



Representing the bargaining unit employees of Passport Services, a division of the Department of State's Bureau of Consular Affairs

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Final Step Grievance

Date: October 13, 2009

To: MANAGER A, Director – Passport Services Office of Field Operations (CA/PPT/FO)

Re: Termination of CWS

In accordance with Article 20 of the Master Agreement Between Passport Services and the National Federation of Federal Employees-Local 1998, I am filing this Final Step Grievance¹ on behalf of the bargaining unit employees of Passport Services regarding the termination of the 4/10 Compressed Work Schedule (CWS) at the Chicago Passport Agency, and other matters (including bad faith bargaining). Management's actions violated the Flexible and Compressed Work Schedules Act (FCWSA – 5 U.S.C. § 6120-6133) and other relevant legal authorities, including but not limited to Article 12 and Article 26 of the Master Agreement. In addition, Management's actions constitute an Unfair Labor Practice (a violation of 5 U.S.C. 71).

Some relevant legal authorities

5 U.S.C. § 6130(a)(1) states in part:

In the case of employees in a unit represented by an exclusive representative, any flexible or compressed work schedule, and the establishment and termination of any such schedule, shall be subject to the provisions of this subchapter and the terms of a collective bargaining agreement between the agency and the exclusive representative.

5 U.S.C. § 6131(c)(3) states in part:

¹ Note: this is being filed as a "Step 2/Final Step Grievance" and not as a "Step 1 Grievance." When the Union filed a step grievance (in that case, an "Informal Grievance") on July 25, 2003 regarding the termination of 3 of the 8 CWS 5/4-9 schedules at the Seattle Passport Agency, MANAGER B (then the Director of CA/PPT/FO and now the Managing Director of Passport Services) replied on August 25, 2003 in her denial of the grievance that she viewed the grievance not to be a step-grievance but rather a "Grievance Between the Parties." The Union accepted that interpretation then and is acting accordingly now by filing a "Final Step Grievance."

(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.

5 U.S.C. § 7116(a) states in part:

- (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-
 - (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; ...
 - (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
 - (6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;
 - (7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or
 - (8) to otherwise fail or refuse to comply with any provision of this chapter.

5 U.S.C. § 7103(a)(12) states in part:

"collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment

affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

Some relevant contractual authorities

Article 12, Section 3b states:

3. LEGAL AND CONTRACTUAL AUTHORITY: ...

- b. The Master Agreement is controlling and neither the Union nor Management at any level may make proposals in conflict with this Master Agreement. Only the national Parties may reopen/amend the Master Agreement during its term and only upon mutual agreement (see Article 38). The national Parties may supplement this Master Agreement in accordance with the provisions of this Article.

Article 12, Section 13a states:

13. POINTS OF CONTACT

- a. Local Level: Notification of proposed changes by the Employer at the local level shall be provided to the Senior Steward (with copies to the other Stewards), or their designees. Where there is no Union representative in an office, notification shall be sent to the Union President and Vice President. Where there is only one Union representative in an office, notice shall be sent to the local official and also to the Union Vice President, or their designees. Responses to Employer proposals, as well as notification of Union-initiated mid-term bargaining proposals, at the local level should be submitted to the Regional/Office Director and Assistant Regional/Office Director(s), or their designees.

Article 12, Section 16a states:

16. NEGOTIATIONS AT THE LOCAL LEVEL:

- a. Existing policies and negotiated agreements at the local office level not in conflict with this Master Agreement remain in effect in accordance with those terms. Any question of conflict with the Master Agreement shall be decided by the national Parties within 60 days of the practices being brought to their attention.

Article 26, Section 1c states:

- c. Alternate Work Schedule Plans shall continue within Passport Services. The Employer may not terminate any Alternate Work Schedule without providing the Union notice and the opportunity to negotiate, in accordance with Article 12. Alternate Work Schedules may only be terminated in accordance with applicable

regulations and laws, including 5 U.S.C. 6131(c). Alternate Work Schedule Plans may vary based on the requirements of each Passport Agency or other appropriate office.

Article 26, Section 3b states:

- d. Local agreements/policies will include, at a minimum:
 - i. The earliest and the latest time a bargaining unit employee may work;
 - ii. The lunch period; and
 - iii. The core time (that time during which each bargaining unit employee must be present for work).

Article 27, Section 6 states:

AWS ON SECOND OR NIGHT SHIFT: Local policy on AWS or Night Shift will be available to bargaining unit employees assigned to those shifts where AWS is available. Local AWS options and procedures for second or night shifts must be in conformance with Article 26 of this Master Agreement.

