In the Matter of an Interest Arbitration between the DEPARTMENT OF THE NAVY CONCORD NAVAL WEAPONS STATION CONCORD, CALIFORNIA and LOCAL 1931, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	Case No. 91 FSIP 60

ARBITRATOR'S OPINION AND DECISION

Local 1931, American Federation of Government Employees, AFL-CIO (Union) filed a request with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under section 7119(b)(1) of the Federal Service Labor-Management Relations Statute (Statute) between it and the Department of the Navy, Concord Naval Weapons Station, Concord, California (Employer). The Panel initially recommended to the parties, pursuant to section 2471.6(a)(2) of its regulations, that the dispute be referred to the undersigned for mediation-arbitration via a telephone conference call. After receiving the parties' responses to its recommendation, the Panel, pursuant to section 2471.11(a) of its regulations, directed such proceeding whereby I was vested with authority to mediate with respect to all outstanding issues, and render a decision should any remain unresolved.

The proceeding was held on July 2, 3, and 11, 1991. During mediation the parties were able to reach an agreement on three out of the four issues in dispute. Thereafter, they were given the opportunity to present their respective positions on the remaining issue concerning inspections in full. Post-hearing briefs were filed, and I have now considered the entire record.

BACKGROUND

The Employer's mission is to supply weapons and ammunition to naval vessels. The Union represents approximately 1,000 General Schedule and Wage Grade employees in three separate bargaining units, in a variety of clerical, technical, administrative, and skilled and unskilled trades positions. The parties' current collective bargaining agreement, which covers all three bargaining units, was originally implemented on June 4, 1987. It was extended by mutual agreement on June 4, 1990, and is now due to expire on June 4, 1993. The current impasse arose out of negotiations over Employer-initiated revisions to its Physical Security Manual. The Union first received notification of the Employer's desire to issue a new Physical Security Manual on April 14, 1989.

ISSUE

The issue at impasse basically concerns whether the current practice of providing the Union with notice and an opportunity to be present prior to vehicle and worksite inspections, and personal property searches conducted by the Employer, should continue.

POSITIONS OF THE PARTIES

1. The Union

The Union proposes that the following provision, contained in a Memorandum of Agreement (MOA) covering "Physical Security Search and Seizure," executed by the parties on July 22, 1985, be retained:

> The Employer will notify the Union and afford the Union an opportunity to be present prior to conducting vehicle inspections, worksite inspections, and personal property searches. Unit employees will be advised of their rights and will be afforded an opportunity for themselves and their representative to be present prior to their personal property being searched.

As a threshold matter, the Union contends that because the MOA is part of the parties' current collective bargaining agreement, "there exists [a] [c]ontract bar from amending or

terminating the [MOA] during the life of the contract" (emphasis in original). In this regard, the Union submits three affidavits from individuals who were members of the Union's bargaining team in 1985 when both the MOA and the parties' current collective bargaining agreement were being negotiated. Their sworn statements confirm that at that time the Union submitted proposals on search and seizure during the negotiations over the collective bargaining agreement. The Employer instead suggested that the parties address the Union's proposals in connection with changes it wanted to make in the Physical Security Manual, and that the Union agree to the MOA "which would become a part of the [c]ontract and would be in effect during the life of the [c]ontract." This permitted the Employer to implement the Physical Security Manual without having to wait for the completion of contract negotiations that eventually were to last for approximately 5 years. The MOA, therefore, was negotiated as part of the collective bargaining agreement, and expires at the same time, i.e., June 4, 1993. Moreover, in the arbitration hearing before the undersigned, the Employer "admitted" that it "could not deny the Union's allegation that the Memorandum of Agreement is a part of the [c]ontract."

On its merits, the provision requires only that the Union be given prior notification and an opportunity to be present when the Employer is conducting a planned search or inspection, and does not prevent the Employer from continuing the search once such notification properly has been provided. In practice, the Employer notifies the Union by telephone 2 hours in advance of the planned search or inspection. The practice "has worked very well in the past" because "it allows the Union an opportunity to have a representative available, and saves the Employer time and money by not having to wait to get a representative released from [his or her] regular duties." In this regard, the parties' collective bargaining agreement mandates that a Union representative be present prior to conducting interviews with employees that could lead to disciplinary actions. In such circumstances, retention of the provision "would prevent unnecessary delays for both the Employer and the Union" because the Employer could continue with the search and inspection, and "the Union could provide representation for the employee in an interview."

2. The Employer

The Employer's position is that the Union's proposal be withdrawn. With respect to the Union's contention that there

is a contract bar to the negotiations, the argument "seems specious at this point." The parties have been attempting to negotiate the Physical Security Manual "for almost 2 years." The Union "has submitted proposals and even requested the services of both" the Federal Mediation and Conciliation Service (FMCS) and the Panel. To "raise the [contract-bar] issue . . . in this forum is ludicrous."

