did Eligible On-Campus Employees. Each of these violations stands independently, and each independently warrants the full scope of remedies described below.

The record does not support a finding that the Agency violated a freestanding past practice of granting teleworking bargaining unit employees early dismissal via administrative leave before holidays when otherwise similarly situated non-teleworking coworkers were granted such early dismissal.

The record does not support a finding that the Agency violated Article 16 of the Parties' 2024 Agreement when it failed to provide the Union with the opportunity for pre-decisional involvement before making the change, or with notice and an opportunity to bargain over impact and implementation before discontinuing the practice.

The record does not support a finding that the Agency violated 5 U.S.C. § 7116(a)(1) and (5) by failing to provide the Union with notice and an opportunity to bargain impact and implementation.

The Agency is directed to cease and desist from violation of: 1) the Parties' Telework MOUs – either directly and/or via a violation of Article 5, Section 5 of the Parties' 2024 Agreement; 2) the Telework Enhancement Act of 2010; and 3) the Parties' past practice until such time as the Telework MOUs and the 2024 Agreement are no longer in effect or for any

earlier periods as to which the Union is determined – as a matter of law – to not be the exclusive representative of this bargaining unit, subject to final determinations as to exclusions from or other modifications to the bargaining unit.

The Agency is further directed to restore the *status quo ante* and to grant Eligible Teleworking Employees early dismissal before federal holidays when the Agency elects to offer early dismissal before such holidays to Eligible On-Campus Employees.

The Agency is also directed to make the affected bargaining unit employees appropriately whole – in accordance with the Parties' collective bargaining agreement and applicable law, including the Back Pay Act – for the Agency's improper denial of administrative leave for the 2025 Memorial Day and Independence Day holidays, and for any holidays thereafter on which the Agency has committed similar violations, until such time as the Telework MOUs and the 2024 Agreement are no longer in effect or for any earlier periods as to which the Union is determined – as a matter of law – to not be the exclusive representative of this bargaining unit, subject to final determinations as to exclusions from or other modifications to the bargaining unit.

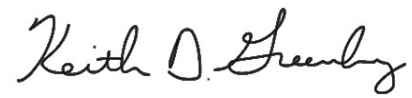
Given the uncertainty in light of pending unresolved litigation between these Parties and others in other forums regarding the legality and effect of Executive Orders 14,251 and 14,343, the determination of the individuals entitled to a make-whole remedy here is remanded to the Parties in the first instance.

Jurisdiction is retained to address any matters related to remedy that the Parties are unable to resolve on remand. Jurisdiction is also retained to entertain an application for attorney fees to the extent consistent with the Back Pay Act, 5 U.S.C. § 5596.

In the event of a dispute over remedy, the Parties are directed to contact the Undersigned to schedule a conference to address the disputed remedial matters and the state of any relevant pending litigation or other developments.

The grievance is sustained in part and denied in part to the extent consistent with the foregoing Opinion and Award.

November 24, 2026



Keith D. Greenberg, Esq.
Impartial Arbitrator