FEDERAL LABOR RELATIONS AUTHORITY

National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service, Office of Chief Counsel	)	Case No. 0-NG-3695

UNION'S RESPONSE TO AGENCY'S STATEMENT OF POSITION

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INTRODUCTION

The National Treasury Employees Union's (NTEU) proposal to create a remote work pilot program is negotiable because it does not violate any management rights or government-wide regulations. The proposal carefully preserves agency discretion to determine who, if anyone, participates in the pilot program. This broad agency discretion brings the proposal into conformity with management's statutory rights to assign work, direct employees, and determine the agency's organization.

Further, the IRS Office of Chief Counsel's (the Agency) freedom to determine pilot participants' official worksites and official stations under the Office of Personnel Management's (OPM) locality-pay regulation and the Federal Travel Regulation, respectively, aligns the proposal with those regulations. The Agency's argument to the contrary is based on a fundamental misinterpretation of the proposal.

Finally, the OPM guidance upon which the Agency relies is not a government-wide regulation within the meaning of the federal labor statute. The guidance, therefore, cannot render NTEU's proposal unlawful. And NTEU's proposal, in any event, does not contravene it.

BACKGROUND

I. The Statutory Framework

Under the Federal Service Labor-Management Relations Statute (the Statute), federal agencies are subject to a "broadly defined duty to bargain over conditions of employment that is subject only to the express statutory exceptions." *Library of Cong. v. FLRA*, 699 F.2d 1280, 1285 (D.C. Cir. 1983). Such exceptions include the management rights enumerated in Section 7106(a) of the Statute. *See, e.g.*, *NTEU v. FLRA*, 1 F.4th 1120, 1121 (D.C. Cir. 2021). Another express exception to the duty to bargain encompasses proposals that are contrary to a government-wide rule or regulation. 5 U.S.C. § 7117(a)(1).

A. The Management Rights that the Agency Raises

The Agency claims three management rights make NTEU's proposal non-negotiable: the rights to "assign work," to "direct" employees, and to determine the "organization" of the agency. 5 U.S.C. § 7106(a). *See generally* Agency's Statement of Position (Ag. Br.). These management rights provisions must be interpreted "narrowly." *See, e.g.*, *NFFE Local 951 v. FLRA*, 412 F.3d 119, 124–25 (D.C. Cir. 2005) (quoting legislative history).

1. Management's Rights To Assign Work and Direct Employees

The right to assign work "includes the authority to determine the particular duties to be assigned to an employee, when work assignments will occur, and to whom or what positions duties will be assigned." *NFFE Local 951*, 412 F.3d at 121–22 (quoting *NTEU*, 53 F.L.R.A. 539, 567 (1997)) (cleaned up). The right to direct employees refers to an agency's right to "supervise and guide [its workers] in the performance of their duties." *NTEU v. FLRA*, 943 F.3d 486, 492–93 (D.C. Cir. 2019) (quoting *Bureau of Pub. Debt*, 3 F.L.R.A. 769, 775 (1980)). While management's rights to assign work and to direct employees are "not coterminous," the Authority often discusses them concurrently. *See, e.g.*, *id.* at 493. The Authority has held that these rights, taken together, mean that agencies have the prerogative to "determine what work will be done, and by whom and when." *Id.*

2. Management's Right To Determine the Agency's Organization

Management's right to determine organization allows agencies to determine their "administrative and functional structure." *FDA, Detroit Dist.*, 59 F.L.R.A. 679, 682 (2004). This includes "how the agency will be divided into organizational entities" and "where organizationally

certain functions shall be established and where the duty stations of the positions providing those functions shall be maintained." *Id.*

B. The Regulations and Guidance that the Agency Raises

Agencies cannot negotiate over proposals "that are inconsistent with . . . any Government-wide rule or regulation." *NTEU v. FLRA*, 942 F.3d 1154, 1155–56 (D.C. Cir. 2019) (quoting 5 U.S.C. § 7117(a)(1)) (cleaned up). Here, the Agency has raised two government-wide regulations and an OPM guidance document that it argues qualifies as a government-wide regulation.

