U.S. Department of State Passport Services	)	FMCS Case No. 16-50736
and	)	Opinion and Award Issued: November 15, 2016
National Federation of Federal Employees, Local 1998	)	

BACKGROUND

This July 14, 2015 grievance alleges that "the recent Agency unilateral implementation of a ban on personal electronic devices (PEDs) in the workplace...is a violation of relevant legal authorities, including, but not limited to, violations of Article 12 of the Collective Bargaining Agreement" (CBA or Agreement; J-2). On October 29, 2015, the Agency denied the grievance in its entirety, including raising and reserving the defenses of procedural and substantive arbitrability. J-3. Pursuant to Article 22 of the CBA, an arbitration hearing was held on June 1 and June 2, 2016. A transcript of the proceedings was taken, and post-hearing briefs were filed.

This grievance arose under the CBA which became effective in July 2009. The prior CBA had become effective in July 2006. A-6; U-2. The parties adopted into the July 2009 CBA the following language which had not been included in the predecessor CBA:

ARTICLE 12
NEOGITATIONS DURING TERM OF THE MASTER AGREEMENT

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7. PROHIBITION ON UNILATERAL CHANGES: The Employer agrees that it will not unilaterally implement changes in personnel policies or practices or other general conditions of employment,

> including those originating from terms of dispute settlement agreements, unless Management is taking an action due to an emergency in accordance with 5 U.S.C. 7106(a)(2)(D) or the date of implementation is required by law. In these situations, post-implementation issue resolution or negotiations may be appropriate.
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> **ARTICLE 3**
> **DEFINITIONS**
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> **EMERGENCY SITUATION**: A sudden, unexpected occurrence or set of circumstances demanding immediate action. Cyclical or foreseeable fluctuations in workload and matters of administrative or personal convenience do not constitute an emergency situation.
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> J-1

The National Federation of Federal Employees, Local 1998 (NFFE or Union) represents approximately 1,400 Passport Specialists at the Department of State, Bureau of Consular Affairs, Passport Services Directorate (Agency) at 32 offices nationwide. The majority of bargaining unit employees are Passport Specialists. These employees adjudicate passport applications by reviewing and verifying the applicant's citizenship and identity.

Chloe McClendon was an outside contract worker, rather than a federal employee, who worked for the Agency at the Houston Passport Agency beginning in 2010. In 2012, she was transferred to the Atlanta Passport Agency, and in 2014 she was transferred back to the Houston Passport Agency. At some point, the Agency learned that throughout her years of work at both these offices, McClendon had violated Agency rules, as well as a number of laws, by using her PED to photograph passport applications and forwarding that biographic information to a

third party for the purpose of identity theft. There is no dispute that her criminal activity involved 1,526 U.S. passport records. The evidentiary record is unclear regarding precisely when the Agency became aware of McClendon's illegal activities. The Union states that it was in late 2014 or early 2015, and the Agency states that it was in the Spring of 2015.

McClendon was convicted of wire fraud and aggravated identity theft, and, in April 2016, she was sentenced to serve a total of 65 months, 41 months for the former crime and a consecutive 24 months for the latter crime.[1] A-2.

After the Agency learned of the McClendon conspiracy, it learned of a conspiracy involving two brothers -- Sohaib and Muneeb Akhter -- and a third person to gain remote access to the personally identifiable information (PII) of all past, present and future passport applicants for purposes of identity theft as well as the ability to approve or deny visa applications in process in the Agency's electronic systems. Sohaib was a contract employee who worked in the building which contains the Washington Passport Agency, the Special Issuance Agency, and the Agency's headquarters office. Sohaib attempted to install a customized device underneath metal siding in a server room in the basement of the building. The attempt failed when he broke the device's power supply before he could install it. On October 2, 2015, the Akhter brothers received multiple-year prison sentences for the crimes of which they were convicted. A-4.

On April 8, 2015, LMR attorney sent the Union an "Official Notification - Personal Electronic Device (PED) Policy" which reads in its entirety:

> No later than 60 days from the date of this notification, the Agency intends to enact a policy prohibiting the use of personal electronic devices (including, but not

[1] On December 18, 2015, the Agency's Deputy Assistant Secretary (DAS), Brenda Sprague, wrote to the sentencing judge to urge that he impose on McClendon the maximum sentence allowable under law. A-3.

> limited to, personal cellular telephones, laptop and other computers, tablets, and all other such devices with cameras) by all personnel within the hardline of any Passport Services facility at any time.[2] This message constitutes official notification pursuant to Article 12 of the Agreement. If you wish to invoke bargaining, the Agency will require you to do so within 15 calendar days of today pursuant to Article 12, Section 9(b). We look forward to addressing any questions or concerns you may have, and appreciate your anticipated cooperation with the implementation of this policy, which is tailored to important security objectives, in the spirit of teamwork and shared responsibility.
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> U-3

The Union requested bargaining regarding the policy and made two information requests, one statutory and one pursuant to the Agreement. The Agency responded to the requests, and on May 7, 2015, the parties agreed to ground rules which provided for two days of bargaining, to be followed immediately by two days of mediation, from May 18-21, 2015.[3] U-5. Local 1998 President Rob Arnold testified that he is confident this was the first time the parties ever had agreed in advance that mediation would immediately follow bargaining. He added that the Agency indicated it was "in a rush to implement the policy [and that] the Union would get better bargaining terms if it were to agree to rush to the table." TR. 67.

