National Treasury Employees Union,
Union,
and
Securities and Exchange Commission,
Agency.

Case 13 FSIP 1
Term Contract Negotiations
Mediation/Arbitration

BEFORE: PAUL GREENBERG, Neutral Factfinder

FACTFINDER'S ANALYSIS AND RECOMMENDATIONS

I. INTRODUCTION

National Treasury Employees Union (NTEU or Union) and Securities and Exchange Commission (SEC or Agency) are parties to a labor management agreement (LMA). The most recent agreement was approved by SEC on November 27, 2007, with a term of three (3) years. The 2007 LMA has 44 Articles.

At the expiration of the 2007 LMA, the parties entered into negotiations for a new LMA. Based on materials supplied to this Factfinder, it is my understanding the parties conducted approximately 14 days of direct negotiations between April and August 2011. The parties then elected to proceed with facilitated negotiations with the assistance of FMCS Commissioner Kurt Saunders. Approximately 21 days of mediated negotiations were held between October 2011 and August 2012.

The parties were able to reach agreement on 36 articles. On October 1, 2012, NTEU contacted the Federal Service Impasses Panel (FSIP) requesting FSIP take jurisdiction over six outstanding articles. FSIP accepted jurisdiction, but in a letter dated December 19, 2012, FSIP directed the parties to engage a private Mediator/Factfinder. The parties were directed to engage in additional mediated discussions with the neutral with the goal of reaching agreement on the outstanding articles. If no agreement was reached, the neutral was to assume the role of Factfinder, submitting a written report with recommendations for settling any disputed articles. The parties selected this Factfinder, Paul Greenberg, to perform the "mediation/arbitration" task.

Acting as Mediator, I met with the parties for three days in January and February 2013,

and the six outstanding articles were discussed. The "starting point" for the discussions were the "last best offers" (LBOs) of the parties, which had been assembled into a "side-by-side" comparison. The NTEU LBOs generally carried a September 2012 date, while the SEC LBOs were identified with dates from summer 2011.

The outstanding articles are:

Article 7	Work Schedules
Article 11	Telework
Article 19	Training
Article 22	Health and Safety
Article 30	Excused Absence/Administrative Leave
Article VII	Furlough

The mediation sessions provided this Mediator/Factfinder with helpful background relating to the parties' respective positions, and at moments there appeared to glimmers of opportunity to make progress toward agreement on some of the disputed contract terms. Ultimately, however, no agreement was reached and the process entered the factfinding stage.

It was understood that the parties would be submitting Statements of Position (*aka* "post-hearing briefs) and reply briefs outlining their positions. In a letter dated February 3, 2013, I outlined my expectations for the factfinding process. In part, the letter included the following directives:

> 3. During our sessions, it was agreed the parties are *not* restricted to advocating the "last best offer" language that previously had been provided to me prior to January 22. The parties are free to revise their proposed contract language in the position statements that will be submitted to me in March 2013, based on the input from "the other side" or from myself (in my role as mediator).
>
> 4. Additionally, the parties are allowed to present proposals "in the alternative," *i.e.*, the parties are allowed to submit their *preferred* contract language, with supporting argument ("This is the language the Factfinder should adopt, and for the following reasons . . . "), and the parties also are allowed to present alternative language and argument (*e.g.*, "Although we believe X to be the correct position, and urge its adoption, we understand the concerns of the other side and suggest the following language might be considered as an alternative because it may address the other side's

concerns . . .").

* * * *

7. At several points in our discussion, the advocates expressed a belief there continued to be room to reach agreement on some of the proposed language changes, especially on lesser points. I encourage the parties to confer ASAP and try to work out these differences, recognizing it always is better for the parties to develop language jointly than to have a 3rd party do the drafting. Although these direct, joint discussions can happen at any time, such discussions plainly would be most valuable if they occurred prior to March 22.

Substantial Position Statements and Reply briefs were submitted, accompanied by extensive documentation.

As part of my process for reviewing and comparing the parties' proposals, it is my normal practice to assemble a side-by-side comparison of the two "last best offers."[1] By email of May 18, 2013, I advised the parties that I was having problems generating the side-by-side comparison for Articles 7 and 11, and I directed the parties to collaborate and assemble the documents. Unfortunately, the parties were unable to produce a document that they agreed upon, and instead submitted differing versions. In SEC's view, the LBO being propounded by NTEU in mid-May 2013 included provisions that were different from the text found in NTEU's Position Statement and Reply brief. NTEU expressed strong disagreement, arguing that its proposed version of the side-by-side precisely tracked the NTEU LBO articulated in NTEU's March 2013 Position Statement (accompanied by alternatives that also had been suggested in March 2013).

To the best of his ability, the Factfinder has reviewed the respective side-by-side comparisons provided by the parties, and compared these documents with the proposals (and alternate proposals) included in their Position Statements. Because the parties' positions in many respects have shifted since the end of negotiations, this was not a simple undertaking. Ultimately, of course, what is key is the Factfinder's recommendation.

I have considered carefully the proposals and arguments submitted by both parties, and hereby forward my recommendations for final LMA language in connection with the outstanding

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[1] In practice, these side-by-side comparisons of the parties' LBOs later become the first two columns of the side-by-side comparisons found as Attachments A-F to this Recommendation.

LMA articles.

In this document, I first provide a brief description of the Agency. This material – which I believe is uncontroverted – is extracted from SEC's Statement of Position. I then address the applicable standards for evaluating the proposed LMA changes, recognizing some special statutory conditions applicable to this SEC labor agreement that do not have general application across the Federal sector. I then consider, in turn, each of the outstanding Articles, reviewing major points made by the parties and providing (in brief narrative form) my observations and conclusions. Attached to this document, the parties will find my recommended LMA language for each Article (Attachments G-L).

II. SEC'S MISSION AND ORGANIZATION

The mission of the SEC is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. The SEC consists of five presidentially-appointed Commissioners, with staggered five-year terms. One Commissioner is designated by the President as Chairman, the agency's chief executive. The Agency is headquartered in Washington, D.C., with approximately 4,000 staff located in the Washington area and in 11 regional offices throughout the country.

The Agency performs a variety of functions. *Inter alia*, SEC oversees the key participants in the securities markets, including securities exchanges, securities brokers and dealers, investment advisers, and mutual funds. In this capacity, SEC is concerned primarily with promoting the disclosure of important market-related information, maintaining fair dealing, and protecting the investing public against fraud and other misconduct.

Crucial to the SEC's effectiveness in each of these areas is its law enforcement authority. Each year the SEC brings hundreds of civil enforcement actions against individuals and companies for violation of the securities laws. Typical infractions include insider trading, accounting fraud, and providing false or misleading information about securities and the companies that issue them. During the enforcement process, the Agency sometimes must move with urgency to obtain a temporary restraining order or other emergency relief to halt serious ongoing fraud or other misconduct.

It is the responsibility of the Commission to: interpret and enforce federal securities laws; issue new rules and amend existing rules; oversee the inspection of securities firms, brokers, investment advisers, and ratings agencies; oversee private regulatory organizations in the securities, accounting, and auditing fields; and coordinate U.S. securities regulation with federal, state, and foreign authorities. Although SEC is the primary monitor and regulator of the U.S. securities markets, the Agency works closely with many other institutions including Congress, other federal departments and agencies, the self-regulatory organizations (*e.g.* the stock exchanges), state securities regulators, international regulators, and various private sector organizations.

SEC's functional responsibilities are organized into five Divisions and 23 Offices, each of which is headquartered in Washington, D.C. The five SEC divisions perform a broad range of functions:

- Division of Enforcement: The Division of Enforcement assists the Commission in executing its law enforcement function by recommending the commencement of investigations of possible securities law violations, by recommending that the Commission bring civil actions in federal court or as administrative proceedings before an administrative law judge, and by prosecuting these cases on behalf of the Commission using its independent litigating authority. As an adjunct to the SEC's civil law enforcement authority, the Division coordinates with law enforcement agencies in the U.S. and around the world to bring criminal cases when appropriate.

- Division of Trading and Markets: This Division assists the Commission in executing its responsibility for maintaining fair, orderly, and efficient markets. The staff of the Division provide day-to-day oversight of the major securities market participants: the securities exchanges; securities firms; self-regulatory organizations (SROs) including the Financial Industry Regulatory Authority (FINRA), the Municipal Securities Rulemaking Board (MSRB), clearing agencies that help facilitate trade settlement; transfer agents (parties that maintain records of securities owners); securities information processors; and credit rating agencies; as well as the Securities Investor Protection Corporation (SIPC). The Division also carries out the Commission's financial integrity program for broker-dealers; reviews proposed new rules and proposed changes to existing rules filed by the SROs; assists the Commission in establishing rules and issuing interpretations on matters affecting the operation of the securities markets; and performs surveillance of the markets.

- Division of Corporation Finance: This Division assists the Commission in executing its responsibility to oversee corporate disclosure of important information to the investing public. Corporations are required to comply with regulations pertaining to disclosure that must be made when stock is initially sold and then on a continuing and periodic basis. The regulations are intended to elicit information material to an investment decision. The Division's staff routinely reviews the disclosure documents filed by companies. The staff also provides companies with assistance interpreting the Commission's rules, responds to corporate issuer no-action requests, and recommends to the Commission new rules for adoption. This Division reviews documents that publicly-held companies are required to file with the Commission. Through the Division's review program, the staff assesses whether publicly-held companies are meeting their disclosure requirements and seeks to improve the quality of the disclosure. Significant uncorrected failures to comply with disclosure

obligations are often referred to the Division of Enforcement.

- Division of Investment Management: This Division assists the Commission in executing its responsibility for investor protection and for promoting capital formation through oversight and regulation of America's $26 trillion investment management industry. This important part of the U.S. capital markets includes mutual funds and the professional fund managers who advise them; analysts who research individual assets and asset classes; and investment advisers to individual customers. The Division's additional responsibilities include: assisting the Commission in interpreting laws and regulations for the public and SEC inspection and enforcement staff; responding to no-action requests and requests for exemptive relief; reviewing investment company and investment adviser filings; assisting the Commission in enforcement matters involving investment companies and advisers; and advising the Commission on adapting SEC rules to new circumstances.

- Division of Risk, Strategy, and Financial Innovation: The Commission's newest Division was established to help further identify developing risks and trends in the financial markets. This Division is providing the Commission with sophisticated analysis that integrates economic, financial, and legal disciplines. The Division's responsibilities cover three broad areas: risk and economic analysis; strategic research; and financial innovation.

The largest of the Commission's 20 Offices is the Office of Compliance Inspections and Examinations, which administers the SEC's nationwide examination and inspection program for registered self-regulatory organizations, broker-dealers, transfer agents, clearing agencies, investment companies, and investment advisers. The Office conducts inspections to foster compliance with the securities laws, to detect violations of the law, and to keep the Commission informed of developments in the regulated community. Among the more important goals of the examination program is the quick and informal correction of compliance problems. When the Office finds deficiencies, it issues a "deficiency letter" identifying the problems that need to be rectified and monitors the situation until compliance is achieved. Egregious violations are referred to the Division of Enforcement.

The SEC's remaining offices include: Office of the General Counsel, Office of the Chief Accountant; Office of Credit Ratings; Office of International Affairs; Office of Investor Education and Advocacy; Office of the Chief Operating Officer; Office of Financial

Management; Office of Support Operations; Office of Acquisitions; Office of Human Resources; Office of Information Technology; Office of Legislative Affairs and Intergovernmental Relations; Office of Public Affairs; Office of the Secretary; Office of Equal Employment Opportunity; Office of the Inspector General; Office of the Ethics Counsel; Office of Minority and Women Inclusion; and Office of Administrative Law Judges.

II. APPLICABLE STANDARDS

As NTEU notes in its Position Statement (citing *Environmental Protection Agency, Region 7, Kansas City , Kansas and Local 907 AFGE*, 12 FSIP 79 and 12 FSIP 81 (2012)), the FSIP commonly assesses the merits of proposed changes to labor agreements in light of demonstrated need (*i.e.*, what is the need for a change in the *status quo)* and comparability (whether the proposed language is comparable to language currently contained in other federal sector labor agreements). NTEU urges the Factfinder to rely upon these same criteria.

In addition, NTEU notes additional statutory criteria applicable to the SEC. One is the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), enacted in the wake of the savings and loan industry collapse in the late 1980s. Although FIRREA primarily focused on restructuring the S&L industry, a portion of the statute de-coupled certain agencies from the pay standards applicable generally at other Federal agencies. In its current form, the relevant FIRREA code provision states:

> § 1833b. Comparability in compensation schedules
>
> (a) In general
>
> The Federal Deposit Insurance Corporation, the Comptroller of the Currency, the National Credit Union Administration Board, the Federal Housing Finance Board, the Office of Financial Research, and the Bureau of Consumer Financial Protection, the Farm Credit Administration, in establishing and adjusting schedules of compensation and benefits which are to be determined solely by each agency under applicable provisions of law, shall inform the heads of the other agencies and the Congress of such compensation and benefits and shall seek to maintain comparability regarding compensation and benefits.
>
> (b) Commodity Futures Trading Commission
>
> In establishing and adjusting schedules of compensation and benefits for

> employees of the Commodity Futures Trading Commission under applicable provisions of law, the Commission shall--
>
> (1) inform the heads of the agencies referred to in subsection (a) of this section and Congress of such compensation and benefits; and
>
> (2) seek to maintain comparability with those agencies regarding compensation and benefits.

12 U.S.C. §1833b. Although the rationale for this portion of FIRREA is not explored by the parties, it is this Factfinder's understanding this initiative reflected an awareness by Congress that the FIRREA agencies needed greater flexibility in their pay practices to attract and retain employees with the skills needed to regulate the financial industry, recognizing that these employees frequently could work in the financial industry itself and earn substantially higher wages and benefits than would be possible under the general Federal wage schedule.

Although SEC is not one of the agencies listed in FIRREA, in 2002 Congress enacted the Investor and Capital Markets Fee Relief Act, P.L. 107-123, 115 Stat. 2390. Like FIRREA, most of the statute related to structural reforms of the regulated securities industry; however, the statute also granted to the SEC independent authority to set wages. Notably, a portion of the statute (codified at 5 U.S.C. §4802(d)) directs SEC to "seek to maintain comparability" with the FIRREA agencies:

> **§ 4802. Securities and Exchange Commission**
>
> (a) In this section, the term "Commission" means the Securities and Exchange Commission.
>
> (b) The Commission may appoint and fix the compensation of such officers, attorneys, economists, examiners, and other employees as may be necessary for carrying out its functions under the securities laws as defined under section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c).
>
> (c) Rates of basic pay for all employees of the Commission may be set and adjusted by the Commission without regard to the provisions of chapter 51 or subchapter III of chapter 53.
>
> (d) The Commission *may provide* additional compensation and benefits to employees of the Commission *if the same type of compensation or benefits are then being provided* by any agency referred to under section 1206 of

> the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S. C. 1833b) *or, if not then being provided, could be provided by such an agency under applicable provisions of law, rule, or regulation*. In setting and adjusting the total amount of compensation and benefits for employees, *the Commission shall consult with, and seek to maintain comparability with, the agencies referred to under section 1206 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989* (12 U.S.C. 1833b).
>
> (e) The Commission shall consult with the Office of Personnel Management in the implementation of this section.
>
> (f) This section shall be administered consistent with merit system principles.