1. The Locality-Pay Regulation: 5 C.F.R. § 531.605(d)

OPM's locality-pay regulation uses an employee's "official worksite" to determine the employee's locality pay rate. 5 C.F.R. § 531.604(b). An employee's "official worksite" is the "official location of an employee's position of record as determined under § 531.605." 5 C.F.R. § 531.602.

For "an employee covered by a telework agreement," the official worksite changes to the "telework site" if they do not report to the agency worksite at least twice per pay period, with limited exceptions. 5 C.F.R. § 531.605(d). Employees who fall within this category thus earn locality pay based on the location of their telework site instead of their

agency worksite. This agency worksite is called the "regular worksite" in the regulation. *See id.*

Although the two terms are often conflated, an employee's "official worksite" not the same as their "official duty station." "Official worksite" is used for locality pay purposes and indicates the precise location where an employee typically works (such as an office). "Official duty station," in contrast, is a geographic area used to determine "entitlement to overtime pay for travel." OPM, "Hours of Work for Travel," https://www.opm.gov/policy-data-oversight/pay-leave/work-schedules/fact-sheets/hours-of-work-for-travel/ (last visited May 10, 2024).

2. The Federal Travel Regulation

The Federal Travel Regulation (FTR) "implements statutory requirements and Executive branch policies for travel by Federal civilian employees . . . authorized to travel at Government expense." 41 C.F.R. § 300-1.1. Federal employees are eligible for per diem or expense reimbursements when they "perform official travel away from [their] official station." 41 C.F.R. § 301-11.1.

An employee's "official station" is a geographic area that their employing agency has the discretion to define, "provided no part of the area is more than 50 miles from where the employee regularly performs their duties." 41 C.F.R. § 300-3.1. Employees must leave the boundaries of their "official station" to trigger an entitlement to applicable travel reimbursements under these regulations. This "official station" is legally distinct from both an employee's "official worksite" and their "official duty station."

3. OPM Telework Guidance

In November 2021, OPM issued a Guide to Telework and Remote Work in the Federal Government so that agencies might "leverage lessons learned during the pandemic to integrate telework and remote work into their strategic workforce plans." *See generally* Ex. A at 2 (Telework Guide). The Telework Guide "provide[s] agencies with practical resources and information to assist them . . . in updating their current policies." *Id.* at 3. OPM cautioned, however, that this telework "guidance is not designed to be overly prescriptive." *Id.* at 55. It instead reflects only OPM's "latest telework guidance." OPM, "Telework," https://www.opm.gov/telework/ (last visited May 8, 2024).

II. NTEU's Proposal

A. The Purpose of the Proposal

NTEU's proposal would create a remote work pilot program for a limited group of employees within the IRS Chief Counsel bargaining unit—employees whom the Agency would choose whether to include in the program. The program would "allow the Agency to test remote work and evaluate its impact on productivity, the Agency's mission, space needs, digitalization efforts, employee engagement and satisfaction, and recruitment and retention of employees." Ex. B, Record of Post-Petition Conference (Apr. 25, 2024), at 4.

In the proposal, "remote work" means "telework at an approved alternative worksite with no requirement to report to the employee's assigned worksite on a regularly scheduled basis." *Id.* at 2. This definition incorporates the statutory term "telework" as defined in the Telework Enhancement Act: "a work flexibility arrangement under which an employee performs [their job duties] from an approved worksite other than the location from which the employee would otherwise work." 5 U.S.C. § 6501(3); *see also* Ex. B at 2 & n.4 (citing

Telework Guide at 10).[1] During the post-petition conference, the Agency agreed to NTEU's explanation of these terms. Ex. B at 2.