On May 11, 2015, the Union presented the Agency with 67 initial bargaining proposals. A-5; U-6. On May 13, 2015, the Agency declared 38 of the Union's proposals to be outside

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[2] The hardline of an agency office is the internal passport services area which requires a proper badge for access.

[3] On April 9, 2015, the Agency asked the Union if it would agree to enter into expedited mediation. A-A.

the duty to bargain and/or non-negotiable and agreed to bargain the rest of the proposals. On May 14, 2015, the Agency presented the Union with its counter-proposals. U-7. Pursuant to the ground rules, bargaining took place in San Francisco on May 18 and 19, 2015. No proposals were agreed upon by the end of those two days of bargaining, and no proposals were agreed upon by the conclusion of the mediation with Mediator Lydia Baca which took place on May 20 and 21, 2015. During the bargaining and mediation, the Agency agreed to bargain over all 67 initial Union proposals, including those it considered to address permissive subjects, as well as what it considered mandatory subjects of bargaining, and it took the position that the Agency would not agree finally to any proposal until the parties reached a comprehensive agreement regarding the issue of the PED policy.

In email correspondence between the parties clarifying their post-mediation understandings, on May 25, 2015, the Agency notified the Union that going forward it would bargain only on mandatory subjects and would not engage in permissive bargaining, consistent with its May 13, 2015 declarations as to non-negotiable Union proposals. The Agency indicated it might agree to bargain permissively in the future if there were continued progress on mandatory aspects of bargaining. The Agency also stated its intention to move forward in implementing the PED policy, as provided in its notification. A-9.

In a May 26, 2015 email, the Union expressed confusion about exactly where within the facilities the PED ban would apply. It asked the Agency, if it was going to implement the ban, to notify the Union, so it could inform the employees: "Are the devices banned within 10 feet of any computer owned by the Agency? 20 feet? Not necessarily banned around some computer terminals (and, if not, under what criteria)?" A-9. On that same day, the Agency responded:

> Again, to reiterate, the Agency's initial notification and subsequent exchanges between the parties have made clear that PEDs are banned in all Agency space where applicant PII or other sensitive information is processed. In all passport agencies,

> this area is no larger than the facility hardline. We have offered to provide you with floor plans of each agency containing a clear display of the zone within the hardline within which PED possession will be banned, and you thus far have declined to take us up on that offer.
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> A-9

At the arbitration, Arnold testified that the Union "continually ask[s] for those plans and have not been provided with them." TR. 395.

Several of the initial Union proposals address the installation of lockers by the Agency in which employees would be able to store their PEDs during the workday, and during the May 2015 bargaining the Union expressed concern that employees' PEDs would be vulnerable to theft or damage if the lockers were outside the hardlines of facilities. During the initial months after the implementation of the ban, the Agency installed lockers within the hardlines at facilities and permitted employees to possess their PEDs between the entrance to the hardline and the lockers as necessary to store their PEDs in the lockers.

On May 26, 2015, the Union filed a request for assistance with the Federal Service Impasses Panel (FSIP).[4] A-7. The Agency filed an unfair labor practice (ULP) charge, alleging that the Union had violated 5 U.S.C. 7116(b)(5) by insisting to impasse on one or more permissive subjects of bargaining in its May 26, 2015 request for assistance from the FSIP. This charge is pending the decision of the San Francisco Regional Director.

On May 28, 2015, the Union filed a negotiability appeal with the FLRA regarding the proposals the Agency had declared non-negotiable. A-8. On July 6, 2015, the Agency emailed its response to a request the Union had made in May 2015 for an update on its negotiability position. This email notes

[4] The Union provided a copy of its submission to the FSIP to the Agency the next day. U-8.

that the Agency's declarations are attached and states: "For the reasons stated below, the Agency does not believe it is required to bargain any of the Proposals in question other than Proposal 52." U-11. Subsequently, the Union filed another negotiability appeal with the FLRA.[5]

The Union also filed a ULP charge alleging that the Agency violated the Statute by failing to complete bargaining prior to implementing the PED policy. The Authority found that this charge was barred by the Union's grievance and declined to issue a complaint on the charge. U-12. The Union withdrew two other ULP charges it had filed, one regarding the redaction of a memorandum approving the policy and one regarding the Agency's denial of a statutory data request regarding issuance of government-owned smartphones since the announcement of the PED policy.

For some months, the Union's request for assistance remained pending a jurisdictional decision from the FSIP, and ultimately the Union withdrew its request for assistance. Arnold testified that he does not recall the date on which the Union withdrew its request, but it was after it became aware of a June 12, 2015 internal memo from DAS Sprague announcing to upper level management officials that the PED ban would be implemented.[6] U-9. Arnold also testified that the Union withdrew its request for assistance "based on FSIP's concern that there were too many other appeals going on with the negotiability appeals and the ULPs," as well as its realization that the parties once again would be in mediation in CADRO. TR. 77.