5 U.S.C. §4802 (emphasis added).

Both SEC and NTEU have provided this Factfinder with information comparing their proposals with labor agreement provisions or employment practices found at other FIRREA agencies. As such, there really is no dispute that conditions that exist at these other agencies are relevant to the Factfinder's consideration. However, NTEU urges a somewhat more "emphatic" interpretation of the implication of these other statutory provisions:

> The express language of the statute mandates that the Commission consult with and *seek to maintain* comparability with any other FIRREA agencies concerning matters of pay and benefits that they provide to employees. Therefore, in addition to applying the general standard of comparability with other federal sector agencies, the law requires the Factfinder to also apply the more specific compensation and benefits parity standard established by Congress in assessing the parties' proposals and formulating his recommendations for a resolution of this impasse. NTEU asserts this requires the Factfinder to consider whether similar benefits proposed by NTEU are made available by any of the other FIRREA agencies, or could be provided if not currently available, to bargaining unit employees in any of the other FIRREA agencies.

NTEU Statement at 2-3 (emphasis supplied).

As a general proposition, it is this Factfinder's view that the FSIP's "need" and "comparability" standards reflect a practical and conservative approach to reaching just results in the context of a negotiations impasse, and I am guided by these standards in this Factfinding.

With regard to the additional FIRREA statutory overlay (5 U.S.C. §4802 and 12 U.S.C. §1833b), I agree with NTEU that these statutory provisions mandate that I consider the benefits that may exist at the FIRREA agencies, with a view toward maintaining comparability. However, it is plain from the text and structure of these statutory provisions that "comparability" is a somewhat general theme, and the statutes do not reflect a mandate that all the FIRREA agencies (and the SEC) somehow are expected to act in "lockstep" with each other, with each new benefit or working condition granted at one agency automatically being adopted by the others. In this Factfinder's view, there plainly are differences among these agencies that reasonably would result in differing working conditions, including differing agency missions, variations in size and structure, the number and location of offices, etc. Thus the presence of more liberal benefits or working conditions at other FIRREA agencies surely is relevant, but not dispositive. Ultimately, the recommended contract provisions must reflect terms that specifically will be workable at the SEC.

III. PRELIMINARY OBSERVATIONS REGARDING WORK SCHEDULES (ARTICLE 7) AND TELEWORK (ARTICLE 11)

Nominally, Article 7 (Work Schedules) and Article 11 (Telework) address distinctly different questions, and so it is not surprising that the Articles are separate. Article 7 is concerned with *when* an employee is expected (or permitted) to work, while Article 11 addresses *where* an employee's work will be performed (most typically, either in an SEC office or at the employee's private residence).

At one time, questions of *when* and *where* work was performed were somewhat simpler. Commonly, agencies (especially "white collar" agencies) established relatively uniform shifts for most of employees, aligned with the specific rhythm of the agencies' "product." And most employees predictably reported to a Federal worksite to perform their work. The work schedules and locations of employees and supervisors were closely aligned.

Of course, in recent decades such "traditional" models of workforce scheduling have changed substantially. These changes are driven by a variety of factors, but perhaps no factor is as significant as the development of new technologies (computers, telecommunications) that often make it possible for workers to maintain close contact with their office, their supervisors and each other from substantial distances. Thus employees at remote sites often have ready access to the information and equipment needed to perform their work. While such technology potentially may create opportunities for more flexibility in the worker's life, there remain a variety of countervailing concerns, including the ability of supervisors to oversee work; the need for workers to coordinate with others to perform their duties, or work in teams; insuring that services can be provided to the public or stakeholders during conventional work hours; the challenge of operating an entity with nation-wide operations spanning multiple time zones; etc. As SEC notes (in an extended section of its Position Statement), "telework and alternative work schedules must be balanced against mission needs and the benefits of face-to-face collaboration."

Thus there are two recurrent and predictable themes in the competing proposals advanced by NTEU and SEC. Typically, NTEU advocates expanding the options available to employees to determine when and where they will perform their work, while SEC expresses concern over the ability of the Agency to manage the workforce effectively when employees often are working in disparate locations and also working varied work schedules. The concerns of both parties are legitimate; the challenge typically is to find the best accommodation for meeting these competing interests.

With regard to telework, there is an additional factor specifically applicable to SEC that adds some ambiguity to the Agency's arguments. In its brief, SEC notes the Agency is taking on a variety of new responsibilities pursuant to the Dodd-Frank Act, and these responsibilities will require SEC to hire new employees. However, SEC has been criticized by the General Service Administration for having too much office space relative to the size of its workforce, and therefore additional space to house the expanding number of SEC staff may not be made available:

> [S]haring office space [by increased telecommuting] could assist the Agency in planning for potential staff expansion. Subject to appropriations, the SEC is anticipating hiring a significant number of new employees, both at headquarters and in the regional office, to fulfill Congressionally mandated responsibilities. A significant issue, however, is office space for new employees. The General Services Administration, which leases space for the Agency, has informed the SEC that its space utilization is nearly double what it should be, and that more efficient use of existing space must be made before requests for additional space will be processed. One way to increase efficiency is by requiring employees who do not work at their official duty station for three or more days per week on a recurring basis to give up a private office.

SEC Statement at 18. Thus while the Agency, on the one hand, repeatedly stresses the need for employees to be physically present in its offices to provide "face time" with supervisors and colleagues, it also is desirable for the Agency to have more employees teleworking, to mitigate the "space crunch."

IV. ARTICLE 7 WORK SCHEDULES

Under the prior labor agreement, SEC and NTEU previously had agreed to several alternative work schedules:

- Employees are eligible to apply for a "Flexible Work Schedule" (Flexitour) under which full-time employees could work eight hours per day, Monday through Friday. Employees are required to be working during the mandatory "core hours." However, employees can request approval for a schedule with particularized start and stop times for the employee's tour. In addition, employees on Flexitour are entitled to earn credit hours.

- Employees are eligible to work compressed work schedules, either on a "4-10" basis or a "5-4/9" schedule. Like all employees, workers on a compressed work schedule are required to be working during core hours. Workers on compressed work schedules are not allowed to earn credit hours by extending their tours.

In the new labor agreement, the parties are in agreement in instituting a new, innovative "SEC-flex" Work Schedule that would allow employees to establish a recurring work schedule that may have varying numbers of work hours per day. Under the SEC-flex program, an employee might complete his or her 80-hour per pay period work schedule in fewer than 10 work days. In this respect, the SEC-flex program has similarities with the compressed work schedule programs. However, employees working an approved SEC-flex schedule would be eligible to earn credit hours.

As discussed below, although the parties have reached agreement that this new alternative work schedule should be implemented, there is disagreement whether to characterize the program as a pilot program exercise, and whether the program could be discontinued at SEC's discretion.

Section 1 Official Business Hours

Section 1A Parties are agreed.
Section 1B Parties are agreed.

In **Section 1C**, the existing labor agreement states:

C. An employee working a schedule conforming to the official business hours of his or her Office (a "conforming schedule") need not take any action to stay on a conforming schedule.

Both parties have proposed modifying this text. SEC proposes language stating that, in the event an employee is not approved for an alternative work schedule, the employee will "default to a schedule conforming to the official business hours" of his/her office. In contrast, NTEU proposes that an employee who has been approved for an alternative work schedule will default to a Flexitour schedule.

In the Factfinder's view, there remains value in having some notion of a work schedule that constitutes a "regular" or "standard" tour for Agency employees, thereby preserving the notion that alternative work schedules constitute variations from normal practice that are subject to an application process by the employee. Accordingly, I recommend the Agency's proposed language for Section 1C.

Section 2 Core hours

Section 2A Parties are agreed

Under **Section 2B** of the existing labor agreement, the parties have established varying "bands" of core hours. The core hours for the Headquarters Office and other Eastern time zone offices are 10 AM to 3 PM (5 hours); the core hours in the Chicago office are 9:30 AM to 3 PM (5-1/2 hours), while the hours in Ft. Worth are 10 AM to 3 PM (5 hours). The hours in Denver and Salt Lake City are 9:30 AM to 3 PM (5-1/2 hours), while the Los Angeles and San Francisco offices are 10 AM to 3 PM (5 hours).

Both parties propose adopting a uniform set of time bands (local time) in each office throughout the country. However, SEC proposes a 5-hour time band (10 AM to 3 PM), while NTEU proposes to shorten the period of the core hours to 4-1/2 hours (10 AM to 2:30 PM).

SEC argues the 5-hour period is essential to help supervise its workforce and coordinate employee activities in multiple offices nationwide. Further, SEC notes it is responsible for regulating the stock markets and financial exchanges, which operate during "normal business hours."

NTEU argues that shorter core hours would assist employees with worklife flexibility and

help provide relief in connection with traffic congestion. NTEU argues there are precedents for the shorter 4-1/2 hour "core hour" window, pointing to IRS, NCUA, HHS and the Bureau of the Public Debt. NTEU disputes SEC's claim that the 5-hour "core hour" period is needed to coordinate among the SEC regional offices and headquarters. NTEU also disputes that the core hours properly relate to the normal operating hours of the stock markets and financial exchanges, which often open and close far outside any proposed core hours, anyway.

SEC is an agency with a national presence, with employees working in multiple time zones. Additionally, the Agency deals with stakeholders located throughout the country.

I agree somewhat with NTEU that SEC's argument relating to the hours of operation of the stock markets and financial exchanges is strained, because it plainly is true that the operating hours of the markets and exchanges extends beyond even the Agency's proposed core hours. Still, unlike some of the agencies offered by NTEU as comparitors, I believe SEC's position is somewhat different because of the potential need to respond quickly to developments in the financial industry, suggesting a greater need to have employees available during a longer core hour period. Further, under any circumstances, the time zone issues can be a problem in terms of employee coverage and coordination. In the view of the Factfinder, the Agency's proposal of a 5 hour "core hour" period is more reasonable, and therefore is recommended.

Section 2C Parties are agreed.

Section 3 <u>Flexible Hours/Bands</u>

Section 3A Parties are agreed.

Under **Section 3B** of the prior labor agreement, the parties had agreed to different flexible bands at the Headquarters and regional offices. In all instances, however, the earliest start time for any tour was 6:30 AM (local time), and the latest end time was 7 PM (local time).

For the new contract, both NTEU and SEC propose establishing uniform flexible bands in all offices. SEC proposes start times for shifts anywhere between 6:30 AM and 10:00 AM, and end times between 3:00 PM and 10:00 PM. NTEU proposes a range that is 30-minutes greater: 6:00 AM to 10:00 AM start times, and 2:30 PM to 10:00 PM end times.

The arguments raised by the parties are similar to the arguments relating to the "core

hours" issue, Section 2C, *supra*. Overall, I find SEC's proposal to be more reasonable, and I therefore recommend adopting it.

Section 3C Parties are agreed.

Section 4 Work Schedules - Generally

Section 4A Parties are agreed.

Section 4B Parties are agreed. (Note: Whereas the prior Section 4B stated only that Alternative Work Schedules "may assist employees in balancing work and other responsibilities," the parties are in agreement that the new labor agreement will add language stating "Employer shall give priority to its mission, staffing and workload considerations in considering work schedule requests."

Section 4C of the prior labor agreement states:

> C. An employee's participation in an Alternative Work Schedule is not an entitlement. The Employer reasonably will consider an employee's request to participate in the program.

NTEU proposes language suggesting an employee's proposal for an alternative work schedule must be granted "absent just cause." In contrast, SEC proposes the decision to grant or deny an employee's request for an alternative work schedule will be made by the Agency "in accordance with the terms of this Article."

As discussed elsewhere in Article 7, there are a number of factors the Agency reasonably can consider when deciding whether to grant or deny an employee request for an alternative work schedule. One of the problems with the "old" Section 4C is that it required the Agency "to consider" an employee's request for an alternative work schedule, but it did not expressly require supervisors to *decide* whether to grant or deny the request. The revision proposed by SEC addresses this weakness by agreeing that the Agency will "grant or deny," while the NTEU version seemingly would require the Agency to grant an employee's request absent "just cause."

In the view of this Factfinder, the introduction of a "just cause" standard into the labor agreement section dealing with alternative work schedule approvals (as proposed by NTEU) is unnecessary. Although I personally view the text addressing "entitlement" (or lack thereof) to be superfluous, this is language the parties previously have agreed to, and which both parties

propose to retain. I recommend slightly streamlined text (closer to SEC's position), as identified in Attachment A.

Section 4D, 4E Parties are agreed.

Section 5 - <u>Work Schedules - Available Schedules</u>

Section 5A Flexible Work Schedules ("Flexitour") with Credit Hours

The existing labor agreement at **Section 5A1** states:

> 1. A full-time employee on this Alternative Work Schedule has an 80-hour bi-weekly basic work requirement, and fulfills that requirement by working eight hours per day, Monday-Friday. The employee must be present for work during all of his or her Office's designated core hours, but may request set arrival and departure times within the established flexible bands.

SEC and NTEU have agreed on a slight modification to the first sentence, which the Factfinder therefore adopts. There is disagreement, however, over the second sentence.

Both parties add parenthetical language, but the proposals are different. SEC's proposal for Sentence #2 states: "The employee must be present for work *(or account for time away from the office with approved leave)* during all of his or her Office's designated core hours, but may request set arrival and departure times within the established flexible bands." Emphasis added. NTEU's proposal states: "The employee must be present for work (*or account for time away from work with approved leave* ***or credit hours***) during all of his or her Office's designated core hours, but may request set arrival and departure times within the established flexible bands." Emphasis added.

NTEU's proposal include in the parenthetical comment the idea that credit hours may also be used as a method to account for time away from work. In NTEU's view, the use of leave *or credit hours* is consistent with the heading and subject of this section ("Flexible Work Schedule ('Flexitour') with Credit Hours."). Because employees on Flexitour may earn (and use) credit hours, NTEU argues its proposed language is clearer, and the proposed SEC language may lead to confusion.

Further, NTEU criticizes SEC's use of the phrase "time away from *the office*" within the parenthetical comment, noting that the approved use of credit hours also should be available to employees who are on a Flexitour schedule *and teleworking*. Although teleworking employees still must be able to account for all their work time, their work time may not be time spent "in the office."

I agree that NTEU's proposed text is clearer, and therefore recommend its adoption.

Sections 5A2-5A4 Parties are agreed. I note that in its LBO submitted in conjunction with its Position Statement, SEC proposed adding the following language to Section 5A5: "Employees may not use their entitlement to earn and use credit hours under this Section to create a de facto schedule in which they are in the office fewer than eight (8) days, Monday to Friday, per pay period on a regular basis." However, SEC does not present an argument tied to this language as part of its Position Statement. Further, when this Factfinder met with the parties earlier during the mediation phase, Section 5A5 had been identified as a provision where there was agreement between the parties. I therefore decline to recommend adopting the added text offered by SEC.

Sections 5B1-5B4 Parties are agreed.