B. Application and Selection for Pilot Participation

Under the proposal, the pool of qualified applicants for the remote work pilot program is limited to a defined list of occupations, set forth in Section 2. Ex. C, NTEU Petition, at 6. No employee is automatically allowed to participate in the remote-work pilot. Instead, the proposal preserves the Agency's discretion to approve or deny applications on a case-by-case basis. *Id.*

Included in that discretion is the Agency's authority to determine whether a particular employee's "duties require them to report to the office on a regular basis," which would disqualify them from participation in the pilot. *Id.*; *see also* Ex. B at 2. The Agency agreed to

[1] Although OPM distinguishes between "telework" and "remote work" for clarity within the Telework Guide, there is no separate statutory definition of "remote work." *See* Telework Guide at 12. Unlike the telework statute, the Telework Guide includes a requirement to regularly report to an agency worksite within the definition of "telework." *Id.* "Remote work," in contrast, includes no such requirement. *Id.* But both arrangements qualify as "telework" under the statute, as OPM acknowledged when it described remote work as an "additional flexibility beyond *traditional* telework." *Id.* at 56.

this explanation of the proposal at the post-petition conference. Ex. B at 2.

C. Proximity of Alternative Worksite to "Assigned Post of Duty"

An "assigned post of duty" is the Agency worksite where the employee would otherwise work if they were not a remote worker (such as an Agency office building). *See* Ex. B at 3. It is the same location described as the "regular worksite" in the locality-pay regulation. *See* 5 C.F.R. § 531.605(d)(1).

The proposal requires that the location from which a pilot participant works remotely—the employee's "alternative worksite" (typically their home)—must be within 200 miles of their "assigned post of duty." Ex. C at 7. The alternative worksite must also be within the same locality pay area as the assigned post of duty. *Id. See* 5 C.F.R. § 531.605(d) (referring to alternative worksite as the "telework worksite"). The assigned post of duty thus serves as the reference point to determine permissible locations for a pilot participant's alternative worksite.

The Agency determines an employee's assigned post of duty. Ex. B at 3. Nothing in the proposal alters the Agency's discretion to assign or

to change an employee's assigned post of duty. *Id.* During the post-petition conference, the Agency agreed with this interpretation of the proposal. *Id.*

D. Pilot Participants' Travel to Agency Worksites

Although pilot participants are not required to report to their assigned post of duty on a regular basis, the proposal provides that they must report to an Agency worksite "when requested by management." Ex. C at 7. The Agency has the discretion to decide when to require a pilot participant to report to an office. *Id.*; Ex. B at 3. The Agency also has the discretion to decide to which office location the employee must report. Ex. B at 3. When required to report to an Agency worksite, pilot participants are entitled to travel reimbursements consistent with "existing rules," including agency policy and the Federal Travel Regulation. Ex. B at 4; Ex. C at 7. The Agency agreed with NTEU's explanation of this portion of the proposal at the post-petition conference. Ex. B at 4.

ARGUMENT

I. NTEU's proposal is negotiable because it preserves management rights.

A. The proposal does not violate the Agency's rights to direct employees and to assign work.

1. A remote work proposal setting forth eligibility criteria is negotiable so long as management retains the discretion to approve or deny individual requests on a case-by-case basis. *See NAGE Local R1-144*, 65 F.L.R.A. 552, 554–55 (2011).

In *NAGE*, the Authority found that a proposal similar to the one disputed here did not affect management's "rights to assign and direct employees." *Id.* There, the proposal provided that up to five union officials would be "eligible for telework to perform union-related duties on official time" for up to "20 hours per week per person." *Id.* at 553. The agency "interpret[ed] the proposal as requiring it to allow Union officials to telework," which it argued "affect[ed] management's rights to assign and direct employees." *Id.* In evaluating the proposal, the FLRA explained that, for an employee to be "eligible" for telework "*does not mean* that there is a requirement that an employee be assigned to telework." *Id.* at 554 (emphasis added). Based on this definition of eligibility, which refuted the agency's view that the proposal would

"*require* management to allow Union officials to telework," the FLRA "reject[ed]" the agency's "management's rights arguments." *Id.* at 554–55 (emphasis added).

NAGE governs here. Although a divided Authority in 2018 attempted to scrap its longstanding telework precedent, including *NAGE*, the D.C. Circuit vacated the management-rights rulings underlying that effort. *See generally NTEU v. FLRA*, 1 F.4th 1120 (D.C. Cir. 2021) (reviewing *NTEU & FNS*, 71 F.L.R.A. 703 (2020)). Critical here, to "vacate" a ruling is to "nullify or cancel" it—to "void" it. Black's Law Dictionary 1546 (7th Deluxe Ed. 1999).