On June 22, 2015, the Agency implemented the PED policy, which after the Agency's initial notification to the Union had been expanded to include personal electronic devices

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[5] From September 30, 2015 through January 6, 2016, the parties participated in CADRO with the Authority. As of the date of the arbitration hearing, the negotiability appeals had not been resolved or decided.

[6] The memo includes the following: "Please disseminate this memorandum to all staff. Bargaining Unit Employees are allotted 15 minutes in MIS to review this memo." U-9.

with texting capability, in addition to photo capability. U-9. Within the initial months after implementation, before the Agency had installed lockers at all locations, management at each office designated a location near the entrance to the hardline where employees could store their PEDs during the work day. During this interim period, employees at the Charleston Passport Office were required to place their cell phones in a batch box just outside the entrance to the office. Shortly before the Agency installed lockers at that location, on October 8, 2015 the local Union requested midterm bargain with local management regarding implementation of PED lockers. On October 9, 2015, management responded: "This issue is the subject of ongoing discussions between the national parties and will continue to be handled at that level." U-1.

Also during this interim period, local management at the Houston Passport Agency required employees to indicate on a sign-in sheet the times when they deposited and removed their PEDs from the interim storage space. Local Union officials reported to national Union officials that local management stated its intention to use the logs as an additional tool to monitor lunch and break times. U-10. Additionally, Local Union officials at the Arkansas Passport Office reported to national Union officials that urgent security announcements from local schools stopped getting through to employees whose cell phones were locked away. U-13.

On July 14, 2015, the Union filed the present grievance. J-2. The Union granted the Agency's request for an extension to the due date for its response. After the extended due date passed, the Agency requested an additional extension and the Union declined to grant this request. TR. 90. On October 29, 2015, the Agency issued its response denying the grievance. J-3. Subsequently, the Union invoked its right to arbitration under Article 20 of the Agreement, and the arbitration hearing was conducted on June 1 and 2, 2016.

As reported above, the parties participated in CADRO through late January 2016. On February 3, 2016, the Agency sent the Union an email which notes that "our responses to your revised proposals are attached" and states: "We should discuss dates when we can meet...for bargaining over the proposals that we have acknowledged fall within our duty to bargain." A-B.

Arnold testified as to the circumstances underlying the Union's failure to respond to this email. He said the Union had updated its proposals on January 20, and this response from the Agency five days later was not a counter-proposal but an unrequested stance on negotiation, and the Union was wary of a response that could result in another deadline for a negotiability appeal. Also, he said, the Agency's response indicated that it found only one proposal to be negotiable, and the Union did not understand how the Agency's reference to further bargaining over a single proposal could be squared with its position in the ULP charge, which it had not withdrawn, that the Union's attempt to bargain to impasse would constitute a ULP. Tr. 396-397.

DAS Sprague, who is at the top of the Department's organizational chart (A-1), signed the authorizing memo for the PED policy on April 10, 2015. U-4. She testified that the Agency implemented the PED policy before bargaining had been completed, and before the lockers were installed, because:

> ...there were exigent urgent circumstances that required us to address it as soon as possible. Every day we adjudicate about 30- or 40,000 passports. And every day we waited was another 30- or 40,000 people who were exposed to what we knew was a proven vulnerability.
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> TR. 169

Sprague testified that the PED policy applies to all Agency employees and managers, including her. TR. 167. She added that she finds complying with the policy very inconvenient and annoying, but there is no other option which would "introduce any greater measure of security." TR. 175. Sprague testified that, to her knowledge, there have been no federal employees in Passport Services who have been disciplined for inappropriate use of PEDs which involved identity theft, and she is aware of no other schemes involving contract employees like the one involving Chloe McClendon. TR. 177-178.

UNION CONTENTIONS

The Union frames the issue to be decided as follows: Whether the Agency violated the law and/or the collective bargaining agreement when it implemented its policy on the use of personal electronic devices? If so, what is the appropriate remedy?

The Union contends that when the Agency proposed changes to the working conditions of bargaining unit employees, the banning of PEDs in defined workspaces, that created a legal duty to bargain. When the Agency unilaterally implemented this ban without first reaching agreement with the Union on proposals that are negotiable or obtaining resolution of the impasse from the FSIP, it violated the central tenet of the legal duty to bargain under 5 U.S.C. Chapter 71 and Article 12, Section 7 of the CBA.

Under FLRA case law, an Agency's unilateral change to working conditions is a violation of law unless the change is "necessary for the functioning of the agency." *See U.S. Department of Justice Immigration and Naturalization Services*, 55 FLRA 892, 899 (1999). To establish this defense, the Agency is required to show that "its actions were in fact consistent with the necessary functioning of the agency, such that a delay in implementation would have impeded the agency's ability to effectively and efficiently carry out its mission. *Id.* In the present case, the Agency's judgment that the PED ban was necessary is not at issue, and that the policy change may impact the safety and security of matters overseen by the Agency and its mission is not dispositive. Also, the bargaining and/or communications which took place between the parties after June 22, 2015 are irrelevant to the disposition of the grievance.

