United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

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| In the Matter of<br><br>UNITED STATES DEPARTMENT OF STATE<br>BUREAU OF CONSULAR AFFAIRS<br>PASSPORT SERVICES<br><br>And<br><br>NATIONAL FEDERATION OF FEDERAL EMPLOYEES<br>LOCAL 1998 | Case No. 18 FSIP 059 |

**DECISION AND ORDER**

The National Federation of Federal Employees, Local 1998 (Union) filed this request for Panel assistance under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, concerning an impasse stemming from mid-term negotiations over access to online passport research systems. The mission of the U.S. Department of State, Bureau of Consular Affairs, Passport Services (Agency) is to formulate and implement policy relating to immigration and consular services, and to ensure responsive and efficient provision of consular services overseas.

The Union represents a nationwide bargaining unit consisting of 1,400 non-professional employees who are Passport Specialists that work in 29 passport agencies and centers throughout the country. The Passport Specialists adjudicate passport applications for completeness, affirmation of truthfulness, presence of required entries, signatures and photographs, and inclusion of application fees in the appropriate amounts. The Passport Specialists range in grade from GS-5 to GS-11. The parties are governed by a National Collective Bargaining Agreement.

**BACKGROUND**

In 2008, the parties executed a Memorandum of Understanding (MOU) over the Passport Data Interim Systems Access Audit Program (ISAAP). The ISAAP is a security program designed to monitor employee searches and deter unauthorized access to online passport research systems, particularly at that time, the Passport Information Electronic Research System (PIERS).[1] Leading up to 2008, several Passport Specialists were found to have inappropriately accessed sensitive records in PIERS, e.g., looking up Personally Identifiable Information (PII) without a business justification. As a result, the Agency implemented ISAAP to monitor employee searches in PIERS. When an employee accesses a sensitive record in PIERS, ISAAP will send the employee an email questionnaire 24 hours after search, asking the employee to explain the reason for the search.[2]

The 2008-MOU provided Passport Specialists non-productive time during their duty-day to maintain a personal log detailing the intent of their searches while using PIERS. Because the employees adjudicate many cases each day, the belief was that employees would not remember the reason for searching a particular record to answer the ISAAP questionnaire 24 hours after the search.[3] Therefore, the Agency provided the employees non-productive time to keep a log that could corroborate the searches they perform in PIERS. The Agency agreed to allow employees 15 minutes of non-productive time for every five PIERS searches.

In 2012, the Agency notified the Union that the American Citizenship Record Query (ACRQ) would replace PIERS and PIERS

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1 In 2008, Passport Specialists used PIERS as one of the main research systems to assist them in making adjudicative decisions (approve, deny, or suspend) in the processing of a passport application.

2 The ISAAP questionnaire requires the Passport Specialist to answer the following questions: 1) name of the Specialist; 2) job title; 3) purpose of the search; and 4) was the search conducted for the specialist or someone else. The employee's responses are reviewed by the Oversight Authority Oversight Authority. The Oversight Authority is the manager responsible for surveilling the employees' searches, and determining if access to a record is appropriate. If the Oversight Authority determines that the employee's access is authorized, the case is closed. If the Oversight Authority finds the access to be unclear or unauthorized, the case is sent to the Passport Monitor Committee for a formal decision.

3 The Agency evaluates employees based on a production quota. Employees, depending on their grade level, must adjudicate a pre-determined amount of passport applications in an 8-hour day. GS-11 employees are required to complete approximately 100 applications per day.

would only be available in limited circumstances. As a result, ISAAP started to monitor employee searches in ACRQ. When an employee searches a sensitive record in ACRQ, instead of ISAAP generating a questionnaire 24 hours after a search, ISAAP will automatically direct the employee to the questionnaire page. The employee cannot view the record, or perform other searches until the questionnaire has been completed.

The Union requested to re-negotiate over the 2008-MOU. After receiving an update from the Agency over the databases that the Agency added to the adjudication process of a passport application since the signing of the 2008-MOU, the Union sent the Agency proposals pertaining to all of the databases used by employees during the adjudication process. The parties initiated negotiations over a new MOU and had four bilateral telephonic negotiation sessions: June 17, 2014 (one to two hours); December 18, 2014 (one to two hours); April 1, 2015 (four hours); and February 3, 2016 (four hours).