Section 5C describes the overall structure of the new SEC-flex work schedule. Although the parties are in disagreement over several aspects of the program's implementation, there is substantial agreement over the specific terms of the program.

The parties are in agreement regarding **Section 5C1 (a) through (f)**.

With regard to **Section 5C1(g)**, SEC proposes the following language:

> [Approved SEC-flex schedules . . .] (g) permit employees to earn a maximum of ten (10) credit hours on non-core workdays (i.e., Saturday or Sunday) and on holidays.

In contrast, NTEU proposes

> [Approved SEC-flex schedules . . .] (g) permit employees to earn a maximum of ten (10) credit hours on non-core workdays (i.e., Saturday or Sunday), holidays and *other non-workdays*.

In support of its position, NTEU argues there is ambiguity in the SEC proposed language, and the SEC text does not fully address OPM guidance relating to the earning credit hours on holidays. For example, NTEU notes that an employee on SEC-flex might normally have a mid-week day when he or she is not scheduled to work – the so-called "non-work day." In NTEU's view, an employee who works on his or her non-work day should be entitled to earn credit hours.

With regard to holidays, NTEU notes that while employees on flexible schedules may be banned from earning credit hours when they *voluntarily* choose to work on holidays, OPM guidelines provide that employees who are scheduled to work on holidays may credit hours. *Fact Sheet: Credit Hours Under a Flexible Work Schedule*, Union Exhibit (UX) 9.

In this Factfinder's view, NTEU presents the better argument here. Recognizing there are some legal nuances relating to the ability of employees to earn credit hours on certain non-work days, I recommend adopting NTEU's text, but with the addition of the proviso "to the extent permitted by law."

Section 6 - <u>Procedures for Requesting Flexitour Schedule</u>

Section 6A Parties are agreed.

Section 6B NTEU originally proposed language different from SEC, but NTEU has acceded to SEC's language

Section 6C (and the parallel provisions of **Section 7B5**) addresses the criteria to be used by management when considering whether to grant or deny an employee's request for an alternative work schedule. Both NTEU and SEC propose to modify the language found in the prior labor agreement. Some aspects of the competing proposals primarily are disagreements about format, while others are more substantive.

First, I note NTEU proposes that an employee's Flexitour schedule <u>will</u> be granted "unless" the employer affirmatively finds one or more criteria that mitigate against this scheduling flexibility. In the Factfinder's view, it is unreasonable to create such a presumption of approval. I recommend SEC's language indicating that approval or denial of the request will be based on consideration of the relevant criteria. I find SEC's language to be more neutral.

One of the areas of substantive disagreement involves **Section 6C3.** In NTEU's view, an

employee's job performance should weigh against approval of a work schedule request only if the employee has been placed on a "performance improvement plan" (PIP), of if the employee has received an overall current performance evaluation rating of "needs improvement." NTEU argues the standard advocated by SEC is too amorphous and lends itself to arbitrary treatment by supervisors. Further, NTEU notes the labor agreement (at Article 36) includes provisions relating to unacceptable performance; in NTEU's view, it is unreasonable for management to be given the option of denying a flexible work schedule for performance-related issues without first placing an employee in a position to assert his or her rights under Article 36.

In contrast, SEC would consider whether "the employee is on a performance improvement plan or *has significant performance weaknesses communicated to the employee in writing*."

Overall, in the view of the Factfinder, SEC reasonably should be able to consider significant performance problems that fall short of a PIP or "needs improvement" performance rating. I therefore recommend SEC's language.

Similarly, there are competing provisions relating to whether an employee's attendance problems may be used as a factor when weighing whether to approve or disapprove the Flexitour request, **Section 6C4.** NTEU proposes that attendance problems be considered only if they have occurred within the previous six months, and only if the employee has been disciplined or has received written communication. NTEU also would include consideration when an employee is on leave restriction. In contrast, SEC would consider whether the employee has "significant documented time or attendance issues and/or performance counseling communicated to the employee in the preceding 12 months."

The Factfinder recommends language slightly different from both. With regard to the time period, I recommend adopting NTEU's "preceding 6 months" term. SEC's reference to counseling regarding performance issues (as found in Section 6C4) really is addressed already in Section 6C3, and therefore is redundant in this provision and is removed. I agree with SEC that management can consider whether there are documented time and attendance problems that have been communicated to the employee, but SEC can consider such T&A problems even if the employee has not been given written notice or placed on a leave restriction. The Factfinder's recommended language is found in Attachment A.

With regard to **Section 6C7**, SEC seeks to include in its consideration as a negative factor

whether the requesting employee has received any discipline or adverse action within the prior 12 months. NTEU would limit management's consideration only to discipline or adverse actions involving *abuse of the flexible work schedule program*.

In the Factfinder's view, SEC's language is too broad, and NTEU's text is too narrow. I therefore recommend that managers be allowed to consider any discipline or adverse action within the prior 12 months that reasonably calls into question the employee's ability to perform his or her job while working a flexible work schedule.

In **Section 6C8**, SEC seeks to preclude from Flexitour an employee whose duties require him or her to be at the Official Duty Station each weekday during official business hours. This is new contract language. I agree with NTEU that the concerns identified in 6C8 already are covered adequately by 6C2, and also 6C1. I recommend the SEC-proposed new language be omitted from the labor agreement.

The **Section 6D** language offered by the parties varies only slightly. SEC proposes that the Agency can remove "certain positions" from participation in the Flexitour schedule based on business reasons. Although NTEU's proposed language is only slightly different, NTEU suggests SEC's language would give management the right to exclude entire positions from participation in Flexitour, when the business needs of the Agency might only need to be restricted to requests from individual employees in certain positions (*e.g.*, coordinating schedules to insure proper coverage). In any event, NTEU suggests this "business needs" language is redundant because the concept is addressed sufficiently in Section 4 of this same Article.

I find this last argument of NTEU persuasive, and recommend that Section 6D be removed entirely.

Section 6E (to be renumbered as 6D) relates to the ability of SEC Regional offices to use numerical staffing requirements to insure adequate coverage. NTEU expresses concern that the provision – as drafted by SEC – would allow Regional offices to adopt such numerical staffing requirements without first bargaining with the Union over the impact and implementation of such a standard. In the view of the Factfinder, it is reasonable to insure this provision of the labor agreement does not function as a waiver of NTEU's right to "I and I" bargaining. I therefore recommend adoption of the NTEU text.

For **Section 6F** (to be renumbered as 6E), the parties have proposed very similar

language. I recommend using the SEC proposed text.

Section 7 - <u>Procedures for Requesting a Compressed 5-4/9 or 4-10 Schedule or SEC-flex Schedule</u>

Section 7A1 provides the criteria for eligibility for participating in a Compressed 5-4/9, 4-10 or SEC-flex work schedule. The parties offer differing proposals. To a substantial degree, the competing approaches are similar to those argued in connection with Section 6C, *supra*, involving participation in the Flexitour schedule.

Section 7A1(a), (b) and (c) correspond to similar issues in Section 6C. I recommend language similar to the language used in Section 6C, modified to fit the altered format of this Section.

Section 7A1(d) in the prior labor agreement provided that an employee seeking to work a 4-10 schedule must first have worked a 5-4/9 schedule successfully:

> d. has worked a Compressed 5-4/9 work schedule for at least one year prior to being eligible to request a Compressed 4-10 work schedule.

SEC proposes to retain this provision in the new Section 7A (setting eligibility requirements for all three compressed work schedules – 5-4/9, 4-10 and SEC-flex). NTEU objects, for several reasons. NTEU argues that two of these schedules (5-4/9 and 4-10) have been in place at SEC for many years, and employees know how the schedules work. Employees can change their schedule if they later find they are dissatisfied with it. Similar schedules at other agencies do not have any such requirement that employees first work a 5-4/9 schedule as a prerequisite for seeking to work a 4-10 schedule. NTEU also notes an editorial inconsistency, because the provision appears in a section outlining the eligibility criteria for all three compressed work schedules, but appears to apply only to the 4-10 schedule.

Ordinarily, this Factfinder might be inclined to leave the "legacy" text of the labor agreement (Section 7A1(d)) undisturbed in this instance, but I note the Agency really has not offered any affirmative argument explaining why previously working a 5-4/9 schedule still should be viewed as a threshold requirement for requesting a 4-10 schedule. Because SEC has not really advocated for retaining the policy, and because the rationale for the policy is not readily apparent to the Factfinder, I do not see this particular requirement as being useful and I therefore recommend that Section 7A1(d) be dropped from the language of the new labor agreement.

Section 7A2 addresses circumstances where SEC may seek to exclude positions from participating in the compressed work schedules. The text proposed by the parties is very similar; if the Factfinder were to chose one version over the other, the SEC version would be preferable. However, NTEU correctly notes this same issue is addressed fully in Section 4C, and the text found in 7A2 therefore is redundant. I recommend eliminating Section 7A2 entirely.

In its proposal, SEC adds language (Section 7A3) stating "SEC-flex is not available to any employee who teleworks on a recurring basis." This prohibition was not presented during the mediation phase, nor is the new language discussed in SEC's Position Statement. I therefore recommend that the language not be adopted.

Sections 7B1, 2, 3 Parties are agreed.

Section 7B4 Although the parties offered slightly different proposals, NTEU has acceded to SEC's proposed text, which is recommended.

Section 7B5 addresses the criteria considered by managers when deciding whether to grant or deny a request for a compressed work schedule. The language proposed by the parties is parallel to the language found in Section 6C, and the Factfinder's assessment of the competing proposals is the same. I recommend text for Section 7B5 that is comparable to the text recommended for Section 6C.

Section 7B6 addresses situations where a Division, Office or Regional Office seeks to exclude positions from eligibility for compressed work schedules based on numerical staffing requirements. The concerns here parallel the provision found at Section 6E (now renumbered as Section 6D in the Factfinder's recommendation), and comparable language is recommended here for the reasons cited *supra*.

Section 7B7 addresses situations where multiple eligible employees request compressed work schedules, and not all employees can be accommodated while still maintaining coverage at the office. Under the existing labor agreement, Section 7B7 establishes a "pecking order" among such employees who are working in the same *branch*. SEC proposes substitute language, grouping together employees "in the same work unit (the applicable section or group within a division or office)." NTEU criticizes this language as being imprecise, noting the term "work unit" is not defined in the agreement. NTEU notes that "branch" is used to identify the smallest unit where all employees report to the same supervisor. This problem was surfaced during mediation, and the Factfinder suggested alternative text might be considered; NTEU has proposed such alternative text.

Absent evidence that the existing language in the labor agreement actually has caused any confusion, the Factfinder recommends the existing language in the labor agreement be retained, with a slight modification to recognize the addition of the SEC-flex program.

SEC's proposed **Section 7B8** (numbered as 7B9 in the "old" labor agreement) provides that certain approved compressed work schedules are subject to a one-year trial period, during which SEC has the right to compel an employee to revert to a Flexitour or Compressed 5-4/9 schedule with two weeks advance written notice. Even after the one-year trial, SEC reserves the right to compel an employee to revert to a Flexitour or Compressed 5-4/9 schedule with two weeks notice.

Whereas the former Section 7B9 in the "old" labor agreement linked such summary changes in an employee's work schedule to some of the factors that were weighed when initially deciding to grant the alternative work schedule, or the factors listed in Section 7B9, the new SEC proposal does not have any such standards limiting management's discretion.

NTEU proposes striking the provision entirely, arguing the addition of the SEC-flex schedule does not provide a fresh basis for retaining this contract language. NTEU notes SEC has many years of experience now with employees working compressed work schedules, and points to labor agreements at other agencies that do not have similar provisions granting to management such a strong right to remove employees from their approved schedules.

The Factfinder recommends retaining the legacy contract provision, including the prior language setting standards governing any action by management to remove an employee from his or her approved compressed work schedule. The provision is modified to include the new SEC-flex schedule.

Section 8 - <u>Employee-Initiated Changes</u>

Section 8A Although the parties submitted slightly different proposals modifying existing labor agreement language, NTEU has acceded to SEC's proposed language.

Section 8B in the existing labor agreement states:

> An employee on a Compressed 5-4/9 or 4-10 work schedule may request to change his or her non-workday to another workday in the pay period because of mission or workload requirements.

As NTEU correctly notes, it is clear from the overall context of Section 8 that the changes contemplated in Section 8B are *ad hoc* changes that might be requested on a pay-period-by-pay-period basis, and not requests for an on-going change in the employee's scheduled day off. NTEU notes this *ad hoc* flexibility may be needed or desirable in a variety of circumstances, including situations where an employee might be required to attend a mandatory meeting on a scheduled day off, or where an employee would like to change his or her scheduled work day because of an important personal commitment on a normal workday, thereby avoiding the need to take leave. NTEU notes that requests for a longer-term, on-going change in an employee's regular compressed work schedule are addressed in Section 8C.

Both SEC and NTEU have proposed changes to Section 8B. The changes are similar, and address some of the weaknesses that exist in the language of the "old" labor agreement. The Factfinder recommends slightly modified text, expressly identifying Section 8B as encompassing *ad hoc* modifications to a work schedule.

Section 8C addresses requests for on-going changes in an employee's work schedule. Both parties propose modifications to the existing labor agreement, although SEC's proposed language is closer to the "legacy" text. The key difference relates to situations where an employee's request for a schedule change is denied. In NTEU's version, any such denial must be provided in writing, whereas the SEC version states the denial will be memorialized in a written document only if requested by the employee. NTEU has indicated it would accede to the SEC version, so long as it is clear the provisions of Section 8C (which limit schedule changes to one time each quarter) do not apply to the *ad hoc* requests to "swap days" contemplated by Section 8B.

The Factfinder recommends adopting SEC's version, with slight modifications.

Section 8D of the existing labor agreement provides a mechanism for an employee to request a change to his or her work schedule or non-work day more than once each calendar quarter, in exceptional circumstances. The Agency will consider such requests in light of mission, staffing and workload requirements.

Both parties propose changes to the section. NTEU suggests the section really should be viewed as a continuation or second paragraph of Section 8C, because it is concerned with changes to an employee's on-going, regular schedule and is not concerned with occasional *ad hoc* switching of days.

In the view of the Factfinder, NTEU's assessment of the proper location for the "modified

8D" text is correct. I therefore recommend placing the "exceptional circumstances" proviso within Section 8C, with slight modifications.

Section 9 - <u>Employer Initiated Changes</u>

Sections 9A, B Parties are agreed.

Section 9C is concerned with the criteria under which SEC unilaterally may suspend or terminate an employee's compressed work schedule. The parties offer competing proposals, both beginning with "legacy" language in the existing labor agreement.

Section 9C2 deals with situations where an employee's performance has declined while on the compressed work schedule. The existing labor agreement speaks of situations where an employee's performance has declined, or the employee has failed to meet deadlines or progress on assignments, but expressly excludes "insignificant fluctuations or declines in performance."

In NTEU's view, the existing language could be interpreted to allow the Agency to change employee's schedule based on a single instance when an employee runs into problems. NTEU therefore proposes more stringent language:

> C. The Employer may suspend or terminate an employee's Work Schedule if the Employer finds that:
>
> 2. the employee's performance has *significantly* declined (for example, where the employee *repeatedly* fails to meet established deadlines or *repeatedly* fails to progress satisfactorily on assignments but excluding insignificant fluctuations or declines in performance)[.]