The sole issue is the timing of the implementation of the ban, and the focus is on whether on June 22, 2015, there was an emergency which required the Agency to implement the PED ban prior to completing bargaining with the Union. The Agency plainly failed to show that delaying the implementation of the ban would have prevented it from carrying out its mission. Indeed, the undisputed facts show that the Agency did not immediately implement the PED ban, which, in itself, demonstrates that a delay did not affect the functioning of the

Agency. The Agency also provided no direct evidence of any impact on the operation between April 8, 2015 and June 22, 2015.

The Union urges the Arbitrator to follow both the arbitrator's and the FLRA's decision in *U.S. Department of Homeland Security United States Customs and Border Protection*, 62 FLRA 263 (2007). In *Homeland Security*, Arbitrator Vaughn ruled that the Agency's unilateral implementation of a grooming policy violated the parties' National Agreement, despite the Agency's claim that implementing the policy prior to completion of bargaining was necessary for the functioning of the Agency. The Arbitrator found that the Agency's one month delay in implementing the policy -- less than the approximate 75 days here -- showed that implementation was not necessary to the functioning of the Agency. The FLRA upheld the Arbitrator's finding as consistent with law. *Homeland Security*, 62 FLRA at 265. The Union also points to other FLRA case law in which delays in implementation were found sufficient to show that the "functioning of the agency" was not implicated.

The Union points out that the FLRA case law solely concerns whether the policy, and its implementation, affects the functioning of the agency. Whether the agency may have had good reasons to implement the policy is not sufficient to override an agency's bargaining obligation. *Naturalization Service*, 55 FLRA at 904. In the present case, the Agency's argument that its decision to bargain with the Union for 60 days was an act of good faith does not find support in FLRA case law. Also, given the Union's attempt to go to the FSIP, any claims that bargaining would have dragged on for too long are not supported by the evidence.

The Agency's position also is undermined by the language in the CBA. In 2009, the parties added language, in Article 12, Section 7, which prohibits unilateral changes unless, as one exception, they are made due to an emergency, and in Article 3, the parties agreed to define an "Emergency Situation" as "[a] sudden, unexpected occurrence or set of circumstances demanding immediate action." For clarity, the parties agreed that "[c]yclical or foreseeable fluctuations in workload and matters of administrative or personal convenience do not constitute an emergency situation." J-1. The Agency learned that a contract employee had used her PED to commit

identity theft, but there was nothing sudden or new to provide a reason for unilateral implementation of the PED ban.[7] Cell phones with cameras and texting capability, and the threat of identity theft, have been around for years, and one instance of abuse which was not committed by federal employees does not fit the contractual definition of emergency. Moreover, the contractor's illegal activity, which occurred over a period of five years at multiple passport offices, due to non-enforcement of the Agency's existing regulations, does not create an "emergency situation." Nor can it accurately be characterized as "sudden" merely because she finally was caught.

Further calling into question the emergency nature of the policy is the fact that it first was announced as critical in nature, but its application became haphazard. Shortly before implementation, the Agency announced exceptions which applied only to non-bargaining unit employees such as cleaning crews and Diplomatic Security Agents. U-9. Subsequently, the ban was waived for a variety of visitors such as outside visitors attending office symposiums and construction workers. TR. 17, 41.

At the very least, the Agency was required to complete bargaining before enacting a policy which has a dramatic effect on the working conditions of bargaining unit employees, who are subject to a security clearance and background checks and have a property interest in their job. The ban has an impact on the safety of employees and their families. Passport Specialists regularly are reassigned away from their workstations and had relied on their PEDs to stay within reach of their loves ones -- including in the event of a tragedy -- their families, physicians, and their children's schools. Even Agency training materials specify cell phones as critical during an active shooter event.

The Agency's defense of its unilateral implementation of the PED ban is based on arguments that are irrelevant or contrary to the factual record. The facts undermine the

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[7] According to the Union, the ban was not prompted by a second incident -- again involving a non-bargaining unit employee -- who used a device to attempt to illegally hammer into the wall to access the department server.

Agency's primary argument that it could not wait to complete bargaining about the ban because its bargaining with the Union normally takes months, if not years. The Union agreed to comprehensive ground rules with tight timeframes which included two days of bargaining followed by two days of mediation proposed by the Agency. U-5. After the FMCS Mediator Baca released the parties as being at impasse (U-8), the Agency claimed Baca had not truly released the parties but refused to consult with her. A-9. The ground rules were silent regarding requesting the assistance of the FSIP, but, in a good faith attempt to move the process along, the Union did so on May 27, 2016.[8] U-8. The Agency should not now benefit from the fact that it interfered with the impasse process by filing a ULP charge against the Union and arguing that FSIP should not assert jurisdiction.