The Agency's reliance on the management-rights rulings vacated in *NTEU v. FLRA* is thus misplaced. *See* Ag. Br. at 23–24 (citing *NTEU & FNS*). Once the D.C. Circuit voided those management-rights rulings, the Authority's purported overruling of its earlier telework precedent was undone. And, by extension, its pre-2018 telework precedent, including *NAGE*, controls the outcome of this case.

2. Like the proposal described in *NAGE*, NTEU's remote work pilot proposal is negotiable because it preserves required agency discretion, giving the Agency full freedom to grant or deny applicants'

requests on a case-by-case basis. Ex. C at 6; Ex. B at 2. As in *NAGE*, NTEU's proposal merely lists eligibility criteria that narrow the pool of possible applicants; it does not guarantee anyone the right to become a remote worker. *See* 65 F.L.R.A. at 554.

3. The Agency's position statement does not grapple with *NAGE*'s holding or with other binding Authority precedent showing that "*where* employees will work" is negotiable. *See Antilles Consol. Educ. Ass'n v. FLRA*, 977 F.3d 10, 16 (D.C. Cir. 2020) (citing *HHS, Ctrs. for Medicaid Servs.*, 57 F.L.R.A. 704, 707 (2002)) (observing that under the Authority's right to assign work precedent agencies may be compelled to bargain over *where* employees will work, but not *when*) (emphasis added). Instead, the Agency cites non-telework cases concerning various restrictions on supervision methods such as limits on spot checks, unannounced evaluations, and a practice where IT employees were allowed to work behind locked doors. *See* Ag. Br. at 21–23 (citing *AFGE Local 1712*, 62 F.L.R.A. 15 (2007) (*Fort Richardson*); *NAGE, Local R1-203*, 55 F.L.R.A 1081 (1999); *AFGE, Local 2879*, 38 F.L.R.A. 244 (1990)).

Yet nothing in NTEU's proposal restricts the Agency's ability to use supervision methods of its choice to monitor the employees for whom it authorizes remote work. Modern technology, moreover, provides ample supervision tools for those working outside the office—notwithstanding the Agency's assertions otherwise. *See* Ag. Br. at 23. The Authority has never found telework nonnegotiable on the basis that work at a telework site restricts management's ability to supervise employees.

Accordingly, the Authority should find that the Union's proposal does not affect management's rights to assign and direct employees.

B. The proposal does not violate the Agency's right to determine its organization.

The same management discretion that brings NTEU's proposal in line with the rights to assign work and direct employees also aligns it with the Agency's right to determine its organization. *See, e.g.*, *NAGE*, 65 F.L.R.A. at 554–55.The Agency's claim that NTEU's proposal violates the Agency's right to determine its organization thus has no merit. *See* Ag. Br. at 26–30.

1. Under NTEU's proposal, the Agency—and no one else—decides who may participate in the remote work pilot program, and by

extension, whose official worksites will change to an alternative worksite.[2] In other words, in preserving the Agency's discretion to approve or deny individual remote work requests, NTEU's proposal also preserves the Agency's discretion to determine the official worksites of individual employees.

The Agency nonetheless claims that NTEU's proposal infringes on management's right because it forces the Agency to change employee duty stations and would prevent the Agency from relocating employees. *See* Ag. Br. at 25–32. Because the Agency knows, however, that the employee's official worksite will change if it decides to approve the employee's remote work request, it may take that consideration into account when it exercises its discretion over the remote work request.

2. The Agency cites two inapposite cases in support of its arguments concerning the organizational management right. One does not concern a bargaining proposal at all, and the other concerns a significantly different type of bargaining proposal than is at issue here.