SEC makes a modest concession to Section 9C2, adding the word "significant" to the first clause.

In the Factfinder's view, SEC's additional qualification is sufficient to make clear that minor deficiencies or lapses in an employee's performance should not become justification for removing an employee from his or her schedule. The SEC text is recommended, with a slight change to improve grammar.

Section 9C4 addresses situations where employees have encountered time and attendance problems. The concern here parallels the concerns articulated earlier in Section 6C4, and similar text is recommended as discussed *supra*.

Sections 9D, 9E Parties are agreed.

Section 10 - Changes Due to Travel or Training

Parties are agreed.

Section 11 - Changes Due to Promotion, Reassignment or Detail

Under the existing labor agreement, employees promoted, reassigned or transferred must request approval from their new supervisors to maintain their alternative work schedules. Both parties propose modifications to the labor agreement language, although SEC's proposal is a minor change in terminology.

NTEU proposes the following language:

> If an employee is promoted *to a new position*, reassigned or detailed, he or she must request approval from his or her new supervisor of the employee's previously elected Work Schedule, or must submit a request to the new supervisor for a new schedule. Such requests will be granted or denied pursuant to Sections 6 and 7 of this Article.

Emphasis added.

NTEU suggests its proposed language clarifies that seeking renewed approval for a compressed work schedule or re-applying only would apply in situations where an employee has a new supervisor, or is promoted into a new position. No such review and approval would be required in situations where an employee simply is promoted *within the employee's current position*, *e.g.*, when an employee is promoted from one pay band to another.

Additionally, NTEU suggests language mandating that supervisors affirmatively grant or deny requests.

The Factfinder believes NTEU's proposed changes are helpful in clarifying this section of the agreement, and recommends text along the lines proposed by NTEU.

Section 12 - Credit Hours (Flexitour or SEC-flex Schedules Only)

Sections 12A, B & C Parties are agreed.

The existing labor agreement requires employees to obtain supervisory approval to earn credit hours. Such approval normally should be obtained in advance, but the labor agreement recognizes such approval may be granted after-the-fact. However, the discretion to award credit hours retroactively is left to the sole discretion of management.

SEC proposes the following text:

> D. An employee's request, via the time and attendance system, to earn credit hours must normally be approved in advance by the employee's supervisor. The Employer may, in its sole discretion approve credit hours retroactively.
>
> The Employer's decision regarding an employee's request to earn credit hours will be based on whether there is sufficient work available to keep the employee productively occupied during the entire period for which credit hours are requested, and whether that work can be performed at the requested time. An employee may not save work that otherwise could be completed during the regular tour of duty in order to earn credit hours.

NTEU proposes the following language:

> D. An employee’s written request (via the time and attendance system or email) to earn credit hours must be approved, normally in advance and in writing (via the time and attendance system or email), by the employee’s supervisor. The Employer may approve credit hours retroactively (e.g., where it was not possible for the employee to obtain advance approval by his or her supervisor, and the work in question is required to be performed to meet the Employer’s mission and/or workload requirements). In the event of denial, the Employer will provide the employee with the reasons for the denial in writing.
>
> The Employer’s decision regarding an employee’s request to earn credit hours will be based on whether there is sufficient work available to keep the employee productively occupied during the entire period for which credit hours are requested, and whether that work can be performed at the requested time. An employee may not save work that otherwise could be completed during the regular tour of duty in order to earn credit hours.

NTEU is critical of the existing policy allowing SEC managers to decide whether to grant

or deny retroactive approval of credit hours at their sole discretion. In NTEU's view, it is appropriate to have a standard; otherwise, application of the policy may not be uniform within the Agency. Further, NTEU urges that the labor agreement give examples of the means that might be used to request approval.

In the view of the Factfinder, there is some merit to both proposals, and modified language is recommended. Significantly, although I recommend retaining management discretion to deny the earning of credit hours that were not requested and authorized in advance, I believe giving employees the right to request a written explanation may serve as a useful check on possible arbitrary treatment. At the very least, a written explanation will place employees on clearer notice of the circumstances where a manager might deny retroactive approval of credit hours.

I recommend the following text:

> D. An employee's request to earn credit hours must normally be approved in advance by the employee's supervisor. Such requests and approvals normally will be processed through the time and attendance system, although email or other forms of documented communication also may be used.
>
> The Employer may, in its sole discretion approve credit hours retroactively. In the event of denial, the Employer will provide the employee with the reasons for the denial. At the employee's request, the reasons for the denial shall be in writing.
>
> The Employer's decision regarding an employee's request to earn credit hours will be based on whether there is sufficient work available to keep the employee productively occupied during the entire period for which credit hours are requested, and whether that work can be performed at the requested time. An employee may not save work that otherwise could be completed during the regular tour of duty in order to earn credit hours.

Whereas Section 12D addresses the *earning* of credit hours, **Section 12E** deals with *using* credit hours.

NTEU proposes modest modifications to the existing "legacy" labor agreement language. Both parties agree that employees must obtain approval from supervision prior to using credit hours; NTEU proposes to add language specifying that such approval should made be in writing

by the supervisor, using SEC's time and attendance system or email. Additionally, although existing language requires that the reason for any denial of credit hours be provide in writing *if requested by the employee*, NTEU would require any denial to be explained in writing.

As in Section 12D, I agree it can be helpful to identify the mechanisms available for requesting to use credit hours, and approving or denying the request. I therefore recommend language similar to the text proposed by NTEU. With regard to written explanations for denials, I agree with SEC there is no reason to burden supervisors unnecessarily with providing universal written explanations, and I therefore recommend the text of the prior labor agreement.

Section 12F addresses the hours during the workday when employees may earn credit hours. Under the "old" labor agreement, credit hours only could be earned between 7:00 AM and 7:00 PM. Both SEC and NTEU propose to expand substantially the "window" when credit hours can be worked and earned.

Like NTEU's proposal (Section 3) to allow employees on alternative work schedules to begin work as early as 6:00 AM, NTEU proposes that credit hours be earned between 6:00 AM and 10:00 PM. SEC proposes that the earning of credit hours be limited to 6:30 AM to 10:00 AM. Because I already have agreed with SEC that 6:30 AM is an appropriate start time for work shifts, I agree this is an appropriate beginning time for the earning of credit hours.

The existing labor agreement language states "An employee may not earn credit hours during a holiday or an excused absence." Although both parties initially proposed to retain this language, NTEU notes (per its argument relating to Section 5C1(g), *supra*) that under very limited circumstances, OPM has indicated employees may be allowed to earn credit hours on holidays. Like Section 5C1(g), I recommend language recognizing such a possibility.

Under the existing labor agreement, employees may request to earn credit hours in 15 minute increments, but with a 30 minute minimum. Employees may use credit hours in 15 minute increments, with a 15 minute minimum.

SEC proposes to retain the legacy language, while NTEU proposes to allow employees to earn credit hours in 15 minute increments, with only a 15 minute initial increment. NTEU notes the SEC "30-minute minimum" is not mandated by OPM policies, and there are other agencies that allow an initial 15 minute increment when earning credit hours. NTEU suggests the existing 30-minute minimum is a holdover from a period when SEC's timekeeping system was unable to

track time in 15-minute intervals; because the SEC system now is capable of handling the 15-minute intervals, there is no technical reason why the 30-minute minimum must be retained.

Although SEC does not provide an argument in support of the existing 30-minute minimum, this Factfinder can understand why the Agency might want to retain the older time frame. While I accept as true NTEU's representation that Agency computer systems can handle the 15-minute request, and a minimum 15-minute interval would comply with Federal personnel regulations, there nonetheless is a cost in supervisory time and attention associated with each request to earn credit hours. Fifteen minutes is a very short time interval; if the Agency has decided that supervisors should not be devoting time to approving or disapproving *de minimis* requests for credit hours, that does not strike this Factfinder as unreasonable.

I therefore recommend retaining the legacy language, as advocated by SEC.

Section 12H addressed the number of credit hours that can be carried over by full-time employees, and also the number of credit hours that can be earned and carried over by part-time employees. Although NTEU proposed language different from SEC, NTEU has acceded to the SEC proposed language, which the Factfinder recommends.

Section 12J relates to employees working credit hours on weekends. The existing labor agreement notes that Agency buildings may not be heated or cooled on weekends and therefore an employee who is approved for weekend work assumes the risk that the SEC workplace may be uncomfortable. SEC proposes to retain the existing language.

NTEU does not object to the existing language *per se*, but seeks to add language allowing employees approved to telework the ability to work at their remote work site when earning credit hours on weekends. The form of the language proposed by NTEU seem to presume that such a credit hour request will be granted, and uniformly requires supervisors to provide written explanations for any denials.

The Factfinder agrees that, when the Agency feels there is a legitimate value for an employee to perform credit-hour work on weekends, it may be useful – both for the Employee *and* for the Agency – to allow an employee approved to telework to perform the work from his or her home. I recommend language addressing and sanctioning such weekend telework, but with modified language per Attachment A.

Section 12K of the existing labor agreement states:

> K. While an employee may only earn credit hours at his or her Official Duty Station, an employee working an approved telework schedule on a given day(s) may request to earn credit hours at his or her approved alternate work site on that day/those days.

SEC proposes to retain this legacy text, and initially NTEU agreed. However, in its Position Statement, NTEU has altered its position, noting the existing language is somewhat inconsistent with proposals to allow credit hour work on weekends (*i.e.*, non-work days) from remote locations, and also potentially the ability to earn credit hours on holidays under circumstances permitted under OPM guidelines.

The Factfinder agrees with NTEU that the existing language creates potential conflicts or misunderstandings when aligned against these other provisions. Accordingly, I recommend alternative language modeled on the NTEU proposal in its Position Statement (at p. 46). *See* Attachment A.

Section 12L in the existing labor agreement purports to regulate the time periods when credit hours can be earned:

> L. A full-time employee may earn credit hours consistent with his or her office's morning and afternoon flexible bands, as well as the band for non-workday weekends. Therefore, credit hours may not be earned before or after the employee's Office's flexible and weekend bands. A part-time employee may earn credit hours within these bands as well as during his or her Office's core hours.

SEC proposes to retain this language, while NTEU proposes to delete the text entirely. NTEU argues the language is confusing and may be inconsistent with other provisions of the labor agreement as proposed by the parties. Further, NTEU notes the work bands of the labor agreement only address mid-week days, and not weekends.

In light of the fact that the bands have been expanded, this Factfinder is unconvinced the language of Section 12L serves any useful purpose, and I agree with NTEU that the text may simply provide opportunities for confusion. I recommend the text be eliminated.

SEC proposes to retain the text of **Section 12M** of the current labor agreement, which

states:

> M. An employee may not earn credit hours when at Employer-required training.

SEC argues employees at training should remain focused on their training, and not on work. In contrast, NTEU contends a training day is like any other work day; to the extent SEC has work the employee needs to perform, the employee should be able to put in additional credit hours to complete the work.

The Factfinder agrees with NTEU that a flat contractual ban on earning credit hours while at training serves little purpose. Presumably, there are urgent situations when the Agency will find it in the Agency's interest to encourage employees at training sessions to put in "extra time" and complete needed work; under those circumstances, there is no clear rationale for SEC and NTEU to agree in advance that any such additional work automatically should be barred under the labor agreement. To the extent SEC believes it is undesirable for employees to be performing additional Agency work while attending employer-sponsored training, SEC is in a position to instruct its supervisors not to approve credit hours under those circumstances.

I therefore recommend existing Section 12M be eliminated from the new labor agreement.

Sections 12N and O Parties are agreed..

Section 13 - <u>Pay/Leave</u>

Sections 13A and B Parties are agreed.

Both NTEU and SEC propose new language for **Section 13C**, in light of special issues relating to holiday pay in connection with the SEC-flex program.

SEC proposes the following language:

> C. An employee on a SEC-flex work schedule will only earn eight (8) hours holiday pay on a holiday. This is set by law (5 U.S.C. 6124). Such employee will have to take appropriate leave (including credit hours earned) for the 9th or 10th hour.

NTEU recognizes the statutory limitations relating to holiday pay for employees on the SEC-flex program, but suggests such employees be allowed to work additional time during pay periods that include a holiday so they are not compelled to use vacation leave or credit hours to qualify for a full paycheck:

> C. An employee on a SEC-flex work schedule will only earn eight (8) hours holiday pay on a holiday. This is set by law (5 U.S.C. §6124). Such employee will either have to take appropriate leave (including credit hours earned) for the 9th or 10th hour *or the employee may adjust his or her work schedule for that pay period only to work the additional hour(s). Such additional hour(s) must be completed during the regular or credit hour tour of duty hours in that pay period.*

Emphasis added. NTEU's arguments are two-fold. First, there is a basic question of fairness to the employee, with NTEU contending the employee should not be required to consume his or her leave time simply because there is a holiday. Second, NTEU suggests that allowing the employees to "make up" the additional time (so they achieve a regular 80-hour pay period) actually is in SEC's interest, because the Agency gets the benefit of the additional productive hours.

I believe NTEU has the better argument on this. Admittedly, implementation of the SEC-flex program may be complicated for SEC administrators and supervisors, given the relatively wide variety of schedules that might be developed by employees. And adding a mechanism for making up lost time on holidays adds yet another level of complexity to the system. Still, the Factfinder is confident Agency managers and supervisors are capable of making this working, and whatever additional effort may be involved is outweighed by the matter of fairness to the workforce. I therefore recommend adoption of the NTEU proposed language.

Sections 13D, E, F Parties are agreed.

Section 14 - <u>Lunch</u>

Although NTEU proposed modified language extending the time band for taking lunch, it has acceded to SEC's position.

Section 15 - <u>Time Reporting</u>

Parties are agreed.

Section 16 - Reports

Parties are agreed.

Section 17

The parties are in strong disagreement whether the SEC-flex should be viewed as a pilot program. As part of its proposed Section 17 language, SEC proposes:

> The SEC-flex work schedule will run as a one (1) year pilot program whereupon the parties will determine whether to continue the work schedule.

SEC proposes to implement an evaluation program over the first 18 months of the SEC-flex implementation. At the end of that period, "Based on the evaluation results, the Employer may exercise reasonable discretion to continue, modify, or terminate the trial program."

As this proposed provision is structured, it appears there is a presumption that the SEC-flex work schedule ends after the one-year pilot program, unless there is joint agreement to continue the program into the future. Further, it is clear SEC reserves the unilateral right to terminate the program after 18 months, based on an evaluation conducted by Agency management.

NTEU argues this approach runs counter to the requirements of the Federal Employees Flexible and Compressed Work Schedules Act ("Work Schedules Act"), 5 U.S.C. §6120 *et seq.*, particularly 5 U.S.C. §6131, which prohibits an agency from terminating an alternative work schedule unless there is first a showing of adverse agency impact.[2]

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[2] §6131. Criteria and review

(a) Notwithstanding the preceding provisions of this subchapter or any collective bargaining agreement and subject to subsection (c) of this section, if the head of an agency finds that a particular flexible or compressed schedule under this subchapter has had or would have an adverse agency impact, the agency shall promptly determine not to—

(1) establish such schedule; or

(2) continue such schedule, if the schedule has already been established.