Even if factually accurate, the Agency's argument that it acted reasonably by adopting some of the Union's proposals is not a valid basis under any FLRA case law for allowing for unilateral implementation of a change to working conditions. To hold otherwise would undermine the mutuality necessary for a meaningful bargaining relationship. Moreover, the Agency's argument that it showed good faith by allegedly continuing to bargain even after implementing is a red herring. The bargaining dynamic was severely altered by the unilateral implementation, after which the Agency had no reason to compromise or agree to any of the Union's proposals.

The Union rejects the part of the Agency's defense which claims that references to Houston and Seattle are local issues which are precluded from being referenced in a national grievance. The Agency's overly formal position regarding national grievances attempts to carve up the grievance into claims. There is nothing improper about the Union supporting a national grievance by citing conditions it believes to exist at multiple local locations, based on information it receives from the many offices around the country. U-10; U-13. In any event, nothing can preclude the Arbitrator from ruling on the Agency's

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[8] Under Article 12, Section 15, either of the national parties can request assistance from the FSIP or agree to proceed to binding arbitration.

violation of the law and the CBA when it implemented the PED ban on June 22, 2015.

Finally, the Union notes that a dispute arose at the arbitration hearing over the meaning of Article 20, Section 9(g), which provides, in relevant part: "If the dispute proceeds to arbitration then, notwithstanding the outcome of the arbitration, the responding party (Employer or Union) that failed to meet a deadline shall be responsible for all of the arbitrator's travel and per diem costs (unless extenuating circumstances apply)." J-1. In the Union's view, under this language the Agency is responsible for paying travel and per diem costs in this case. The undisputed evidence shows that the Agency failed to timely respond to the grievance in this case. The Union granted the Agency a very generous extension, and the Agency's October 29, 2015 response did not come close to meeting the deadline.

Relying on Arnold's uncontested testimony about the intent underlying this language in Article 20, Section 9(g), the Union rejects any claim made by the Agency that this provision only applies where the Union invokes arbitration prior to receiving the Agency's response. It also rejects the Agency's apparent reliance on an informal ruling by Arbitrator Joshua Javits in a prior case. A-C. This ruling was made after Arbitrator Javits already had distributed his invoice, and it was made before the Union submitted a responding position.

Regarding remedy, the Union asks the Arbitrator to order a *status quo ante* remedy, stayed for a period of 120 days, to permit the parties to complete bargaining.[9]

The Union contends that a *status quo ante* remedy is required under a review of the five factors to be considered under FLRA case law (FCI factors): (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning

[9] With respect to remedy, the Union urges the Arbitrator to adopt the approach of Arbitrator Vaughn in *Homeland Security*, 62 FLRA 263 (2007).

appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligation under the statute; (4) the nature and extent of the impact experienced by adversely affected employees; (5) whether and to what degree a *status quo ante* remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. *Federal Correctional Institution*, 8 FLRA 604, 606 (1982).

Under factor 1, the Agency improperly conditioned bargaining on a 60 day time frame from the notice, thus engaging in bad faith at that time. Nonetheless, under factor two, the Union acted in good faith by working with the Agency to expedite bargaining. Under factor 3, there is no doubt that the Agency willfully failed to live up to its bargaining obligation. When the Union sought impasse proceedings, the Agency tried to block the Union by filing a ULP and attempting to have FSIP deny jurisdiction. An objective review of the facts shows that the FSIP process likely would have been completed by the summer of 2015, yet the Agency implemented on the disingenuous basis that bargaining to completion could take years.

Under Factor 4, the extensive evidence of the impact to the bargaining unit supports a *status quo ante* remedy. Under factor 5, there is no evidence to suggest that the Agency's operation actually will be impacted or disrupted by a *status quo ante* remedy. This is especially so since the Union is asking for this remedy to be stayed for 120 days for bargaining, and under a stay the Agency will have full control over whether the remedy ever goes into effect. Moreover, there is no evidence that the operation was affected in any way between the notice date of April 8, 2015 and June 22, 2015, the date on which the policy was implemented.

For the foregoing reasons, the Union asks the Arbitrator to sustain the grievance and to order the remedy requested.

AGENCY CONTENTIONS

The Agency frames the issues to be decided as follows: Did the Agency violate Article 12 of the Agreement when it

implemented the PED policy without completing bargaining first? Should the grievance, in whole or in part, be dismissed on arbitrability grounds?

Regarding arbitrability, the Agency cites Article 20, GRIEVANCE PROCEDURE, Section 6, which, in relevant part, reads:

> SKIPPING THE STEP 1 GRIEVANCE: In the following circumstances, a grievance will not be filed at the Step 1 level; rather, the grievance will be filed directly at the Step 2/Final Step level. In these instances, a bargaining unit employee or the Union may file a Step 2/Final Step Grievance within thirty (30) days of the effective date of the action.
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> c. Nationwide Issues: In the case of matters affecting more than one office, the Union may file a Step 2/Final Step Grievance.
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> J-1

The present grievance was initiated at the step two/final step level, and the Agency contends that the Union included two claims in the grievance which each regard only one passport agency. The grievance alleges that employees in Houston were informed that they would have to record the times they signed their cell phones in and out, and those times would be monitored, thus used for disciplinary purposes. J-2. Also, the grievance claims that employees at certain offices, such as Seattle, were informed that their access to the office would be restricted beyond the requirements set forth in the PED policy; a supporting email is attached to the grievance. J-2.