The parties were unable to reach agreement in negotiations. As a result, the parties engaged in face-to-face mediation with the Federal Mediation and Conciliation Service Mediator Ligia Velazquez for a full-day. Mediation did not resolve the dispute and Ms. Ligia Velazquez released the parties. On November 3, 2016, the Union filed a request for Panel assistance in 17 FSIP 010. On February 13, 2017, the Panel dismissed the request for assistance due to unresolved questions concerning the scope of the Agency's bargaining obligations. The parties resolved the duty-to-bargain dispute. On May 9, 2018, the Union filed the instant request for Panel assistance.[4]

The Panel asserted jurisdiction over the remaining seven issues in dispute and determined that the issues should be resolved through a Written Submissions procedure. The parties were ordered to provide the Panel and each other their written submissions, including their last and best offers, any argument and authority relied upon, and any exhibits. The parties were also afforded an opportunity to submit rebuttal statements to the Panel and each other. The parties were informed that, after considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the dispute, which could include the issuance of a binding decision. The Panel has now considered the entire record, including the parties' written submissions, final offers, and rebuttal statements.

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[4] The Union's initial request for assistance contained nine issues in dispute; however, the parties resolved two of those issues.

## PROCEDURAL ISSUES

### Written Submissions

The Agency, in its rebuttal statement, argues against the Panel considering the Union's written submission for the following reasons: 1) the Union's submission was provided to the Panel after the close of business; 2) the Union's written submission exceeds the Panel's page limitation; and 3) the Union failed to serve a copy of its written submission to the correct representative.

The Panel ordered the parties to submit their written submissions "[b]y close of business on Friday, September 28, 2018." The Union submitted its written submission at 5:59 p.m. Eastern Standard Time. The Union, however, is located in Seattle, Washington, which is on Pacific Standard Time. The Procedural Determination Letter did not indicate that the close of business is on Eastern Standard Time. Therefore, the Panel has determined that it will consider the Union's written submission.

The Panel's Procedural Determination Letter ordered the parties to limit their written submissions to "no more than ten double-spaced pages." The Union submitted eleven double-spaced pages in its written submissions to the Panel. The Union's failure to abide by the Panel's page limitation prejudiced the Agency, as the Agency did not have an additional page to present its arguments and evidence. Accordingly, the Panel will not consider the additional page presented by the Union in its written submission.

Finally, the Procedures of the Panel, Part 2471.5(2)(b)(2), Filing and Service of Title 5, states in part, "[t]he party submitting the document shall serve a copy of such request upon all counsel of record or other designated representatives of parties." "Service upon such counsel or representative shall constitute service upon the party, but a copy also shall be transmitted to the party." The Agency argues that the Union did not serve the correct representative, providing its written submission to Program Specialist Bradley Phillips instead of Chief Negotiator and Division Chief, Dan Alessandrini. In accordance with Part 2471.5(2)(b)(2), the Union served a copy of its written submissions to "other designated representatives of parties" when it served Mr. Phillips, who was the Agency's designated representative for the Panel proceedings. The Agency was not prejudiced by the Union serving Mr. Phillips, as it can

safely be assumed that Mr. Alessandrini was provided a copy of the written submissions. Accordingly, the Panel has determined that the Union's submission complies with the procedures of the Panel.

## ISSUES

### 1. Union's Final Offer

> The Employer agrees time will be allotted to employees to maintain a personal log recording search criteria and intent of database searches of ACRQ, PIERS, LexisNexis, CCD, Namecheck, TDIS Inquiry and passport files accessed through a link in TDIS (MIV and FR Hits). The purpose of this log is to create a record which an employee could use in order to explain/justify a search if later questioned. The Employer will allow BUEs to record "Other" time in MIS or other work reporting system time spent maintaining such a log as follows: logging 1-5 searches will be recorded in 15 minute increments as "non-measurable" time in MIS; 5 or more searches will be recorded as 30 minutes. The log should include the name of the individual whose file is being searched, the reason why it was searched (e.g., parent of applicant/derivative case), and the current application number connected to the reason why it was searched or - if there is no current application number - a detailed explanation.