In response, SEC argues there is no violation of 5 U.S.C. §6131, because under its

(b) For purposes of this section, "adverse agency impact" means—

(1) a reduction of the productivity of the agency;

(2) a diminished level of services furnished to the public by the agency; or

(3) an increase in the cost of agency operations (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed schedule).

(c)(1) This subsection shall apply in the case of any schedule covering employees in a unit represented by an exclusive representative.

(2) (A) If an agency and an exclusive representative reach an impasse in collective bargaining with respect to an agency determination under subsection (a)(1) not to establish a flexible or compressed schedule, the impasse shall be presented to the Federal Service Impasses Panel (hereinafter in this section referred to as the "Panel").

(B) The Panel shall promptly consider any case presented under subparagraph (A), and shall take final action in favor of the agency's determination if the finding on which it is based is supported by evidence that the schedule is likely to cause an adverse agency impact.

(3) (A) If an agency and an exclusive representative have entered into a collective bargaining agreement providing for use of a flexible or compressed schedule under this subchapter and the head of the agency determines under subsection (a)(2) to terminate a flexible or compressed schedule, the agency may reopen the agreement to seek termination of the schedule involved.

(B) If the agency and exclusive representative reach an impasse in collective bargaining with respect to terminating such schedule, the impasse shall be presented to the Panel.

(C) The Panel shall promptly consider any case presented under subparagraph (B), and shall rule on such impasse not later than 60 days after the date the Panel is presented the impasse. The Panel shall take final action in favor of the agency's determination to terminate a schedule if the finding on which the determination is based is supported by evidence that the schedule has caused an adverse agency impact.

(D) Any such schedule may not be terminated until—

(i) the agreement covering such schedule is renegotiated or expires or terminates pursuant to the terms of that agreement; or

(ii) the date of the Panel's final decision, if an impasse arose in the reopening of the agreement under subparagraph (A) of this paragraph.

(d) This section shall not apply with respect to flexible schedules that may be established without regard to the authority provided under this subchapter.

proposed contract language the SEC-flex program expressly is deemed a pilot program, and the possible termination of the program at the end of the pilot year actually is a negotiated term (citing 5 U.S.C. §6130(a)(1)). In SEC's view, NTEU's legal claim that the Work Schedules Act would be violated if the SEC-flex program was terminated at the end of a pilot period simply is wrong.

Although the Factfinder tends to agree with SEC that the termination of a pilot program would not constitute a violation of 5 U.S.C. §6131, this really is not the central issue. The real question is whether it is appropriate to "stand up" this significant, negotiated program, merely to place the Agency in a position "one year out" where SEC could terminate the program entirely.

The Factfinder agrees with NTEU that implementation of the SEC-flex program as a pilot is undesirable. Further, even if the concept of a pilot program (with its possible termination) may not violate the letter of the Work Schedules Act, it certainly runs counter to the spirit.

Although somewhat complicated, the SEC-flex program offers real possibilities for improving the quality of worklife for many SEC employees. The parties plainly have spent substantial time developing the program, and SEC essentially is "on board" with trying to make the program work. I believe it would be counterproductive in many respects to enter into the program with the burden of knowing that the program effectively would need to be re-authorized after a single, short year. In the view of the Factfinder, all involved would be better off entering into the SEC-flex program with the knowledge that it is a new work schedule under the labor agreement, while recognizing – per 5 U.S.C. §6131 – that the program can be reopened upon a showing of adverse agency impact.

For these reasons, I recommend adoption of NTEU's language for Section 17.

V. ARTICLE 11 - TELEWORK PROGRAM

Pursuant to the 2010 Telework Enhancement Act, Federal agencies are tasked with promoting telecommuting. SEC and NTEU have substantial experience with telework.

The prevalence of regular telecommuting among SEC employees (as opposed to *ad hoc* telecommuting) is disputed between the parties. On the one hand, SEC points to OPM's 2012 Status of Telework in the Federal Government (a report submitted to Congress, Agency Exhibit D) and asserts the level of telework participation at SEC is relatively high compared to other Federal agencies, including some of the FIRREA agencies. On the other hand, NTEU contests the claim, arguing that many other agencies have much more liberal telecommuting policies. Short of an extended independent study, it is not possible for this Factfinder to reach any firm conclusions on this question; frankly, I also do not believe it is necessary to the task at hand to reach any definitive conclusion on SEC's comparative "performance to date" on promoting telework.

Under the prior 2007 labor agreement (Article 11, Section 3), the parties agreed generally that eligible bargaining unit members could apply for a recurring telework schedule in which they would work from home one or two days per week. However, the parties also established (at Section 13) an "Expanded Telework Trial Program" that allowed employees to telework 3, 4 or even 5 days per week from their remote location. Under this program, "3 or 4 day" teleworkers retained their office spaces at SEC facilities, while 5 day teleworkers forfeited their right to a dedicated office space at an SEC facility.

In its Position Statement (at pp. 56-64), NTEU describes in detail (and with documentation) the implementation of the Expanded Telework program, SEC's assessment of the program, and various materials suggesting that expansive telework at the SEC has been successful (including SEC materials extolling the expansion of telework). Although SEC's new proposals reflect a wholesale retreat from SEC's apparent earlier embrace of greater telework opportunities, this Factfinder finds it significant that no objective evidence has been presented by SEC to demonstrate the Expanded Telework program was <u>not</u> successful. For that matter, SEC has not even provided anecdotal evidence to suggest the program was not successful.

Overall, SEC's proposals therefore present a somewhat mixed and conflicting message. Although the 2007 agreement nominally had only 1- and 2-day teleworking as the "permanent" options, the Agency instituted a program of 3, 4 and 5 day telework on a pilot basis that

apparently was successful. Yet instead of embracing the sweeping 5-day telework scope of the successful pilot program, SEC proposes in the new agreement to "bump up" the maximum number of days for recurrent telework from 2 days to only 3 days (with employees who were successful under the Expanded Telework pilot program being grandfathered). Additionally, whereas under the pilot program only employees teleworking 5 days lost their dedicated office space at SEC facilities, SEC proposes now that employees who telecommute 3 days will not have such dedicated space – a development that plainly is a response to GSA's criticism that SEC is not making fully-effective use of its space.

In its Position Statement, SEC expresses a general view that it seeks to have all employees physically present at its facilities two days each week on a regular basis. In essence, this means employees on a regular 5-day week work schedule might telecommute up to three days. However, an employee on a 4-10 schedule would be limited to two telework days. An employee on a 5-4/9 schedule might telework 3 days (during the "5 day" week), while teleworking 2 days during the "4 day" week, etc. In SEC's words, "This two day minimum requirement facilitates synergy and teamwork, minimizes isolation and communication issues, and enables employees to use resources not available offsite." Additionally, SEC expresses concern that 3-day recurrent teleworkers not circumvent the "2 days in the office" goal by using annual leave or comp time to absent themselves from work on their "in-office" days.

NTEU takes a different view (in its Position Statement, as well as its comments during open session at the earlier mediation), essentially criticizing SEC as being timid in embracing broad telework policies. First, as noted, there is the successful precedent of the Expanded Telework pilot project, with SEC never having made an argument to NTEU that the dramatically expanded program had resulted in an adverse impact on Agency operations. Second, there is the recognition that the overall number of employees who have pursued 3, 4 or 5 day telework schedules has been relatively small, with NTEU contending that even if the pilot program were made permanent, it is highly unlikely that large numbers of employees would be clamoring to spend all or even most of their work time working from home. Third, there is a general acknowledgment that the duties of most Agency employees require their physical presence at SEC facilities all or most of the time. In this regard, NTEU notes the employees who were most likely to be able to telework successfully for multiple days each week were clustered in just a few divisions, where their work involved recurrent review of corporate filings (*vs.* conducting audit or enforcement activities in the field, developing policies and regulations, managing litigation, etc.). Finally, NTEU notes in its Reply brief that a number of the SEC proposals relating to telework (*e.g.*, the requirement that employees be present in the office for two days each week)

are completely new and were not squarely discussed at any time during two years of negotiations, and as such should be rejected by the Factfinder.

Overall, the "take away" for this Factfinder is skepticism regarding the overall SEC approach. Plainly, extensive recurrent telework would be inappropriate for large numbers of Agency employees, simply based on the type of work they perform. However, SEC's approach is to curtail sharply the opportunity for *any* employee to apply for the extremely broad telework schedules that succeeded under the pilot program. In this Factfinder's view, this kind of across-the-board shift is inappropriate. The better strategy is to adopt policies that allow employees broadly to apply for extensive telework opportunities, if they so choose, while also educating supervisors and managers that each telework request needs to be analyzed critically in light of the Agency's needs and the employee's ability to perform work independently. Although this individualized assessment approach may be more difficult (because it places supervisors in a position where they sometimes have to say "no" to their employees), it best achieves the result mandated by Congress, *i.e.*, allowing expanded telework opportunities in circumstances that are appropriate.

Because the Factfinder gave the parties flexibility to alter their LBOs in their final submissions, I consider the LBOs of both parties "as presented," even if the LBO includes new language or concepts that may not have been part of the parties' negotiations. However, where a party injects new language or concepts at this late stage of the process, this Factfinder is strongly inclined to recommend language or concepts that were fully vetted during the recent negotiations, or which are found in the existing labor agreement.

Section 1

For **Section 1A**, NTEU proposes text that modifies somewhat the existing legacy language, while SEC retains the text from the prior agreement. Although there are virtues in NTEU's restructuring, I do not find the differences in the two approaches to be substantive and therefore propose the existing "legacy" text be retained.

SEC proposes in **Section 1B** to modify the existing text of the labor agreement slightly, while NTEU proposes retaining the existing text. Although the prior labor agreement required only that SEC "consider" requests to telework, SEC and NTEU both propose changing the section to clarify that the Agency shall "grant or deny" an employee's request. The remaining SEC changes are not substantive; in the view of the Factfinder, the SEC version is somewhat

clearer than the "old" labor agreement language. I recommend adopting the SEC-proposed modified version.

The parties both propose adding a new **Section 1C**, emphasizing the voluntary nature of telework and stating participation in telework will not place employees at a disadvantage. NTEU's version adds that an employee may choose to discontinue a telework arrangement at any time; this concept was found in the prior labor agreement at "old" Section 11.3C. Earlier versions of SEC-proposed language suggested telework could be discontinued at any time by *either* the employee or the Agency, but this text was removed from the LBO submitted to the Factfinder.

The "non-discrimination" language is the same in both proposals, and is recommended. With regard to NTEU's text stating the teleworking employee may discontinue teleworking at any time, this concept was included in the prior labor agreement and SEC nowhere argues this is improper. The Factfinder therefore recommends the NTEU version of Section 3C, even while recognizing that if a substantial number of teleworking employees discontinued there telework schedule, this could create serious space issues for SEC at its offices. The Factfinder believes it is unlikely that substantial numbers of teleworking employees would change their schedule simultaneously (or near-simultaneously), so this potential problem is speculative. Presumably, the parties would meet and negotiate if reductions in the number of teleworking employees created a space shortage.

Section 2

Section 2 is new, and adds a series of definitions to be used in the balance of the Telework article.

At the beginning of the mediation, it appeared the parties were in agreement on these definitions, and NTEU has proposed retaining the earlier agreed-upon text. However, SEC has proposed two modifications. First SEC proposes to delete entirely the following:

> 6. Traditional Office – The employee's official office, primary workplace or official duty station. This is sometimes known as the usual customary work address or regular home.

In addition, SEC proposes adding text (in *italics*) to the following section:

2. Official Duty Station – Consistent with current law, regulations and Office of Personnel Management (OPM) guidance, the official duty station is the location of the employee's permanent work assignment*; however, if an employee teleworks on a recurring basis for more than eight (8) days per pay period, the official duty station is the telework station*.

In its Position Statement, SEC argues this latter "eight day" language is needed to be consistent with applicable OPM regulations at 5 C.F.R. §531.605. The current version of these regulations states:

> (a) (1) Except as otherwise provided in this section, the official worksite is the location of an employee's position of record where the employee regularly performs his or her duties.
>
> (2) If the employee's work involves recurring travel or the employee's work location varies on a recurring basis, the official worksite is the location where the work activities of the employee's position of record are based, as determined by the employing agency, subject to the requirement that the official worksite must be in a locality pay area in which the employee regularly performs work.
>
> (3) An agency must document an employee's official worksite on an employee's Notification of Personnel Action (Standard Form 50 or equivalent).
>
> (b) For an employee who is relocated and authorized to receive relocation expenses under 5 U.S.C. chapter 57, subchapter II (or similar authority), the official worksite is the established worksite for the position in the area to which the employee has been relocated. For an employee authorized to receive relocation expenses under 5 U.S.C. 5737 in connection with an extended assignment resulting in a temporary change of station, the worksite associated with the extended assignment is the official worksite. (See 41 CFR 302–1.1.)
>
> (c) For an employee whose assignment to a new worksite is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty at the new location, the official worksite in effect immediately before the assignment remains the official worksite through the date of separation.
>
> (d) For an employee covered by a telework agreement, the following rules apply:

(1) If the employee is scheduled to work at least twice each biweekly pay period on a regular and recurring basis at the regular worksite for the employee's position of record, the regular worksite (where the employee's work activities are based) is the employee's official worksite. However, in the case of such an employee whose work location varies on a recurring basis, the employee need not work at least twice each biweekly pay period at the regular official worksite (where the employee's work activities are based) as long as the employee is regularly performing work within the locality pay area for that worksite.

(2) An authorized agency official may make an exception to the twice-in-a-pay-period standard in paragraph (d)(1) of this section in appropriate situations of a temporary nature, such as the following:

(i) An employee is recovering from an injury or medical condition;

(ii) An employee is affected by an emergency situation, which temporarily prevents the employee from commuting to his or her regular official worksite;

(iii) An employee has an extended approved absence from work (e.g., paid leave);

(iv) An employee is in temporary duty travel status away from the official worksite; or

(v) An employee is temporarily detailed to work at a location other than a location covered by a telework agreement.

(3) If an employee covered by a telework agreement does not meet the requirements of paragraphs (d)(1) or (d)(2) of this section, the employee's official worksite is the location of the employee's telework site.

(4) An agency must determine a telework employee's official worksite on a case-by-case basis. A determination made under this paragraph (d) is within the sole and exclusive discretion of the authorized agency official, subject only to OPM review and oversight.

(e) In applying paragraph (d) of this section for the purpose of other location-based pay entitlements under other regulations that refer to this

> section, the reference to a locality pay area is deemed to be a reference to the applicable geographic area associated with the given pay entitlement. For example, for the purpose of special rates under 5 CFR part 530, subpart C, the reference to a locality pay area is deemed to be a reference to the geographic area covered by a special rate schedule.