[2] The Agency uses the terms "official worksite" and "official duty station" synonymously. Ag. Br. at 7 n.2. But these terms are not synonymous as a legal matter. *See supra* Section I.B.1.

a. In *DOD DLA*, the FLRA reviewed an arbitration award that imposed remote work as a remedy and concluded that the remedy violated the organizational management right. 70 F.L.R.A. 932, 932 (2018). This case is procedurally distinguishable because the agency in *DOD DLA* had the remote-work remedy *imposed* upon it by the arbitrator. Because NTEU's proposal affords the Agency the discretion to approve or deny pilot applications on a case-by-case basis, the reasoning and result of a case where a remote-work remedy was imposed (thereby eliminating the agency's use of discretion) is not controlling here.

Further, *DOD DLA* itself is an aberration from the Authority's earlier precedent concerning the organizational management right's relationship with the designation of employees' official worksites or official duty stations. As then-Member DuBester explained in his dissent, throughout the four decades leading up to *DOD DLA*, an agency claiming that duty-station designation affected its right to determine its organization had to "establish that the duty station ha[d] a *direct and substantive relationship* to the agency's administrative or functional structure, including the relationship of personnel through

lines of authority and the distribution of responsibilities for delegated and assigned duties." 70 F.L.R.A. at 936 (emphasis added) (cleaned up). The FLRA's previous test thus required a logical relationship between the administrative structure of the agency and the location of teleworkers' worksites. If the Authority concludes that *DOD DLA* would apply here, it should overrule it and return to its previous, more sensible standard.

b. The only other case that the Agency relies on for its organizational management right argument is distinguishable because it involves an appropriate-arrangements analysis of a markedly different type of bargaining proposal than is at issue here. *See* Ag Br. at 30–32. In *NTEU & CBP*, the Authority ruled that a proposal *requiring* the agency to allow reorganized employees to continue teleworking indefinitely was not an appropriate arrangement because it prevented the agency "from fully implementing" the reorganization. *NTEU*, 72 F.L.R.A. 752, 756 (2022).[3]

[3] Because of the factual distinctions between the proposals, the union's concession on the management-rights issue in the case carries no weight here. *See* Ag. Br. at 30.

Again, the key difference is that the proposal failed to give the agency the discretion to deny the identified employees the option to telework indefinitely. *Id.* at 754. Here, in contrast, there is no dispute that the Agency may approve or deny requests to participate in the pilot program, and it may even change an employee's assigned post of duty. Ex. B at 3. The fact that the pilot program could remain in place during bargaining between the parties does not detract from the Agency's freedom to relocate employees, even during the pilot. *See id.*; Ag. Br. at 31–32 (arguing to the contrary). *NTEU & CBP* therefore provides no support to the Agency's arguments.

II. NTEU's proposal is consistent with the regulations and guidance that the Agency raises.

A. The proposal preserves the Agency's discretion to determine an employee's official worksite for purposes of locality pay under 5 C.F.R. § 531.605(d).

1. The same discretion that prevents NTEU's proposal from violating management rights also preserves the Agency's sole and exclusive discretion over official-worksite determinations for remote-work pilot participants under 5 C.F.R. § 531.605(d). Because the Agency has the final say on whether an employee may participate, it follows that the agency retains its discretion over the determination of that

employee's official worksite. Indeed, if the Agency approves an employee's request to participate in the remote-work pilot, it does so knowing that the employee's official worksite will change to the remote worker's alternative worksite—usually their home. Thus, nothing in the proposal interferes with the Agency's discretion to determine participants' official worksites.

2. The Agency claims that NTEU's proposal conflicts with the locality-pay regulation because it "imposes criteria for choosing pilot participants." Ag. Br. at 14. As the Authority's telework precedent demonstrates, a proposal that lists eligibility criteria for telework participation is negotiable if it preserves case-by-case agency discretion. *NAGE Local R1-144*, 65 F.L.R.A. at 554; *see supra* Section I.A.1. Here, the proposal lists criteria that narrow the list of eligible applicants for the remote work pilot. It does not dictate to the Agency which, if any, applications it must grant.