Union's argument

On October 9, 2009 Management violated the FCWSA by unilaterally terminating the 4/10 CWS on the night shift without completing negotiations, receiving agreement from the Union, or receiving an order from the FSIP. Management had previously sought to terminate the 4/10 CWS on the night shift earlier in 2009 and, after Management felt the parties were at impasse (the Union disagreed with that assertion), had contacted the FSIP. Management subsequently withdrew the FSIP request and stated that they would seek mediation through FMCS with the Union.² The Union expressed a willingness to resolve the dispute through mediation, but Management never followed up and instead started to communicate directly to employees about changes in working conditions (a “bypass”) and attempted to communicate with and negotiate with only one Union representative (contrary to the requirements of Article 12, Section 12 and Section 13a).

Management at PPT/CG also engaged in bad faith bargaining. For example, on April 2, 2009, then-ARD MANAGER C proposed that 16 slots would be available for employees to work the 4/10 CWS on a day shift. A few weeks later, as stated above, Management took the dispute to the FSIP, but then withdrew the request citing Management’s agreement to go to mediation (through FMCS) with the Union over the issue. The Union was then told to hold off on any mediation efforts as a new ARD, MANAGER D, was coming on board. Shortly afterwards, Management refused to go to mediation. Also, on August 12, 2009 Management lowered its proposal from 16 to 10 slots for the 4/10 CWS (and later moved up to 12 slots, on September 11, 2009). Finally – almost exactly 6 months after proposing 16 slots in writing – on October 1, 2009 Management at PPT/CG went back up to 16 slots in its proposal, but then refused to meet and bargain with the Union representatives and instead unilaterally terminated the 4/10 CWS.

² See attachment: June 25, 2009 letter from the FSIP confirming Management’s withdrawal of request for assistance from the FSIP in Case No. 09 FSIP 77.

Up until October 1st, all of the Management proposals were defective in that they had provisions in conflict with the Master Agreement (e.g., restrictions on participating in CWS that were contrary to Article 26, Section 5). The Management officials at PPT/CG did not have the authority to override the Master Agreement and the Union representatives at PPT/CG did not have any obligation – or authority – to agree to a local work schedule agreement that conflicted with the Master Agreement. On October 1st, Management submitted a counter-proposal to the Union’s September 17th proposal, and that new proposal did cure the defects related to the restrictions. However, Management’s proposal was still inconsistent with the Master Agreement because it omitted other provisions (e.g., not specifying the core time). Even more importantly, after October 1st Management refused to meet and bargain in good faith with the Union representatives and instead illegally and unilaterally terminated the 4/10 CWS on the night shift.

If Management desires to terminate the 4/10 CWS on the night shift, then Management should bargain with the Union representatives at PPT/CG who have demonstrated over and over again a willingness to meet and bargain in good faith over that proposal as well as to add the 4/10 CWS onto the day shift. Indeed, the Union representatives at PPT/CG have spent most of this year waiting on Management to agree to meet and bargain. The Union representatives at PPT/CG had offered on September 17th a proposal that provides for many fewer 4/10 CWS slots for the day shift than those that Management at PPT/WN (the Washington, DC Passport Agency) agreed to when Management in that office attempted to terminate the 4/10 CWS on the night shift there. The Union and Management at PPT/WN agreed to have **no limit** on the number of employees who could participate in the 4/10 CWS on the day shift (with a limit of only 10 on Monday and 10 on Friday) – out of about 79 bargaining unit employees. That’s 79 total slots, with Monday and Friday capped at 10 each. The Union representatives at PPT/CG were willing to go as low as 18 total slots – out of about 68 bargaining unit employees, with limits of 6 on Monday, 6 on Wednesday, and 6 on Friday. If the parties had reached an impasse and the dispute went to the FSIP, we are confident that the FSIP would side with the Union’s very reasonable proposal. However, Management violated the FCWSA by unilaterally terminating the 4/10 CWS at PPT/CG.

During earlier discussions, Management incorrectly cited the wrong parts of the law (5 U.S.C. 6101) and regulations (e.g., 5 CFR 610) as an alleged legal authority to unilaterally terminate the 4/10 CWS. However, the very first three words of 5 U.S.C. 6127 are “Notwithstanding section 6101....” This is not simply the Union’s opinion; this is what the Federal Labor Relations Authority (FLRA) has stated previously. For example, in *57 FLRA No. 168*, a union had proposed that employees on a regular 8-hour tour of duty work a 4/10 CWS:

Change the 303rd FS Materials Expediter position from its current work schedule Monday-Friday (7:00 a.m. to 15:30 p.m.) to a Compressed work schedule of Monday-Thursday (10:00 a.m. - 8:00 p.m.)