With respect to both claims, the Union presented no testimony or other evidence: that the sign-in sheet was being used to monitor employees' arrival and departure times, or for disciplinary purposes, at any passport agency other than

Houston; or that management at any passport office other than Seattle had enacted a practice pursuant to the PED policy similar to the one claimed for Seattle. Accordingly, these claims do not regard a nationwide issue or a matter affecting more than one office within the meaning of Article 20, Section 6. The Union improperly initiated these claims at the step two/final step level; therefore, these two claims are not arbitrable, and the Agency asks the Arbitrator to deny the grievance as to these claims.

Notwithstanding its contention that the claims related to the passport offices in Houston and Seattle are not arbitrable, the Agency sets forth its arguments on the merits of each claim. Based on these arguments, the Agency asserts that if the Arbitrator considers the merits of these claims, they should be denied.

The Agency contends that the Union has failed to meet its burden of establishing that the Agency's implementation of the PED policy without first completing bargaining violated Article 12 of the Agreement or any other applicable authority.

In relevant part, Article 12, Section 7 provides that the Agency "agrees that it will not unilaterally implement changes in personnel policies or practices or other conditions of employment...unless Management is taking an action due to an emergency or in accordance with 5 U.S.C. 7106(a)(2)(D) or the date of implementation is required by law."[10] In relevant part, Article 3 defines the term "emergency situation" as "a sudden, unexpected occurrence or set of circumstances demanding immediate action." Section 7106(a)(2)(D) of the Federal Service Labor-Management Relations Statute (Statute) recognizes management's right "to take whatever actions may be necessary to carry out the agency mission during emergencies."[11]

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[10] Steven Polson, the Department's Chief Labor-Management Negotiator, testified that when he served as the Agency's lead negotiator for the bargaining which resulted in the adoption of this provision, he had no intention of waiving or restricting any management right when he agreed to this language. TR. 247.

[11] This right also includes the right to assess independently whether an emergency exists. *See Locals 696 and 2010, AFGE, and*

The evidence presented by the Agency at the hearing demonstrates that its discovery of the Akhter and McClendon conspiracies revealed significant security vulnerabilities with respect to the Agency's ability to secure the PII and sensitive information contained in its facilities. Passport applicants provide the Agency with an original birth certificate, social security number, and a wealth of other PII. A-1.1. As DAS Sprague testified without contradiction: the Agency has about 175 million people's records in its files; every day the Agency adjudicates 30,000 to 40,000 passports; and every day the Agency waited to implement the PED policy exposed another 30,000 to 40,000 people to a known and proven vulnerability. TR. 157, 169.

The evidence shows that the Agency's implementation of the policy without first completing bargaining did not violate Article 12 because the instant situation constituted an emergency within the meaning of both the Agreement and the Statute. The McClendon conspiracy successfully stole applicant PII from more than 1,500 passport applications, and the conspiracy's victims suffered tremendous financial and personal harm. The Akhter conspirators attempted to gain remote access to every current and future record of the Agency's, and the consequences for the American public would have been disastrous had they succeeded. DAS Sprague explained that the Agency could not wait to implement the policy until the completion of bargaining, which both parties acknowledged could have taken multiple years. Union witness Arnold also acknowledged that within 24 hours of its initial announcement of the policy to the Union, the Agency advised the Union that it had decided to implement the policy due to an "emergency". See A-A.

The Agency's lead negotiator for the Agreement testified that the circumstances which prompted DAS Sprague to enact the PED policy constituted an "emergency" within the meaning of the relevant provisions of the Agreement. The Union, the party who bears the burden of proof as to the alleged contractual violation, presented no evidence that the meaning of

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Naval Supply Ctr., Jacksonville, Fla., 29 FLRA 1174 (1987); *IBEW, Local 350, and U.S. Dept. of the Army, Corps. of Engineers, St. Louis District, MO,* 55 FLRA 243 (1999).

"emergency" under the Agreement differs from the statutory meaning and no evidence that the circumstances that precipitated the enactment of the policy did not constitute an "emergency" within the meaning of either authority.

The Agency's determination that continuing vulnerability to theft and appropriation of passport applicant and other sensitive information within its custody and control constituted an emergency was a determination it properly could make under a long line of Authority precedent. *See again Locals 696 and 2010, AFGE, and Naval Supply Ctr.; IBEW, Local 350, and U.S. Dept. of the Army, Corps. of Engineers.* Polson testified that had the Agency waited until the completion of bargaining, it likely would not have implemented the policy until two to three years after it was announced (TR. 263), and Arnold acknowledged that the parties' bargaining process typically is lengthy. TR. 56-57. For this reason, the Agency's determination that implementation prior to the completion of bargaining was necessitated by the emergency itself clearly was reasonable. It also was in accordance with the same line of Authority precedent.