Just as in *NAGE*, the Agency "premises its arguments . . . on a misinterpretation of the proposal." 65 F.L.R.A. at 554–55. The Agency is mistaken in its assertion that the proposal requires it to "approve at least *some number* of pilot applicants." Ag. Br. at 15. The Authority

rejected an analogous argument in *NAGE*, finding that a proposal for a telework program "[did] not require the Agency to allow [eligible employees] to telework." *NAGE Local R1-144*, 65 F.L.R.A. at 554. As explained in *NAGE*, a proposal that creates a telework or remote work program and includes eligibility criteria is negotiable if the agency gets to approve and deny requests to participate.

3. The Agency's remaining arguments that the proposal conflicts with the locality-pay regulation are likewise based on a fundamental misinterpretation of the proposal.

Nothing about the proposed pilot program stops the Agency from changing participants' SF-50s or from designating an employee's telework worksite as their "official worksite" under the locality-pay regulation. That participants will *also* have an "assigned post of duty" that is an Agency office location does not change this fact. Indeed, the "assigned post of duty" has a counterpart in the regulation: the "regular worksite." *See* 5 C.F.R. § 531.605(d)(1). The Agency's assertion that the proposal requires a remote worker's official worksite (or official duty station, as stated by the Agency) to be the same as the "assigned post of duty" is thus flat-out wrong. *See* Ag. Br. at 9–10.

The Agency claims that NTEU "failed to explain whether, or how, their proposal would require an employee's SF-50 to reflect a change to either an employee's official duty station or official worksite." Ag. Br. at 9. The text of NTEU's proposal never mentions the SF-50 or any required Agency action related to it. The proposal's silence on the matter shows that it leaves any effects on the form entirely to the Agency.[4]

In a similar vein, although the Agency now expresses confusion about the definition of "assigned post of duty," the record of the post-petition conference shows that NTEU explained the term's meaning: "the Agency office that an employee is assigned to." Ex. B at 3. NTEU never asserted that the "assigned post of duty" would be used to determine an employee's locality pay. Indeed, under the locality-pay regulations the assigned post of duty corresponds with the "regular worksite," not the official worksite. *See* 5 C.F.R. § 531.605. The Agency thus uses the term "assigned post of duty" incorrectly when it claims that under the regulation, a remote worker "may not have [an] agency

[4] The topic of the SF-50 arose during the post-petition conference only because of a question the Agency posed. Further, that question was resolved during the conference.

worksite as their assigned post of duty" if the employee does not regularly report to the assigned post of duty. Ag. Br. at 12. It is the Agency, rather than NTEU, that has confused the issue by conflating these terms.

Finally, the Agency's observation that the proposal "fails to designate a remote pilot participant's alternative worksite as their official worksite" *supports* its lawfulness. *See id.* at 7. Given the Agency's discretion to apply the locality-pay regulation on a case-by-case basis to determine an employee's official worksite, the proposal *follows* the requirements of the regulation, rather than "disregard[ing]" them. *See id.* at 11.

Because NTEU's proposal leaves the official-worksite determination entirely to the Agency, it is consistent with the locality-pay regulation.

B. The proposal is consistent with background federal and agency travel-reimbursement rules.

NTEU's proposal expressly preserves pilot participants' entitlement to travel reimbursements under "existing rules"—the very same rules that the Agency now claims are violated by the proposal. The Agency agreed with this explanation during the conference, but

now attempts to skirt around that concession. *Compare* Ex. B at 4, *with* Ag. Br. at 16–17 (asserting that the proposal conflicts with agency travel policies and the Federal Travel Regulation).

The Agency's current argument is based on the same fundamental misunderstanding that dooms its argument on the locality-pay regulation. The Agency claims that under the proposal, "a remote pilot participant's alternative worksite is not designated as their official post of duty." Ag. Br. at 17. But, again, nothing in the proposal stops the Agency from designating the telework site as the official worksite or, more precisely for purposes of the FTR, as the employee's "official station."[5] That the proposal leaves this determination to the Agency harmonizes it with the FTR. *See* 41 C.F.R. § 300-3.1. The Agency is free to define the "official station" as a geographic area surrounding the location where the employee "regularly performs their duties," just as required under the FTR. *See id.*

[5] This "official station" is distinct from both the "official worksite" under the locality-pay regulation and the "official duty station" discussed in OPM's overtime regulations. *See supra* Section I.B.2.