On the one hand, it is clear SEC must comply with mandatory OPM guidelines, and therefore the concepts which SEC seeks to interject into the labor agreement at this phase do not appear to be inappropriate. However, it is a matter of concern that the parties have not negotiated over the new proposal. As a solution, I recommend modified text for the "Official Duty Station" definition, simply incorporating by reference the OPM regulation. With regard to the "Traditional Office" definition, I believe the definition is somewhat unclear, and (with SEC) I recommend the definition be removed from the labor agreement.

Section 3

In **Section 3A**, both parties propose stating "All employees may request a telework arrangement," which is legacy language. At one time, the parties were in agreement this short sentence would constitute *all* of Section 3A; however, SEC now proposes to add a new sentence:

> Before commencing telework, employees must have a fundamental understanding of computer and communications technology that would be required to perform their duties remotely and must complete a teleworker technology course.

From its Position Statement, it is unclear to this Factfinder why SEC proposes inserting this language, nor is it clear precisely what this language would do. Plainly, if SEC believes it needs to provide training to workers, it has the means to do so independent of this kind of language. I recommend the new SEC text not be adopted.

Section 3B1 Parties are agreed.

With regard to **Section 3B2**, recurring telework, SEC proposes that recurring telework be limited to two days per week. This would be consistent with legacy language in the main portion of Article 11 of the "old" labor agreement. NTEU proposes that up to five days of recurring telework be authorized, per the pilot program.

As discussed *supra*, I believe NTEU has the better argument. The experience of the pilot

program suggests there are positions at SEC that successfully can be performed by an employee on a regular, 5-day per week telework arrangement. The labor agreement should be written in such a manner that employees can request such a schedule. To the extent supervisors or managers believe a 5-day telework schedule is inappropriate, either because of the work duties of the employee or because of the employee's track record teleworking, the Agency has ample tools to regulate the number of days actually approved for a recurring telework arrangement.

Additionally, with its most recent LBO, SEC adds an extensive array of new requirements for participating in the telework program. In Section 3B2b(1), SEC adds minimum performance standards. In Section 3B2b(2), SEC seeks a provision asking all teleworkers to commit to working two days per week at the official duty station; if an employee has teleworked three days in a pay period, SEC proposes language creating a presumption that annual leave or credit hours will not be approved on the fourth or fifth day. In Section 3B2b(3), SEC creates a "pecking order" to be followed in the event too many employees in an office seek telework. In Section 3B2(b)4, SEC includes a provision stating employees teleworking three or more days per week will be required to share office space an SEC facilities, and will not be guaranteed their own office if they subsequently cease teleworking.

In the view of the Factfinder, the addition of performance standards is unnecessary. SEC managers and supervisors have sufficient tools available elsewhere in Section 11 to insure that employees who are authorized to telework are being effective in their jobs. Similarly, I believe the emphasis on having "two days in the office" is somewhat misplaced. If there is a legitimate business need for employees to be present, there are sufficient tools in Article 11 to make this happen. And if there is a need for employees to be physically present in the office on a recurrent basis, and they are abusing leave or credit hours to evade this expectation, the Agency is in a position to take action.

The language relating to the use of shared offices for employees who telework three or more days is found in **Section 5-2E**.

Section 3B3(b)(4) and (5) Parties are agreed.

Section 3B3(b)(6) The parties offer slightly different text identifying *ad hoc* or recurring telework in connection with the Agency's Continuity of Operations Plan (COOP). I recommend adopting SEC's version.

Section 3C addresses "what to do" with the Expanded Telework pilot program, which now is ended.

Substantively, the language proposed by the two parties is not much different, with a provision that employees who have been successful with expanded telework under the pilot program be "grandfathered" and allowed to retain their schedules. I recommend adopting the NTEU version.

Section 4 (Eligible Positions)

Section 4A The parties offer somewhat similar text describing the types of positions that might be suitable for telework, but SEC includes as one element "Face-to-face contact with other employees and contacts is predictable or contact can be efficiently managed through telephone or email communications." This concept is found in Section 4B1 of the "old" labor agreement, and the Factfinder believes it remains useful. I recommend adopting SEC's version.

Sections 4B Parties are agreed.

Section 4C further illustrates the types of positions that may be appropriate for telework. The parties generally are in agreement, but SEC adds the following caveat at the end of the list: "Some components of these tasks and functions may be improved by collaboration with colleagues, and may not be appropriate for telework." The Factfinder views this text as unnecessary, because the first sentence of Section 4C plainly states the list identifies positions that *generally* are suited for telework. In my opinion, this plainly signals that the list merely is illustrative, and that even positions that may have characteristics identified on the list still must be evaluated based on the actual duties of the individual worker's job. I recommend adopting the NTEU language.

Section 5-1 (Eligible Employees)

> **NOTE: For purposes of this report, the Factfinder "renumbers" Section 5 as "Section 5-1," and adds a new "Section 5-2 to address the termination of the "old" Expanded Telework Trial Program. The Factfinder recognizes the parties likely will want to adjust the location and/or formatting of the recommended Section 5-2, but entrusts this responsibility to them.**

The materials in **Section 5-1** are variations on text currently found in Section 4B of the

"old" labor agreement. For the most part, NTEU proposes retaining the legacy text, while SEC proposes some modifications.

Generally, I believe the NTEU version is preferable. The Factfinder recommends slightly modified text based on the NTEU proposal, but incorporating some features advocated by SEC.

Section 5-2 (Transition from Trial to Permanent Expanded Telework) (New, relating to the recommendation to make the Expanded Telework Trial Program a permanent feature of the labor agreement)

At the conclusion of its Article 11 proposal, NTEU presented alternative language that might be adopted if the Expanded Telework Trial Program – with its possibility of a five-day telework schedule – was to be incorporated permanently into the labor agreement.

As discussed above, based on the success of the trial program, the Factfinder recommends incorporating the possibility of a full-time telework regimen into the labor agreement, even while recognizing such a schedule will not be appropriate for many positions or individuals. However, I believe NTEU has proposed useful text describing a series of tiers and tests that could be set to help implement the expanded program.

I recommend adopting the NTEU-proposed language, with some modifications (including text proposed in SEC Section 3B2). For purposes of this report, I insert this new text between Section 5 and Section 6. I renumber Section 5 as Section 5-1, and identify the new text as Section 5-2.

Section 6 (Decision to Grant or Deny a Telework Request)

Section 6A Parties are agreed.

In **Section 6B**, NTEU advocates the following language, which NTEU advises is based on current language in the labor agreement:

> B. A supervisor may deny a request for a particular telework schedule based on the business need to maintain minimum coverage requirements.

In contrast, SEC proposes language giving a supervisor the ability to deny a telework arrangement where the proposed alternative worksite is remote from the SEC office. In earlier

versions of its proposal, SEC indicated the allowable range would be 100 miles, but in the revised LBO submitted with its Position Statement, the 100 mile figure is dropped. Further SEC adds qualifiers (in *italics*) to the proximity factor:

> B. A supervisor may deny a request for a particular telework schedule based on the business need to maintain minimum coverage requirements or because the proposed Alternative Worksite is so far away from the official duty station that reporting to the official duty station would be impractical. *The Agency, however, retains the right to consider request(s) to telework beyond the commuting area in exceptional circumstances such as situations where an employee needs specialized medical treatment that can only be obtained outside the commuting area*.

Although NTEU does not suggest that an employee's proximity to his or her supervisors or co-workers is *per se* to be ignored, NTEU points to a number of facts that illustrate the difficulty of establishing a workable, general rule. NTEU identifies a number of employees (including supervisors) who telecommute from relatively long distance, apparently without any adverse affect. Further, NTEU notes there are a number of employees who either supervise or are supervised from very long distances, suggesting that employees in many cases simply do not need to be near their offices, depending on the type of work they do and the technology that can be harnessed to provide effective communication.

In this Factfinder's view, SEC's "backpedaling" on its earlier, more-restrictive proposal points to the problems inherent in setting universal, firm rules. With regard to the proximity of an alternate work location to an SEC office, I believe NTEU is correct that each application should be evaluated individually, and I recommend the text proposed by NTEU.

In **Section 6C**, SEC proposes to add a list of personal factors a supervisor may consider when deciding whether to approve an individual employee's application for telework. NTEU disagrees with the addition of this list, arguing some of the factors are vague, and that these considerations already are addressed adequately in Sections 4 and 5.

I disagree with NTEU's argument that these factors already are addressed in Sections 4 and 5. Section 4 deals with the general characteristics of the types of *positions* that may be susceptible to telework, and Section 5 (with the possible exception of Section 5A3) largely is a refinement of considerations found in Section 4 (*i.e.*, that even if an employee's *position* might *ordinarily* be amenable to telework, there may be special circumstances uniquely relating to the work performed by an individual employee in the position that might further limit the employee's

ability to telework).

Section 6C, proposed by SEC, does not address so much the nature of the job, but the track record and work ethic of the employee who is applying for telework. Generally, the Factfinder believes this is a relevant consideration to be evaluated by a supervisor when deciding whether to grant or deny an employee's request to work at a site remote from an SEC office. I recommend a modified, scaled-back version of the SEC text.

Section 6D outlines specific circumstances under which an employee may be denied telework. As NTEU notes, there are two areas of disagreement. One is found in the prefatory comment, where SEC proposes that a employee with any of the enumerated deficiencies "is excluded" from telework, while NTEU suggests the Agency "may limit or exclude" such an employee. I believe NTEU's formulation is more practical, and I recommend its adoption.

With regard to the other criteria, the parties have a variety of different terms. I recommend staying with the "legacy" language of the expired labor agreement.

Section 6E addresses the circumstances under which an employee's telework arrangement may be suspended or terminated. Both parties list the same factors that may be considered, and these factors track the provisions of Section 10 of the "old" labor agreement. SEC previously had added a catch-all "otherwise fails to meet his or her obligations under the program," but this was objectionable to NTEU and appears to have been abandoned by SEC in it Statement of Position. In any event, I agree with NTEU that such language would be superfluous.

The other area of disagreement in Section 6E relates to the procedure for notifying an employee that his or her telework agreement may be suspended or terminated, and the ability of the employee to plead his or her case to the Agency. NTEU proposes that all such suspension or termination actions be communicated to the employee with a written explanation; in this Factfinder's view (per the discussions in Article 7, *supra*), I recommend that written explanations be provided upon the employee's request. I provide slightly modified language based on the NTEU proposal.

The parties' proposals for **Section 6F** are almost the same, except that NTEU would always require the Agency's denial of a telework request to be memorialized in a writing, while SEC would commit the rationale to writing upon the employee's request. I recommend the SEC

version.

In their submissions prior to the mediation, the parties indicated they were in substantial agreement with regard to **Sections 6F, 6G, 6H and 6I**. These provisions relate to the allocation of telework agreements in situations where too many employees from a given branch request telework; the fair and equitable implementation of the telework regime; and Employer consideration of employee requests to use telecommuting centers.

It is unclear why some of these provisions were removed from the most recent SEC LBO, but they remain in the NTEU proposal and I recommend including them. I note these provisions strike this Factfinder as mis-placed at the end of Section 6, but I will leave it to the parties to determine whether to assign the text to another portion of Article 11.

Section 7 (Training) Parties are agreed.

Section 8 (Telework Agreement)

Sections 8A, 8B Parties are agreed.

In **Section 8C**, SEC proposes new language stipulating that employees on telework may be required to update or confirm the information in their telework agreement on an annual basis. NTEU has no comparable proposal. In the view of the Factfinder, there is no fundamental unfairness in the Agency simply confirming with employees that the information at the heart of a telework agreement is accurate. I recommend adoption of SEC's proposal.

The parties both offer proposed language for **Sections 8D, 8E and 8F**. To some extent, the concepts involved are interlinked, and properly are reviewed together.

For these sections, SEC proposes:

> D. Consistent with this Article, a supervisor may elect to review and revise a telework agreement consistent with mission, staffing, and or workload requirements. The Employer will discuss the reasons for revising the telework agreement with the employee and, upon request, provide the reasons for such revision in writing to the employee.
>
> E. The employee must submit a new Telework Request when either of the following occurs:

1. The employee is promoted, reassigned, or detailed to a different position; or

2. The employee wishes to make any change to the original approved telework arrangement, such as the number of telework days, location of Alternative Worksite, etc.

F. If an employee seeks to discontinue his or her established telework arrangement, he or she must notify his or her supervisor.

NTEU proposes:

D. Consistent with this Article, a supervisor may elect to review telework agreements as the business need arises to insure compliance with this Article, and any modifications to the telework agreement may only be made pursuant to this Article. The supervisor will discuss the reasons for any modification to the telework agreement with the employee and provide the reasons for such revision in writing to the employee

Specifically, the employee must submit a new Telework Request when any of the following occurs:

1. The employee is promoted, reassigned, or detailed to a different position; or

2. The employee wishes to make any changes to the original approved telework arrangement, such as the number of telework days, location of Alternative Worksite, etc.

E. If an employee seeks to discontinue his or her established telework arrangement, he or she must notify his or her supervisor.

F. [No proposal for 8F]

With regard to Section 8D, the differences are not major. The Factfinder recommends reviewing telework agreements "as the business need arises," using the terminology proposed by NTEU and tentatively agreed to by SEC prior to the mediation. Presumably, this incorporates concepts like agency mission, workload requirements, etc. I believe NTEU's language about modifications being "consistent with this Article" is helpful, and recommend such text. On the question of documenting in writing reasons for a change to a telework agreement, it is the Factfinder's recommendation that written explanations not be automatic, but be provided upon

request, as proposed by SEC.

Organizationally, I agree with SEC that the language relating to employees submitting new telework requests is better placed in a new Section, rather than being included in Section 8D, and I so recommend.

SEC proposed **Section 8F** is included in the NTEU proposal, but differently numbered.

SEC and NTEU are substantially in agreement on the text of **Section 8G**. As with other provisions, I recommend SEC supervisors only be required to provide written explanations of their decisions if requested by the employee. So I recommend the SEC version.

SEC proposed **Section 8H** allows an employee to request *ad hoc* changes in his or her telework day, with the understanding that such changes will granted so long as the swap does not interfere with the Agency's operations. Similar text appears in the NTEU version of Section 10. The Factfinder is uncertain, organizationally, whether this provision really belongs in *either* Section 8 or Section 10, but I will leave any further editing to the parties. For purposes of this Report, I recommend adding the text to Section 8, as recommended by SEC.

Section 9 (Maintaining a Safe Alternative Worksite)

At the conclusion of negotiations, the parties were in agreement on the text of Section 9. In its LBO, SEC has proposed adding new language to **Section 9C**, which relates to injuries an employee may sustain at the alternate work site while "on the clock." Specifically, in connection with the Agency's investigation of such accidents, SEC proposes to add "A supervisor's signature on such a claim for workers' compensation attests only to what the supervisor can reasonably identify and verify."

The meaning of the supervisor's signature on a claim form is a matter for legal interpretation, based on regulations, case law, etc. In the view of this Factfinder, it is inappropriate to insert this concept into the text of the labor agreement. I therefore recommend the text for Section 9 as shown in the NTEU LBO.