The Union argues that its proposal is meant to extend the procedures contained in the 2008-MOU to the additional databases that were introduced to the passport adjudication process since the agreement was signed, i.e., LexisNexis, CCD, Namecheck, TDIS Inquiry, and MIV and FR Hits. The Union states that the Agency monitors all databases used by employees when adjudicating a passport application, not just the ISAAP-monitored databases (PIERS and ACRQ), which is why the Union proposes to add the additional databases. The Passport Specialists will utilize each of these databases frequently throughout their duty-day while adjudicating passport applications. Therefore, it's important that the Specialists receive non-productive time to keep a log of these searches. Because employees are on a production quota, the Union states that even stopping for a matter of minutes to log the reason for a search can adversely impact the employee's production quota. Therefore, the Union proposes that the Agency permit employees 15 minutes of non-productive time for 1 to 5 searches and a maximum of 30 minutes of non-productive time for any additional searches.

**Agency's Final Offer**

> In instances where employees are required to use PIERS to conduct non-applicant passport searches (e.g., Panama Canal Zone birth records), employees will be allowed to claim 15 minutes of non-productive time for every 5 non-applicant searches for the purpose of maintaining a personal log to assist them in explaining/justifying a PIERS search. Employees will not be granted additional time to maintain a personal log to account for searches in ACRQ or any other database.

The Agency asserts that employees will only use PIERS for a limited purpose, where the applicant and/or applicant's relative is born in the Panama Canal Zone, the employees must use PIERS to locate and review those records. The Agency is willing to provide employees with non-productive time to keep a log for PIERS searches because ISAAP does not instantly email the employees a questionnaire related to their search and instead the employees receive the questionnaire 24 hours after the search is performed. Without a log, employees would need to remember the reasons for their searches. However, when an employee accesses a sensitive record in ACRQ, employees will not need to keep a log of their searches since ISAAP will automatically redirect the employee to fill out a questionnaire about the intent of the search. Therefore, there is no need to provide the employees additional non-productive time.

The Agency claims that it does not have a security program that monitors the other databases mentioned in the Union's proposal, so the employees do not need to keep a log for any other searches. The Agency did acknowledge that it could still review any search performed by an employee and discipline an employee for improper access to a record. However, employees are permitted 60 minutes of non-productive time per day to perform non-adjudicative tasks, such as reading emails. The Agency argues that employees can use this time to keep a log for other searches, if necessary. Permitting the employees to claim even more non-productive time would further decrease the amount of measurable time that the Agency can evaluate an employee on, severely limiting the Agency's ability to accurately assess employee performance. This, the Agency asserts, would significantly impact its mission, which is to timely provide travel documents to the American public.

**Conclusion**

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that a modified solution is the best alternative to resolve the impasse. Employees are on a production standard and must adjudicate up to 100 cases per day. If the employees are questioned 24 hours after they perform a search, it is reasonable to conclude that they might not recall the reasons for the search. Therefore, employees should be permitted non-productive time to keep a log for PIERS searches. As far as any other search that an employee may perform while adjudicating a passport application, the Agency already provides the employees 60 minutes of non-adjudicative time. The employees may use this time to keep a log of all other searches that the employees think are necessary. If the employees need additional non-productive time, the employees may make a request to their supervisor. Accordingly, the Panel orders the parties to adopt the following language:

> "In instances where employees are required to use PIERS to conduct non-applicant passport searches (e.g., Panama Canal Zone birth records), employees will be allowed to claim 15 minutes of non-productive time for every 5 non-applicant searches for the purpose of maintaining a personal log to assist them in explaining/justifying a PIERS search. If Employees need additional time to maintain a log of other databases searched, the Employees may use the 60 minutes of non-adjudicative time already established by the parties in the employees' production standards, or request additional time from their supervisors."

**2. Union's Final Offer**

> Since passport employees often handle one hundred passport applications in a single day (as of the date of signing), employees are free to ask in any future file search investigation, and expect a reasonable explanation, how the employee could remember the actions on a single passport file, absent being provided the ability to document the actions/reasons at the time they occurred.

The Union requests to withdraw this proposal from the impasse proceedings.

**Agency's Final Offer**

The Agency is opposed to this language being included in the MOU.

The Agency is amenable to the Union's request to withdraw the proposal from the impasse proceedings.

**Conclusion**

The Panel accepts the request to withdraw the proposal.

**3. Union's Final Offer**

Disciplinary action regarding unauthorized Passport Database searches will be fair, reasonable, and consistent, will take into account all mitigating factors, and aggravating factors, and will be commensurate with the level of responsibility and oversight exercised by the employee.