In the present case, the Agency urges the straightforward application of the precedent case *Department of Homeland Security, Border and Transp. Directorate, Bureau of Customs and Border Protection, and NTEU,* 59 FLRA 910 (2004). In that case, the agency implemented a policy prohibiting the use of personal cell phones in primary and secondary inspection areas at ports of entry to the United States after discovering that an agency employee had used a personal cell phone to attempt to allow drug smugglers into the country without an inspection. The union filed a ULP charge alleging violation of 5 U.S.C. §§ 7116(a)(1) and (a)(5), and the Authority's general counsel issued a complaint. After trial, the administrative law judge (ALJ) held that the agency had not violated the statute by implementing the policy without bargaining or advance notification to the union. The ALJ reasoned that the agency "immediately implemented the [policy] to close a serious 'loophole' in border security"; thus "the circumstances which caused the [agency] to issue the [policy] also justified [its] immediate implementation." *Id.* The ALJ concluded that the "overriding exigency" of the agency's need to implement the policy absolved it of any responsibility to bargain prior to

implementation or to provide the union with advance notice of implementation. *Id.* The FLRA affirmed the ALJ's decision. *Id.*

Straightforward application of the precedent case compels the conclusion that in the present case the circumstances which caused the Agency to initiate the PED policy also justified its immediate implementation. The Agency was entitled to implement the PED policy without first completing bargaining, and it violated neither the Agreement nor any other authority when it did so. Accordingly, the Agency asks the Arbitrator to dismiss the grievance as to this claim.

The Agency also contends that any Union claim that one or more of the Agency's May 13, 2015 declarations regarding negotiability or the duty to bargain was improper is untimely pursuant to Article 20, Section 6. This provision requires the Union to file a nationwide claim at the step two/final step level within 30 days of the effective date of the action. The Union had 15 days after its May 13, 2015 receipt of the Agency's declarations regarding negotiability to file a negotiability appeal, which it did on May 25, 2015. But the Union was required under Article 20, Section 6 to file a claim challenging the declarations under the Agreement's grievance procedure no later than June 12, 2015, and it did not file the present grievance until July 14, 2015, more than one month after the deadline had elapsed. The Agency asks the Arbitrator to deny the present grievance as to any such Union claim as untimely.

The Agency also contends that none of its May 13, 2015 declarations of negotiability constituted a violation of the Agreement or law. The Agency declared 38 of the Union's initial 67 proposals to be non-negotiable, outside the scope of bargaining, or otherwise outside the duty to bargain. In the event the Arbitrator considers the merits of any issue regarding these declarations, the Agency sets forth its positions and arguments regarding each of the 38 declarations and asks the Arbitrator to deny the grievance as to any and all Union claims regarding these declarations.

Regarding remedy, the Agency contends that, if the Arbitrator concludes that it violated any applicable authority, none of the Agency actions at issue were "willful" for purposes of determining remedy. The Union presented no evidence that the

Agency's actions at issue were willful in nature, but the Agency provided extensive evidence of why it undertook such actions and its good faith belief in their legality at the time. DAS Sprague testified, credibly and without contradiction, that the Agency implemented the PED policy prior to the completion of bargaining because the McClendon and Akhter conspiracies had revealed a serious security vulnerability regarding the PII of passport applications and other sensitive information within the Agency's custody and control. On May 13, 2015, the Agency made declarations of non-negotiability because, for the reasons set forth above, it believes them to be non-negotiable pursuant to applicable law.

By contrast, the Union admittedly was not acting in good faith when it made multiple of the proposals at issue. At the hearing, Arnold was asked on cross-examination whether the Union believed the Agency had to bargain all 67 of its initial proposals at the time it made these proposals. In pertinent part, he responded that "we realized that some of these [proposals] were asking to bargain the substance of the ban, and therefore, probably were not negotiable." TR. 405. Arnold acknowledged that he believed Proposals 1 and 45 to be non-negotiable at the time they were made. TR. 406-07.

In addition to the evidence of both the Agency's good faith and the Union's lack thereof, DAS Sprague testified that a *status quo ante* remedy in this case would constitute reintroduction of a serious security vulnerability. TR. 176. The Agency submits that if the Arbitrator orders a remedy in the present case, she should conclude that the Agency actions were not willful in nature. Therefore, she should order at most the continuation of the ongoing post-implementation bargaining of the parties rather than a *status quo ante* remedy.

DISCUSSION

The issues to be decided here are: Did the Agency violate the law and/or the collective bargaining agreement when it implemented the PED policy without completing bargaining, and, if so, what is the appropriate remedy? Should the grievance, in whole or in part, be dismissed on arbitrability grounds?