Section 10 (Official Duty Station)

This short Section has only two parts. The first part, relating to employees changing their

telework days, has been incorporated into Section 8, and can be deleted from Section 10. The second part is a simple statement relating to the site to be used for computing an employee's pay and travel. Although this portion perhaps could be re-located to some other section of Article 11, I leave such editorial work to the parties, and recommend that the provision be retained in Section 10.

Section 11 (Performance of Work) (initially Section 10 in SEC proposal)

Both parties propose variant language for the paragraphs of Section 11.

In **Section 10A**, both SEC and NTEU agree that performance requirements are the same for telework employees as for employees who do not telework. Further, they agree that employees who telework must notify supervisors if the teleworking employee lacks access to resources, documents, etc.

SEC seeks to incorporate a provision stating "Nothing in this Article shall affect the Employer's right to assign work or make reasonable request to ascertain the status of work assignment(s) in accordance with applicable laws, rules, regulations, the Employer's needs, or operational goals." NTEU objects to this provision, arguing it is inconsistent with the mandate of the 2010 Telework Enhancement Act that agency heads must ensure that "teleworkers and nonteleworkers are treated the same for purposes of . . . work requirements." 5 U.S.C. §6503(a)(3).

The Factfinder disagrees with NTEU's interpretation of the statute, which I do not believe is as rigid as NTEU suggests. In reality, the supervisor/employee relationship in the context of telework is altered in key respects, and it is not inconsistent with the Telework Act for supervisors to take reasonable steps to monitor employee work. The key here is the use of the term "reasonable" by SEC when discussing any additional reporting of activities. I recommend adopting SEC's text for Section 11A.

Both parties are in agreement (in **Section 11B**) that teleworkers must be accessible by phone, email, voicemail, etc. SEC proposes additional language requiring that employees comply with supervisor directives about changing voice mail messages, regularly checking voice mail, etc., and SEC also includes text acknowledging that the telework environment may result in more inquiries from supervisors than would typically occur with employees who are present in the office.

NTEU objects to this language, suggesting it is confusing and that SEC has not demonstrated a need for such new language. As with Section 11A, this Factfinder does not believe the text proposed by SEC is fundamentally out-of-line. I recommend adopting the SEC-proposed text, but adding that supervisor directives must be *reasonable*.

For **Section 11C**, SEC proposes language imposing on teleworkers responsibility for insuring that the manner in which they perform their work does not have "any" negative impact on co-workers and managers. NTEU initially proposed similar language, but qualified the requirement as insuring the telework did not have "a significant negative impact" on co-workers. In its Position Statement, NTEU proposes instead to strike Section 11C entirely.

The Factfinder agrees with NTEU. The very formulation of the Section seems to presuppose that the Agency's work is likely to be impacted negatively by telework; however, this would seem to be inconsistent with the statutory mandate to promote greater telework, and it is a supposition that is not supported by any empirical evidence. Further, it is unclear to the Factfinder precisely what burden the Section seeks to impose on the teleworkers. I recommend the language be omitted.

Section 11D relates to telephone service and the transfer of official calls to the employee's Alternate Work Site. The parties are in agreement for most of this Section, but there is disagreement relating to **Section 11D4**, where SEC proposes to omit the following language currently found in the existing labor agreement:

> If only a single telephone line is available for both voice and data at the employee's alternative work site, or if the primary telephone is a cellular telephone, the teleworker is authorized to have the office line forwarded to a cellular telephone in an effort to ensure telephone communication is available while the teleworker is working online. Under these circumstances, the Employer will reimburse the teleworker for official telephone calls made to and from the cellular telephone.

NTEU argues SEC has not made any argument or showing to demonstrate a need for removing this language. While the Factfinder believes there probably are opportunities for the parties to negotiate revisions to this language, in light of continuing changes in telecommunications technology and cost, such changes really are for the parties to address. I recommend retaining this language.

Similarly, SEC proposes to remove legacy language (**Section 11D5**) addressing issues

with employees in locations that may lack Call Forwarding. It is unclear which employees might be located in such areas, but as with Section 11D4, I am not persuaded a case has been made to delete this provision, and therefore recommend that it be retained.

Section 12 (Balancing Work and Family Needs)

The parties are in agreement on most of the language in this section, which emphasizes that teleworkers with children or dependents must arrange for care by a third party during work hours, and not substitute telework for childcare or dependent care. However, SEC adds a provision allowing a supervisor to request documentation that a caregiver is providing on-site or off-site care during the employee's working hours.

NTEU objects to this language, noting the teleworking employee may not be able to obtain such documentation from a caregiver, not is it clear what documentation would be sufficient. Further, NTEU contends this inquiry may unduly invade an employee's private life. NTEU notes the Agency has resources available under the labor agreement to conduct an inquiry if the Agency believes the employee is not complying with requirements.

While I understand SEC's concerns, in this Factfinder's view the possible benefits of the approach being proposed are outweighed by possible problems. I agree with NTEU that other avenues are available to the Agency. I recommend this added SEC text not be adopted.

Section 12C Parties are agreed.

Section 13 (Time and Attendance)

Parties are agreed.

Section 14 (Work Schedules)

Section 14A Parties are agreed.

The parties are in substantial agreement with regard to **Section 14B**. However, SEC proposes adding the italicized language at the end of this first sentence:

> A teleworking employee's work schedule may include an alternative work schedule consistent with Article 7, *so long as that schedule comports with*

all requirements of this Article.

In the view of the Factfinder, it is implicit that a teleworker who seeks to work an alternative work schedule must meet all the requirements of Article 7 *and* Article 11. The proposed language is unnecessary. I therefore recommend the NTEU version of Section 14B.

Section 14C addresses circumstances where a teleworking employee seeks to take time off on a scheduled telework day, but only for part of his or her tour. The parties are in agreement that taking leave for part of a day is acceptable, with advance supervisory approval. NTEU proposes to add additional language stating the supervisor's decision to grant or deny the leave request will be based on the criteria found at Section 6A and 6B. Further, NTEU proposes language requiring the supervisor to respond to the "time off" request within seven days, and in writing.

The Factfinder believes NTEU's concerns are reasonable, and the language helpful. I recommend modified language that is somewhat less rigid than the framework proposed.

The parties are in substantial agreement regarding **Section 14D**, with minor word changes. I recommend the NTEU language.

Section 14E addresses situations when the Agency directs a teleworker to report to an SEC office or some other duty station on a day that normally would be a telework day. Under such circumstances, the employee may request an opportunity to telework on a substitute day. The parties' positions are not much different. I recommend language requiring the Agency to "grant or deny" such requests (rather than "consider"). Also, I recommend that written explanations for a denial be required only upon request of the employee.

For **Section 14F**, NTEU proposes the following text:

> F. An employee may request to change his or her scheduled telecommuting day to another day in the work week as long as the change does not unreasonably interfere with mission, staffing and/or workload requirements. In the event of denial, the Employer will provide the employee with the reasons for denial in writing.

SEC offers no comparable proposal.

NTEU observes the proposed language is a modified version of Section 6C of the existing

labor agreement, which allowed an employee to request a change in his or her telework day "*because of* mission, staffing and/or workload requirements." Arguably, the legacy language only permitted the swapping of telework days when this affirmatively would *advance* the business interests of the Agency. NTEU argues there may be occasions when it would be very helpful to the employee to swap telework days (because of appointments, etc.), and where the change would not adversely affect the Agency. In NTEU's view, if the *ad hoc* change of work days would help the employee, and not harm the Agency – why not let this occur?

I believe NTEU's proposal is reasonable. As with other provisions, written documentation of the reason for a supervisor's denial should not always be required, but should be provided on request.

Section 14G Parties are agreed.

Section 14H addresses situations where an emergency occurs at an employee's alternative work site on his/her telework day, affecting the employee's ability to perform work. The parties are in substantial agreement regarding the options available to the Agency and the employee, including approval of leave. NTEU proposes that the use of earned credit hours also be an option available, but this option is not found in the SEC proposal. I recommend the NTEU version.

Section 15 (Technology, Equipment and Supplies)

The parties are in agreement for most provisions of this Section, with some minor variations in language. The Factfinder submits a recommended version.

Section 15D relates to whether SEC must provide teleworkers with phone cards. NTEU notes phone cards still may be needed by some employees, including particularly employees whose duties require them to make international calls. SEC suggests it will provide phone cards for making business-related long distance calls, unless the Agency has issued a Blackberry or similar device capable of making long distance calls. The Factfinder proposes alternate language based on NTEU's text, but requiring the Agency to provide phone cards only upon a showing of demonstrated need.

For **Section 15F**, NTEU proposes that SEC "will" provide underutilized computers or equipment to teleworkers. As a general proposition, this would seem to be an appropriate

activity for the Agency, and in the Agency's interest, for a variety of reasons (*e.g.* synchronizing the equipment at an employee's alternative work site with the equipment commonly found at Agency installations, extending the usefulness of surplus equipment and reducing waste, etc.). However, I propose making this activity permissive rather than mandatory.

Section 16 (Protection of Government Records)

Parties are agreed.

Section 17 (Continuity of Operations in Weather or Emergency Conditions)

The first part of **Section 17A** addresses situations involving Agency closures (due to weather, etc.) on an employee's normal telework day. The parties are in agreement that teleworkers are required to work on such days.

The second portion of Section 17A addresses the impact of two different situations on *ad hoc* teleworkers. One involves situations where the Agency closes for severe weather, while the second involves severe weather or unusual event situations when the Agency *does not* close.

With regard to the first situation, SEC proposes *mandating* that *ad hoc* teleworkers work on days when the Agency closes, to the extent the teleworker has access to equipment, documents, etc. NTEU objects to such a mandate.

With regard to the second situation, NTEU proposes that in severe weather or unusual event situations, *ad hoc* teleworkers can request permission to work from their alternative work site, and this authorization "may" be granted by the Agency. (This latter position is a retreat from NTEU's earlier position, which would have presumed the Agency would approve such *ad hoc* teleworking). NTEU would require the Agency to provide a written justification for denying such an impromptu *ad hoc* telework request.

In the view of the Factfinder, SEC's proposal that employees with *ad hoc* telework agreements be compelled to work during Agency shutdowns, even when the employee was scheduled to be working *at the Agency*, is simply unreasonable. On those days, the employee's duty station is the Agency site. If the Agency chooses to shut down the site and send employees home, it is unfair to expect certain groups of workers to be compelled to work from another site. I do not recommend the SEC language.

With regard to NTEU's proposal, I believe NTEU's newer, permissive language is acceptable, and reflects good business practice. However, in this instance, I do not believe it is essential that the Agency supply written justifications for denying *ad hoc* telework days, and therefore do not recommend such language.

Section 17B is somewhat duplicative of the language in Section 17A. Although the text proposed by the parties is somewhat different, the substance of the proposals is largely the same, requiring employees who are teleworking to continue to work in the event the Agency worksite is closed down. Generally, I believe NTEU's version of this text is clearer and more complete. Further, as NTEU notes, the SEC proposal arguably would require employees with *ad hoc* telework agreements to work from the alternate work site in the event of an Agency closure, even if they were scheduled to work at the Agency's facilities. As discussed in Section 17A, *supra*, this requirement does not impress the Factfinder as reasonable. However, I recommend adopting the NTEU language which would require all employees who are *scheduled* to telework to continue working from their alternate work site in the event of an Agency shut down; this would not only apply to recurrent teleworkers, but also to *ad hoc* teleworkers who had requested and received advance permission to work from the alternate work site.

Sections 17C, D, E and F Parties are agreed.

Section 18 (Compensation for Travel)

When the parties concluded negotiations, they had reached agreement on the language for **Section 18A, B and C**. In its proposal, SEC proposes variant language; the NTEU proposal retains the agreed-upon language. The Factfinder does not view the differences in the parties' positions as material, and recommends using the text proposed by NTEU.

In addition, NTEU earlier had proposed a **Section 18D**, relating to travel allowances and use of official time for full-time teleworkers whose worksite is beyond commuting distance from their assigned office. NTEU has dropped this proposal.

Section 19 (Reporting)

The parties are in substantial agreement relating to the preparation of reports monitoring the amount of telework being performed by SEC employees. The NTEU version of Section 19 adds text making it clear that teleworkers may be expected to report additional data to the

Agency. This exhortation strikes the Factfinder as being helpful to all, and therefore I recommend adopting the NTEU proposal.

VI. ARTICLE 19 - TRAINING

NTEU seeks significant new provisions in several area of Article 19, including (a) a commitment that SEC reimburse employees for CPA and bar review courses; (b) a commitment that SEC reimburse employees for continuing education course; and (c) a commitment that SEC reimburse employees for professional dues. Additionally, there is a proposal to modify an existing "upward mobility" program.

Both parties propose changes to the "legacy" language of the prior labor agreement.

Section 1 Parties are agreed.

Section 2A Parties are agreed.

NTEU-proposed **Section 2B** addresses payment for CPA or bar review courses. NTEU proposes that SEC reimburse employees for job-related CPA or bar review courses, noting such courses are reimbursed under labor agreements at the IRS and the IRS Office of Chief Counsel. Further, NTEU suggests there is some precedent at SEC for paying the cost of such programs. SEC does not propose any payments for CPA and bar review courses.

The Factfinder recommends that no new program for review course reimbursement be implemented at this time. The evidence that these benefits are provided in the Federal sector is scant. Further, while this Factfinder recognizes that funding shortages perpetually are an issue at Federal agencies (and such funding shortages cannot serve as a definitive rationale for opposing all new initiatives at all times), the Factfinder believes it is inadvisable to initiate this new benefit at this time.

SEC-proposed **Section 2B** (Section 2C in the NTEU proposal) addresses reimbursement for continuing education related to employees' official duties and when required by licensure bodies. NTEU proposes that SEC reimburse the cost of such education programs, particularly when SEC does not provide continuing education programs in-house.

SEC proposes language expressing a willingness to pay for certain continuing education programs, but cites only in-house programs or various on-line programs currently offered by the Agency. NTEU questions SEC's position, noting there is an Agency policy document issued by the Office of Human Resources providing for reimbursement for the costs of outside training. In

addition, NTEU contends that during the recent labor agreement negotiations and mediation with FMCS Commissioner Saunders, SEC indicated employees were eligible to request authorization to take outside courses and seek reimbursement.

In the Factfinder's view, the key question being presented is whether the matter of employees taking outside courses (with reimbursement) will be come a "matter of right" under the labor agreement, or whether SEC will continue to exercise substantial and unilateral control over reimbursed attendance at outside courses.

Continuing education is essential to the on-going task of developing a skilled workforce, and often an employer can profit from employees attending diverse types of courses offered by a variety of providers. But while this Factfinder would encourage SEC to continue and expand its practice of reimbursing employees for attending employer-approved outside courses, I decline to recommend NTEU's proposed language mandating such a practice. I therefore recommend the SEC-proposed language, with some additional text noting that employees may take advantage of Agency-sponsored policies that may reimburse for approved outside courses, and also language tied to seeking credit approval for continuing education programs offered by SEC's training providers.