The Union argues that it wants to ensure that discipline for employees who are found guilty of unauthorized searches will be consistent with the Douglas Factors.[5] The Union references the Office of Personnel Management (OPM), which states:

> "[m]anagers should take discipline that is reasonable and proportionate to the misconduct. Penalties should be reasonably consistent with the discipline applied to similarly situated employees. In other words, where the charges and the circumstances surrounding the charged behavior are substantially similar for two employees, and there are no considerations that would warrant treating them differently, the penalties should be comparable. The supervisor should also weigh any relevant aggravating and mitigating factors that may be relevant such as the nature and severity of the offense, the employee's disciplinary record and years of service, the employee's potential for rehabilitation, and applicable agency penalty guidelines."

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[5] The Merit Systems Protection Board, in its landmark decision, *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct.

The Union claims that the OPM guidance is reflected in its proposal; therefore, the Panel should adopt the Union's proposal. The Union also states that the parties are in the middle of successor CBA negotiations. Therefore, any reference to the language in the parties' CBA is premature.

**Agency's Final Offer**

> Disciplinary action regarding unauthorized Passport Database searches will be consistent with the CBA.

The Agency asserts that Article 24 of the parties' CBA already requires disciplinary action to be fair and equitable, and that the Agency takes into consideration all relevant Douglas factors, which includes mitigating circumstances along with the nature and seriousness of the offense. The Agency states that to add different language in an MOU than what is in the parties' CBA only serves to create confusion and potentially more litigation. Therefore, a reference to the article on discipline in the CBA will sufficiently meet the needs of both parties.

**Conclusion**

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the best alternative to resolve the impasse. The parties already have an article in their CBA that addresses disciplinary action. A reference in the MOU to the disciplinary article in the CBA will ensure consistency in the disciplinary process.

The Union is concerned that a reference to the CBA is premature because the parties are currently engaged in bargaining over a new agreement; however, the parties are bound by the existing agreement until a new one is reached. Once a new agreement is reached, the Union will have had an opportunity to fully bargain over the language that it preferred to include in the disciplinary article. Accordingly, the Panel orders the parties to adopt the Agency's proposal. Thus, the Panel orders the parties to adopt the following language:

> Disciplinary action regarding unauthorized Passport Database searches will be consistent with the CBA.

**4. Union's Final Offer**

> The Union will be provided annually with the list of "Oversight Authority" officials at each office. The Union will also be provided with the participants of the Passport Monitor Committee, and will be appraised of any changes to the committee.

The Union argues that the Agency should provide it with the Oversight Authority (OA) officials and the Passport Monitor Committee, so that it can ensure that other managers, who do not have authority to review employee passport records, are not inappropriately surveilling employees. The Union claims that there have been instances in the past where managers, who were not OA officials, inappropriately surveilled employees' passport records.

**Agency's Final Offer**

> The Agency will consider information requests from the Union regarding the list of the Oversight Authority(s) at each agency along with the members of the Passport Executive Committee.

The Agency is not in agreement to provide the Union with a list of these managers without the Union making a request, detailing its particularized need for the information under 5 U.S.C. § 7114(b)(4). The Agency is not convinced that this information is necessary to fulfill the Union's statutory obligation to represent its bargaining unit employees. The Agency states that the Union can request the information under 5 U.S.C. § 7114(b)(4) and the Agency will evaluate the Union's articulated need for the information at that time.

**Conclusion**

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that a modified solution is the best alternative to resolve the impasse. It's not clear how the Union will prevent managers from improperly surveilling employees if it has a list of OA officials and the Passport Monitor Committee. If the Union wants to obtain a list of managers, who serve as OA officials or on the Passport Monitor Committee, so that it can ensure managers are not improperly accessing employees' files, the Union may request the information under 5 U.S.C. §7114(b)(4).

Thus, the Panel orders the parties to adopt the following language:

> "The Union may request a list of the Oversight Authority officials and Passport Monitor Committee from the Agency under 5 U.S.C. § 7114(b)(4)."

**5. Union's Final Offer**

> Any initial report of a BUE's alleged unauthorized access to a passport file must contain the basis for why the accused employee's access is not authorized. The accused employee will receive a copy of this report. All OA responses on ACRQ questionnaires will be promptly shared in writing with the affected employee.

The Union argues that during bargaining, a revision to the Foreign Affairs Manual (FAM) encouraged employees to report their fellow co-workers if they suspected an employee improperly accessing sensitive records.[6] Therefore, employees should be provided the report that contains the allegations, so the employees can defend themselves against disciplinary action.