On the merits of the issue, the provision contained in the parties' previous MOA "serves no useful purpose." On the contrary, "it creates an administrative headache for management and functions as a deterrent to the physical security and well being of the base and its people." Giving the Union advance notice and an opportunity to be present "eliminates the element of surprise" that makes random gate inspections of vehicles entering or leaving the base effective. Such inspections are one of the best means available for: (1) turning up contraband and stolen Government property; (2) revealing attempts to bring weapons on base; and (3) detecting illegal drugs. Moreover, "the very fact that such inspections occur without warning serves as a deterrent itself." Moreover, there are adequate safeguards for bargaining-unit employees which make it unnecessary for the Union to know ahead of time when inspections will take place. In this regard, bargaining-unit employees are guaranteed their Miranda and Weingarten rights, where applicable, as well as the protections of the parties' collective bargaining agreement, which "goes beyond the letter of Weingarten by requiring the Employer" to advise employees of their rights to Union representation before an interview which may lead to formal disciplinary action.

The security personnel conducting random searches on behalf of the Employer generally "do not have the authority to propose or effect disciplinary action against bargaining-unit employees," or the skills and sophistication to deal with the possible "influence/interference" of the Union's experienced representatives. In addition, with regard to random searches, the Union has "no legitimate right to observe the searches of vehicles" belonging to individuals who are not members of the bargaining unit "who constitute the majority of people entering or exiting the base on a 24-hour basis." Finally, the second sentence of the Union's proposal "is totally inconsistent" with a provision in the current collective bargaining agreement concerning Employer inspections of employees' lockers and tool boxes, and "is also unclear on its face as to what rights the Employer must notify the employee [of]."

CONCLUSIONS

Turning first to the contract-bar argument presented by the Union, I conclude that it provides no basis for preventing a decision on the merits of the dispute. In this regard, the record indicates that since April 14, 1989, when the Union initially received notification that the Employer proposed to make changes in its Physical Security Manual, the parties have had numerous bilateral negotiations on the matter, three of which included the assistance of an FMCS mediator. On October 30, 1990, **the Union** requested the Panel's assistance to resolve the impasse which resulted from those negotiations. At no time prior to the request for assistance, or during the Panel's preliminary investigation of the request, wherein its designated representative makes a recommendation as to whether there are any jurisdictional issues raised by the parties which might prevent the Panel from asserting jurisdiction over a dispute, did the Union raise the contract-bar argument. Indeed, the argument apparently was raised for the first time before the undersigned during the mediation portion of the mediation-arbitration process, and only after agreement had been reached on all of the other issues in dispute. The record also reveals that since April 14, 1989, the Union has formulated at least three different proposals concerning the remaining issue at impasse.

These facts support the conclusion that the Union constructively waived its right to make the contract-bar argument when it failed to raise the matter during the Panel's preliminary investigation of its request for assistance. In my view, it is particularly important that the merits of the issue be reached because, had the Union raised the argument at the appropriate time, the Panel may not have asserted jurisdiction. Finally, acceptance of the Union's argument that a contract bar exists which prevents the parties from amending or terminating the 1985 MOA until the current collective bargaining agreement expires in June 1993, would undercut the basis for the entire negotiations, and be harmful to the integrity of the collective bargaining process. Put another way, if taken to its logical conclusion, the effect of the Union's belated claim would be to cast doubt upon the validity of all of the provisions previously agreed upon concerning the Physical Security Manual, a result which even the Union most likely does not intend.

Having considered the evidence and arguments presented by the parties on the merits of the issue, I am persuaded that the Employer's position should be adopted. In my view, it clearly has demonstrated that the current practice of affording the

Union advance notice and an opportunity to be present prior to conducting random vehicle inspections: (1) does little to protect the interests of bargaining-unit employees; (2) is administratively burdensome; and (3) potentially reduces the deterrent effect of the inspections themselves. The only benefit cited by the Union in favor of the status quo is that it avoids delay in locating Union representatives where a planned search uncovers conduct requiring an interview which may result in disciplinary action against a bargaining-unit employee. While there is no evidence provided as to how often random searches of vehicles actually uncover stolen Government property, illegal drugs, weapons, or the like, the record does indicate that the majority of vehicles subject to random searches belong to individuals who are not represented by the Union, i.e., military personnel, contractors, dependents, nonbargaining-unit employees, etc. Thus, it appears that the benefit derived from the current practice arises only in very limited circumstances, and is minimal.

If a vehicle inspection, worksite inspection, or personal property search should uncover conduct which may result in disciplinary action requiring an interview, employees are protected through a variety of Constitutional, statutory, and contractual rights, some of which guarantee that a Union representative may be present. Such rights would be completely unaffected by the elimination of the current practice. Moreover, the foregoing discussion has focused on random searches of vehicles because the parties' collective bargaining agreement already contains a provision pertaining to certain types of worksite inspections and personal property searches. An examination of that provision (Article 32, Section 6) reveals that the parties have previously negotiated wording requiring the presence of a Union representative if it is necessary to open the locker or tool box of an absent employee. It also appears that the Union's proposal in this case would be inconsistent with that provision where the worksite inspection or personal property search involves employees' lockers or tool boxes.

For all of these reasons, I shall order the Union to withdraw its proposal so that the parties may implement all of the remaining provisions over which agreement previously was reached. Should the Union wish to reinstitute the practice being eliminated by this decision, I note that it will have an opportunity to submit proposals in this regard in a little more than 18 months upon the expiration of the current collective bargaining agreement.

DECISION

The Union shall withdraw its proposal.

H. Joseph Schimansky
Arbitrator

November 8, 1991
Washington, D.C.