Because NTEU's proposal incorporates—but does not modify—existing travel-reimbursement rules, the proposal does not conflict with any applicable travel rules or regulations.

C. The proposal is consistent with OPM's telework guidance—which, in any event, is not a government-wide rule or regulation.

The Agency argues that NTEU's proposal is "inconsistent" with OPM's Telework Guide and that this is "yet another indication that the proposal is contrary to government-wide regulations." Ag. Br. at 18. To the extent that the Agency asserts a separate regulatory violation based on an alleged conflict with the Telework Guide, that argument fails because the document is not a government-wide regulation. NTEU's proposal, in any event, is consistent with the Telework Guide.

1. In this context, a "government-wide rule or regulation" includes "official declarations of policy of an agency *which are binding*" on the "agencies to which they apply." *HHS v. FLRA*, 844 F.2d 1087, 1099 (4th Cir. 1988) (quoting legislative history of 5 U.S.C. § 7117(a)(1)) (emphasis added). Here, the Telework Guide explains that its purpose is "provide agencies with practical resources and information to assist them . . . in updating their current policies." Ex. A at 3.

Thus, rather than create any new binding policy, the Telework Guide summarizes existing rules as a resource for agencies to use in formulating *their own* policies. *Id.* Indeed, OPM noted that it did not intend the guidance to be "overly prescriptive." *Id.* at 55. Because the Telework Guide did not alter any existing rules or legal rights, it is not a "government-wide rule or regulation" such that it can independently render NTEU's proposal nonnegotiable under Section 7117(a)(1).

2. Even if the Telework Guide did constitute a government-wide rule or regulation, NTEU's proposal is consistent with OPM's guidance. The Agency's argument is, again, based on its misguided assertion that "nothing [in the proposal] indicates that a remote worker's official worksite is their alternative worksite." Ag. Br. at 20. As explained above, that is because an agency determines the official worksite of its employees under the locality-pay regulation. And nothing in NTEU's proposal prevents the Agency from doing that.

For similar reasons, the Agency is wrong when it asserts that the proposal "indicates that a remote worker's official worksite is their 'assigned post of duty' at an 'agency worksite.'" Ag. Br. at 20. Neither the proposal nor NTEU's explanation equates "official worksite" with

"assigned post of duty." The proposal allows the Agency to redesignate a remote worker's alternative worksite as their "official worksite" and retain the "assigned post of duty" as the "regular worksite,"—or as defined in the Telework Guide, the "Agency worksite." Ex. A at 10 ("Agency worksite" is the same as "regular worksite" under the locality-pay regulations.). In sum, NTEU's proposal is consistent with the Telework Guide.

CONCLUSION

For the reasons discussed above, NTEU's remote work pilot proposal is negotiable.[6]

[6] The Agency's position statement attempts to preserve future negotiability arguments regarding the proposal. Ag. Br. at 2 n.1. Under the Authority's regulations, however, the Agency gets only one bite at the negotiability "apple." Agencies must supply "*all* arguments and authorities in support of [their] position" in their statement of position. *AFGE Local 32*, 73 F.L.R.A. 464, 465 (2023) (emphasis in original); *see also* 5 C.F.R. § 2424.32(d)(ii). This is so under the previous and current versions of the regulations. *See AFGE Local 2031*, 73 F.L.R.A. 769, 770 (2023) (Member Grundmann, concurring). The Agency, moreover, cannot now use its reply to make any remaining arguments that it wishes to press. The reply serves the "limited purpose" of allowing the Agency to explain why it disagrees with any arguments "made for the first time in the union's response." *AFGE Local 32*, 73 F.L.R.A. at 466.

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May 28, 2024

STATEMENT OF SERVICE

I certify that on May 28, 2024, a complete copy of the foregoing Union's Response to Agency's Statement of Position, including all attachments, was filed with the Office of Case Intake and Publication, Federal Labor Relations Authority, Washington, D.C., through its eFiling system. A complete copy was also sent this day to the following via the indicated methods of service:

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