The Union also argues that employees should be provided the OA's responses to an employee's ISAAP-questionnaire so that they can similarly defend themselves against potential disciplinary actions. The Union states that providing the employees this information will not only protect the employees, but will expedite the investigation process.

**Agency's Final Offer**

> The Agency is opposed to this language being included in the MOU.

The Agency states that if discipline is proposed, the employee is entitled to any materials relied upon to substantiate the proposed discipline in accordance with Article 24 of the parties' CBA. If the Agency investigates the allegation, and it chooses not to pursue discipline, then the

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[6] The Foreign Affairs Manual or FAM is a single, comprehensive, and authoritative source of the Agency's organization structures, policies, and procedures that govern the operations of the State Department, the Foreign Service, and other federal agencies.

allegations are irrelevant and may only lead to additional unnecessary litigation between the parties.

**Conclusion**

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that a modified solution is the best alternative to resolve the impasse. If the Agency takes disciplinary action against an employee, then the employee is entitled to the information used to support the discipline in accordance with the parties' CBA. Further, if the employee retains representation from the Union over the disciplinary action then the Union is permitted to request the evidence relied upon to discipline the employee. Accordingly, the Panel orders that the parties adopt the following language:

> "Current BUEs retain all rights under the CBA to obtain information. The BUEs also retain the right to a Union representative who may request information under 5 U.S.C. § 7114(b)(4)."

**6. Union's Final Offer**

> Current or former BUE whose passport files are determined to have been inappropriately accessed will be notified of the breach.

The Union asserts that in a 2013-grievance, a manager was found to have inappropriately accessed passport files. Many of those files were of high profile public figures, but it was uncovered that the manager had accessed the records of Agency employees. The employees were not told of the breach of their records. The Union states they only uncovered the information after it made a request to the Agency under the Statute. Therefore, the Union states that if a breach of an employee's passport records occurs, which contains sensitive PII, the employee should be notified.

**Agency's Final Offer**

> The Agency is opposed to this language being included in the MOU.

The Agency claims that the incident the Union is referring to occurred approximately eleven years ago. Since that time, the Agency created in-depth policies to ensure that individuals are notified when their passport information may be compromised.

**Conclusion**

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the best alternative to resolve the impasse. The Union notes that employees' files were accessed as a result of a breach from a manager who did not have permission to view those files. The Agency appears to have taken corrective action to ensure that employees' files are not inappropriately accessed. If there is a breach of the employees' files, the Union may request information under the parties' CBA and the Statute. Accordingly, the Panel orders that the Union withdraw its proposal.

**7. Union's Final Offer**

By their signature below, the parties agree that this concludes negotiations over the impact and implementation of the passport database audit programs.

The Union requests to withdraw this proposal from the impasse proceedings.

**Agency's Final Offer**

By their signatures below, the parties agree that this concludes negotiations over the impact and implementation of the Interim Systems Audit Program.

The Agency is amenable to the Union's request to withdraw the proposal from the impasse proceedings.

**Conclusion**

The Panel accepts the request to withdraw the proposal.

**ORDER**

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's

regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel, under § 2471.11(a) of its regulations, hereby orders the adoption of the following to resolve the impasse:

1. In instances where employees are required to use PIERS to conduct non-applicant passport searches (e.g., Panama Canal Zone birth records), employees will be allowed to claim 15 minutes of non-productive time for every 5 non-applicant searches for the purpose of maintaining a personal log to assist them in explaining/justifying a PIERS search. If Employees need additional time to maintain a log of other databases searched, the Employees may use the 60 minutes of non-adjudicative time already established by the parties in the employees' production standards, or request additional time from their supervisors.

2. The Union is ordered to withdraw its proposal.

3. Disciplinary action regarding unauthorized Passport Database searches will be consistent with the CBA.

4. The Union may request a list of the Oversight Authority officials and Passport Monitor Committee from the Agency under 5 U.S.C. § 7114(b)(4).

5. Current BUEs retain all rights under the CBA to obtain information. The BUEs also retain the right to a Union representative who may request information under 5 U.S.C. § 7114(b)(4).

6. The Union is ordered to withdraw its proposal.

7. The parties are ordered to withdraw their proposals.

By direction of the Panel.

Mark A. Carter
Chairman

November 20, 2018
Washington, D.C.