Note that the employees in that case were on a regular 8-hour tour of duty and the union proposed that they be moved to a 4/10 CWS (which would also cross into the 10% night differential pay), and that the employees were previously all working 5 days/week but the union proposed they work only 4 days. The agency in that case - United States Department of the Air Force, 509TH Mission Support Squadron (DPC), Whiteman Air Force Base, Missouri (i.e., an agency with obviously a very important mission) – argued that by virtue of Management’s Right to determine tours of duty [5 U.S.C. 7106(b)(1)] and in accordance with 5 CFR 610.121,

Management did not have to bargain with the Union over this proposal. The FLRA found otherwise, and ordered that agency to bargain with the union SUBSTANTIVELY over that proposal. In other words, Management had to bargain over whether or not to terminate the CWS – not simply the I&I aspects of that. The FLRA found the union’s proposals to be “fully negotiable”:

In reaching this result, we reject the Agency's contention that the proposals are nonnegotiable because they are inconsistent with the exercise of management's rights under § 7106(a) or are otherwise encompassed within § 7106(b)(1) of the Statute. The Authority has held that because alternative work schedules for bargaining unit employees are fully negotiable within the limits set by the Work Schedules Act, there are no issues pertaining to the negotiability of those schedules that the Authority will consider under § 7117 of the Statute, insofar as those issues concern an alleged conflict with the Statute. *See NTEU*, 39 FLRA at 34. Therefore, the Agency's claim that the proposals violate various provisions of § 7106 of the Statute provides no basis for finding that the proposals, which concern the establishment of alternative work schedules, are contrary to law. *See, e.g., NAGE*, 56 FLRA at 1045; *Space Systems Division, Los Angeles Air Force Base, Los Angeles, California*, 45 FLRA 899, 903 (1992); *NFFE, Local 642*, 27 FLRA 862, 867 (1987), *enforced sub nom. Bureau of Land [v57 p768] Management v. FLRA*, 864 F.2d 89, 91-92 (9th Cir. 1988). [n4]

Further, we reject the Agency's contention that the proposals are inconsistent with 5 C.F.R. § 610.121. [n5] The Authority previously has addressed the requirements of 5 C.F.R. § 610.121 and has found that they govern work schedules established under 5 U.S.C. § 6101, rather than alternative work schedules established under the Work Schedules Act. *See EPA*, 43 FLRA at 94. Consequently, 5 C.F.R. § 610.121 does not apply to the proposals and does not operate to bar negotiations under the Work Schedules Act.

If a proposal is “negotiable” then it is “legal” – and its adoption into practice through collective bargaining is enforceable through the grievance and ULP processes.

If the parties have bargained to impasse over a management proposal to terminate a CWS (or a union proposal to add a CWS), then the impasse can be referred to the FSIP. These types of cases go in the “express lane” and must be decided by the FSIP within 60 days. 5 U.S.C. 6131(c)(3)(D) is clear on this subject:

- (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.

That is the legal way to terminate the 4/10 CWS on the night shift.

Conclusion

What's at stake here are the Compressed Work Schedules used by employees all throughout Passport Services. All of the local agreements, policies, and practices are under threat by Management's actions and plans at PPT/CG.

Management's actions are absolutely inexcusable considering that the Union had already gone to arbitration and filed a negotiability appeal in 2003 regarding the termination of 3 of the 8 5/4-9 CWS options at PPT/SE (the Seattle Passport Agency). Management had terminated the 3 CWS schedules that had start times earlier than 7:00 AM and moved all of those employees to schedules starting at 7:00 AM. The Union prevailed in both the arbitration settlement and in the negotiability decision by the FLRA.³ This present case is an even more blatant violation of the law. All of the 4/10 CWS employees have been moved off of the 4/10 CWS on the night shift and moved on to either 8-hour standard or flexitour schedules or 5/4-9 CWS schedules.

The FLRA has clearly ruled that Management must bargain over the substance of a proposal to terminate or create a CWS (i.e., whether or not to drop or add a CWS), not simply the impact and implementation ("I&I") of a proposal to terminate or create a CWS. Terminating a CWS without bargaining is an Unfair Labor Practice and a status quo ante remedy is appropriate.⁴

Requested Relief

I respectfully request that Management remedy the violation by making the employees and the Union whole. This includes, but is not limited to, returning to the status quo ante and restoring the employees to the 4/10 CWS. It also includes back pay, plus interest, for the 10% night differential pay that was not received as a result of the violation, and the restoration of sick and annual leave that had to be used as a result of the violation. A signed public acknowledgement, posted⁵ in prominent locations, committing to bargaining in good faith and abiding by the law is also an appropriate part of the remedy for this violation of law and the Master Agreement.

Thank you for your consideration.

Sincerely,

Colin Patrick Walle, Union President – IAMAW FD1 NFFE Local 1998

³ See 60 FLRA No. 34.

⁴ See 44 FLRA No. 50.

⁵ See 59 FLRA No. 56.