In NTEU proposed **Section 2D**, the Union seeks a provision under which SEC would reimburse employees for professional dues, licenses, society memberships, etc., when such dues/licenses/memberships are required by OPM as a condition of employment, or when SEC actively encourages such memberships. NTEU proposes to limit such reimbursements to $400 per year, and further qualifies the provision by stating such reimbursement shall be "subject to the availability of funds." NTEU continues by proposing that employees be given administrative or duty time to attend classes needed to meet mandatory continuing education requirements set by the licensing bodies or societies, up to about 16 hours per year. NTEU points to such benefits at two other FIRREA agencies, FDIC and OCC.

In response, SEC notes that the Agency is almost exclusively funded with appropriated dollars, unlike the FDIC. Further, citing *Dep't of the Treasury, Office of the Chief Counsel and NTEU*, 4 FSIP 5 (2004), SEC notes NTEU previously was unsuccessful in obtaining an order that bar dues be reimbursed because such a benefit was deemed uncommon in the Federal sector. Additionally, SEC argues NTEU has not shown how payment of such dues would provide "any tangible benefit" to SEC.

Although SEC may be correct (per the 2004 FSIP decision in the *Treasury and NTEU* case) that payment of bar dues is not common at Federal agencies, in the Factfinder's experience this type of reimbursement of job-required professional dues costs is quite common among large employers, and most likely is commonplace among the private sector employers where SEC's professional employees would likely be working if they had not chosen to take positions in the Federal sector. Further, although the precedents cited by NTEU are limited, NTEU has identified two FIRREA agencies where such benefits are provided; unlike the Department of the Treasury, the statutory mandate that FIRREA agencies (and SEC) consider comparability with other FIRREA bodies provides a very different legal context from the situation considered by FSIP in *Treasury*.

Additionally, where employees are required to attend continuing education classes as a condition for maintaining a licensure requirement that is mandated by the employer (*e.g.*, the SEC), it is not unreasonable for employees to be given administrative or duty time to attend such courses.

I therefore recommend that NTEU's proposed language be adopted, with slight modifications. I recommend that the maximum reimbursement for dues or fees be limited to $200 per year. Further, I recommend that the provision relating to attendance at continuing education courses be separated into a second paragraph of the labor agreement.

Section 3 Parties are agreed.

Section 4 addresses SEC's Upward Mobility program. An Upward Mobility program provides a structured opportunity for employees in lower pay grades to be trained and mentored, so they can advance into higher-level positions.

Both SEC and NTEU are committed to maintaining this program, but the parameters of the program they propose are substantially different. While NTEU defends its proposal, it offers as an alternative that the structure and operation of the program be left undefined in the labor agreement, and instead be placed in the hands of a joint labor-management committee.

For this program in particular, the Factfinder believes it would be difficult for a party outside the Agency (*i.e.*, the Factfinder) to set the parameters for a workable program. I therefore adopt NTEU's suggestion, and recommend that an Upward Mobility program be mandated by the labor agreement, but that the operations of the program be set later by a joint committee.

VII. ARTICLE 22 - HEALTH AND SAFETY

The parties propose only two changes to Article 22, otherwise agreeing to retain legacy language.

Section 13 in the existing labor agreement includes text encouraging employees to take advantage of fitness programs, and also commits SEC to try to provide fitness centers at SEC facilities, subject to space and budgetary constraints. NTEU notes the availability of on-site fitness facilities varies widely between different SEC installation; indeed, at the SEC headquarters at Station Place in Washington, D.C., access to fitness facilities in the complex (which consists of multiple leased spaces) actually is dependent upon where an employee's office may be located. At other SEC facilities, there is no on-site fitness center.

NTEU therefore proposes a new **Section 13C**, which would provide bargaining unit employees with subsidies to obtain gym memberships at locations where SEC does not have on-site fitness facilities. NTEU's proposed subsidy would be progressive, with higher subsidies going to lower-paid workers. NTEU notes many other agencies (include FIRREA agencies) provide on-site gyms.

Although SEC is committed to promoting fitness, and has worked with a vendor to obtain discounted gym membership rates for employees at the SEC regional offices, SEC opposes NTEU's proposal. SEC has noted the availability of fitness facilities at SEC facilities often is beyond SEC's control (because GSA obtains the space).

Employee health and safety can provide substantial benefits both to the employee and to the Agency, and the Factfinder encourages the parties to continue to find ways to provide fitness facilities to employees. However, I do not recommend initiating a program of subsidizing gym memberships. I therefore recommend the "legacy" provisions of Section 13.

SEC proposes a new **Section 16**, which would declare the parties' joint commitment to maintaining a safe work environment. In addition, the provision would mandate that employees "notify their supervisors" if any individual threatens them. During mediation, the Agency explained it wants to encourage employees to come forward and report possible workplace safety issues.

NTEU opposes the provision, largely because it is unclear what duty the proposed text

would impose on the Union. Further, if read literally, an employee who fails to report threats or incidents of workplace arguably would be in violation of the labor agreement, and could be disciplined.

The Factfinder fully supports SEC's efforts to maintain a safe work environment for all its employees, and I am confident NTEU similarly is supportive of such efforts and is available to promote workplace safety. However, the core responsibility for insuring a safe workplace rests with the Agency. I agree with NTEU that the proposed labor agreement text has the potential to create confusion, and therefore recommend SEC-proposed Section 16 not be adopted.

ARTICLE 30 - EXCUSED ABSENCE/ADMINISTRATIVE LEAVE

SEC proposes that the "legacy" language for Article 30 from the prior labor agreement be preserved without change. NTEU proposes several changes, including several proposals for expanded administrative leave for bargaining members.

Section 1 Parties are agreed.

Section 2 of Article 30 deals with weather-related absences or absences for other, similar reasons. The parties are in agreement with regard to paragraphs 1 and 3 of this provision. However, NTEU proposes new text for paragraph 2.

Whereas the existing labor agreement arguably would allow SEC to grant administrative leave when an employee is unavoidably *delayed* in arriving at work, NTEU would expand paragraph 2 to encompass situations in which administrative leave could be granted by SEC if an employee was entirely *prevented* from arriving at work because of emergency situations. Similarly, with regard to provisions allowing employees to request a reasonable amount of excused leave, NTEU proposes adding language making clear that the requests may encompass either part or all of a work day. NTEU proposes new language making clear that SEC can require an employee who alleges an emergency situation to provide documentation. In two locations in the paragraph, NTEU proposes minor text changes, removing references to the Agency "considering" employee requests and instead stating the Agency "may grant" the requests. NTEU points to similar language at a few other agencies.

SEC objects to the NTEU proposal, arguing that the few examples of other agencies offered by NTEU are insufficient to establish comparability, and NTEU is seeking new language to address situations that are speculative.

The Factfinder has compared carefully the legacy language (advocated by SEC) and the new language proposed by NTEU. Overall, I find the NTEU-proposed language better describes the range of weather- and emergency-related situations that may arise. Further, I note NTEU is careful to leave discretion to grant or deny these special leave requests entirely in the hands of Agency managers. Because I find the NTEU-proposed language to be reasonable and more comprehensive, I recommend it be adopted.

Sections 3, 4 Parties are agreed.

NTEU proposes to add several new types of excused absences in new **Sections 5-7.** NTEU notes that all such absences would be qualified by language found in new **Section 8**, which states:

> **Section 8**
>
> Notwithstanding the above, nothing contained in this Article will restrict the Employer's ability to require the presence of an employee, pursuant to its right to assign work under 5 U.S.C. §7106(a)(2)(B), should the Employer determine that the employee's services are necessary.

Under NTEU-proposed **Section 5**, SEC would agree allow up to two SEC employees to take extended leaves of absence for Union-related work, subject to the caveat of Section 8. A single employee would be granted an unpaid leave of absence if the employee were elected to a position as an NTEU national officer, and a single employee would be granted an unpaid leave of absence to serve a full-time appointive position at NTEU. For both such employees, the Section would require SEC to return the employee later to his or her prior position "to the extent possible"; if such reinstatement to the prior position were not possible, the employee would be returned to another position for which he or she is qualified, at the same grade.

With regard to comparability, NTEU cites similar provisions in labor agreements at the IRS, IRS Office of Chief Counsel and FDIC. NTEU notes an employee in either of these situations always would be entitled to request a leave of absence, anyway, but including the language in the labor agreement would provide greater support for this proposition.

SEC opposes the proposal, arguing that its employees are hired to perform SEC business, not NTEU business. SEC notes the labor agreement (Article 39) already provides for one SEC employee to be on NTEU business 100% of the time, and a second employee can be on NTEU business 50% of the time. SEC argues it is a relatively small agency that would be harmed if it were required to keep positions open while employees were absent to perform NTEU work, and not backfill the positions.

Although the Factfinder acknowledges that the comparability data provide by NTEU is quite limited, I believe the NTEU proposal is reasonable and would not be unduly burdensome on SEC. I therefore recommend its adoption, with several observations. First, unlike the 1.5 paid positions currently allowed for Union business under Article 39, these two potential positions that might be performing NTEU work would be on uncompensated leave, and thus

would not be paid by SEC. Second, the Factfinder is not persuaded that such leaves of absence would impose a high burden on SEC. I disagree with SEC's interpretation of the NTEU text, when SEC suggests the Agency would be prohibited from back-filling any positions that might become vacant as the result of a leave of absence; this simply is not required under the proposal. Further, the proposal (at Article 8) also gives SEC managers flexibility to deny such leave if SEC concludes an employee's services are essential. Third, while SEC is not a huge agency, it is not a tiny agency, either. In this Factfinder's view, the Agency easily could accommodate up to two employees who might be on extended unpaid leave while performing senior-level NTEU duties.

In newly-proposed **Section 7**, NTEU offers text that would allow employees with five or more years of service to request a leave of absence of up to one year to attend full-time, job-related study. As drafted, such a sabbatical would be given if the study will enable the employee to perform his or her current job better, or some other job within SEC. NTEU proposes several discreet preconditions for the employee's participation in such a program. and also provides an employee could use a combination of annual leave and leave without pay. Like the Section 6 provisions for employees performing duties at NTEU headquarters, employees who take a sabbatical would not be fully guaranteed the right to return to their current position.

SEC objects that it needs all its employees to perform the work of the Agency, suggesting the sabbatical program would be burdensome. Further, SEC argues it already encourages employees to take advantage of training opportunities.

In the view of the Factfinder, the NTEU proposal is quite interesting, and holds the potential for having great value to employees who seek additional extended formal study, as well as to SEC. However, I am not persuaded the full potential impact on SEC has been adequately discussed and evaluated by the parties. How much demand for such a program exists? How many positions might fall temporarily vacant while employees pursue additional study?

While the Factfinder encourages the parties to discuss this area further, I decline to recommend adding NTEU-proposed Section 6 to the new labor agreement.

In its proposed **Section 7**, NTEU seeks a mechanism for employees to take up to 30 days of leave without pay to perform political activities permitted under the Hatch Act Reform Amendments of 1993. NTEU argues employees currently are eligible to request such leave without pay, anyway, under existing SEC policies; in NTEU's view, the proposed contract language simply would memorialize existing practice. NTEU notes similar provisions in several

other labor agreements with Federal agencies.

SEC objects to the proposal. The Agency appears to acknowledge that employees may request leave without pay from their supervisors on an *ad hoc* basis; however, SEC argues the Agency is a law enforcement agency, and it is important that the Agency avoid the appearance of political partisanship.

With SEC, I am not persuaded the NTEU-proposed language is essential, and I share some of SEC's concerns that memorializing such a program in the labor agreement (perhaps seeming to encourage yet more employees to seek such leave) potentially may be damaging. I do not recommend the NTEU proposal be adopted.

Section 8 serves to emphasize management's right to require an employee to be present for work, based on the need for the employee's services. I believe this NTEU-proposed language is helpful in reinforcing the Agency's ability to manage the workforce, and I therefore recommend it be included in the labor agreement.

ARTICLE VIII - FURLOUGH DUE TO LAPSE IN APPROPRIATIONS

The current labor agreement does not include language addressing the implementation of furloughs that may occur as the result of a lapse in Agency funding. At one time, the potential for such a furlough may have been reviewed as remote. Unfortunately, we now live in an era when the potential for furloughs is no longer speculative.

NTEU has proposed an extensive new **Article VIII**. The NTEU proposal recognizes that Agency management inevitably maintains discretion to determine what jobs will need to be performed in the event Agency funding is curtailed and a furlough is ordered. However, NTEU urges there should be a process prepared in advance for determining which employees in various skill sets or job classifications will continue to work in the event of a general shut-down. NTEU proposes establishment of an "Excepted Position Cadre" composed – in the first instance – of volunteers with the requisite skills. In the event a sufficient number of volunteers does not materialize, others would be added to the list in order of reverse service computation date (SCD). NTEU argues this is analogous to a system already implemented by SEC in connection with the Agency's Continuity of Operations Plan. NTEU argues the goal is to have a transparent process, which employees will be able to understand better, and with more advance notice.

The NTEU proposal also addresses a variety of other concerns, including coordinated advance planning between labor and management; information campaigns to keep employees informed of developments, their rights and available resources; and the impact of a furlough on any "use or lose" leave.

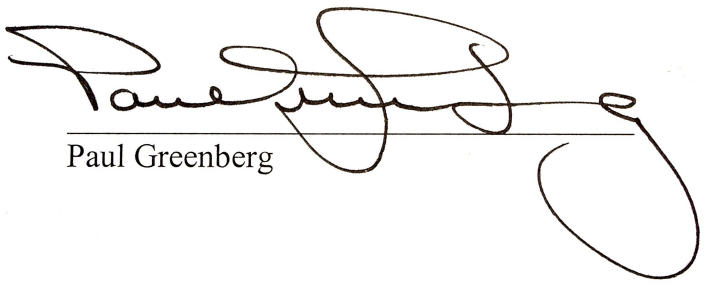
Although SEC expresses a willingness (in its Position Statement) to include a Furlough article in the labor agreement, SEC criticizes the NTEU proposal as limiting Agency action too severely. SEC argues it must be able to make staffing determinations for critical needs without regard to seniority. Further, SEC argues the Agency may be required to make staffing decisions prior to furloughs very quickly.

The contract language proposed by SEC is consistent with the views expressed in its Position Statement. In the view of the Factfinder, SEC's position seems to be this: the Agency will comply with legal requirements, but does not want to engage in advance planning for a furlough with NTEU and wants to retain the largely unfettered right to select which employees will work in the event of a curtailment of Agency functions. In the view of this Factfinder, SEC's proposal is relatively extreme, and fails to address legitimate concerns of the bargaining

unit.

Overall, I find most of NTEU's proposal to be reasonable, and I recommend most of the text be added to the labor agreement. With regard to one of NTEU's core proposals, however – the creation of the Excepted Position Cadre – the Factfinder has concerns whether the methodology advocated by NTEU will work across all the SEC units. For certain units, and certain types of positions, I believe it is likely that alternative standards may be needed for identifying which employees will be called to fill an Excepted Position.

I therefore recommend modified language directing the parties to work jointly, and in good faith, over the next 12 months to plan and devise appropriate mechanisms for identifying which employees will be called to work in the event of a furlough due to a lapse in funding. In the event the parties are unable to reach joint agreement, the procedure proposed by NTEU will be implemented.



Paul Greenberg

June 23, 2013