At the threshold, I do not find that the Agency has established that the grievance should be dismissed as not arbitrable, in whole or in part. Indeed, the Agency does not urge me to find that the whole of the grievance, which was filed at the Step 2/Final Step level of the contractual grievance procedure, should be found to be inarbitrable. Nor would such a finding be compatible with the express terms of Article 20, Section 6(c), which provide that a grievance will be filed "directly at the Step 2/Final Step level," rather than at the Step 1 level, in this instance:

> c. Nationwide Issues: In the case of matters affecting more than one office, the Union may file a Step 2/Final Step Grievance.
>
> J-1

There is no dispute that this grievance addresses the Agency's implementation of the PED policy on June 22, 2015 and that this policy applies to all passport offices throughout the country and was implemented on a nationwide basis. On its face, the July 14, 2015 grievance alleges that "the recent Agency unilateral implementation of a ban on personal electronic devices in the workplace...is a violation of relevant legal authorities, including, but not limited to, violation of Article 12 of the Collective Bargaining Agreement." J-2.

The Agency's argument that the grievance should be dismissed as not arbitrable rests on its contention that the Union included in this national grievance two "claims" which each regard only one passport office. The face of the grievance shows that a section captioned Union's Argument follows the statement of alleged violations quoted above. This section sets forth seven numbered paragraphs describing aspects of the June 2015 implementation of the PED ban which the Union asserts differ from the terms of the Agency's April 2015 announcement of the ban. Paragraph 6 refers to the use of a sign-in sheet at

the Houston office, and Paragraph 7 refers to restrictions on access to the Seattle office.[12]

I find no basis in this record to conclude that the Union presented an issue as to the implementation of the PED policy in either the Houston office or the Seattle office as a separate claim within this national grievance. Rather, the evidence supports the Union's assertion that its references to these individual offices, both on the face of the grievance and at arbitration, were part of its presentation of information it received from offices throughout the country regarding the implementation of the PED policy which it challenged in the national grievance. In accordance with my finding that this national grievance does not include separate claims regarding the implementation of the ban at the Houston and Seattle offices, I find that there are no independent issues regarding either of those offices to be decided on the merits here.

The Agency also contends that any Union claim that one or more of the Agency's May 13, 2015 declarations regarding negotiability or the duty to bargain was improper is untimely pursuant to the requirement in Article 20, Section 6 that a national claim must be filed within 30 days of the effective date of the action. The Agency also contends that if I find any claim challenging its declarations regarding negotiability to have been timely filed, that claim should be denied.

As correctly noted by the Agency, this grievance was filed on July 14, 2015, more than 30 days after the Agency issued its declarations regarding negotiability on May 13, 2015. But this grievance does not challenge the May 13, 2015 declarations; rather, the Union properly filed timely negotiability appeals with the FLRA. The grievance filed by the Union challenges the Agency's implementation of the PED policy without completion of bargaining, and this grievance was filed within 30 days of the June 22, 2015 implementation, in accordance with the requirement set forth in Article 20, Section 6.

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[12] An email attached to the grievance addresses changes in opening procedures resulting from the policy's implementation in a particular office.

On the merits, the Agency urges me to apply what it characterizes as the precedent case *Department of Homeland Security, Border and Transp. Directorate, Bureau of Customs and Border Protection, and NTEU,* 59 FLRA 910 (2004), where the FLRA affirmed the ALJ's decision. That case involved the unilateral implementation of interim guidelines which prohibited the use of personal cell phones in primary and secondary inspection areas at ports of entry after the agency discovered that one of its employees had used a cell phone to attempt to allow drug smugglers into the country without an inspection. Those interim guidelines were implemented without notice and an opportunity to bargain.

In *Homeland* Security, a critical initial finding of the ALJ, which was upheld by the FLRA, was that the Union's evidence had failed to establish that the interim guidelines constituted a change to bargaining unit employees' conditions of employment. In that context, the ALJ set forth the reasoning the Agency asks me to adopt in the present case: that the circumstances which caused the agency to issue the interim guidelines also justified their immediate implementation.

I am unpersuaded by the Agency's assertion that *Homeland* Security should be regarded as the precedent case here. The present record establishes that the PED policy constituted a change to the working conditions of the affected bargaining unit employees. Indeed, the undisputed evidence reflects that the implementation of the PED policy had a significant effect on the working conditions of these employees. Beyond mere convenience, the employees had used and relied on their PEDs to stay in touch with, and within reach of, their loved ones and others who often communicate safety-related information about the employees or their loved ones, including physicians and children's schools. As also pointed out by the Union, Agency training manuals specify use of cell phones as critical during an active shooter event.

Under §7116(a)(1) and (5) of the Statute, the Agency had a duty to complete bargaining with the Union before implementing the PED policy. The dispositive issue in the present case is the timing of the implementation of the PED policy -- whether there was an emergency which required the Agency to implement the policy on June 22, 2015, prior to

completing bargaining with the Union. The Agency presented evidence which shows that it decided to adopt the PED ban after it became aware of a significant security vulnerability with respect to its ability to secure the PII and sensitive information contained in its facilities. A federal employee who was a contract worker from 2010 to 2015 at two different passport offices had used her personal cell phone to photograph passport applications and forward biographic information from over 1,500 U.S. passport records to a third party for the purpose of identity theft.[13] It is uncontested that there are about 175 million people's records in the Agency's files, and the Agency adjudicates 30,000 to 40,000 passports daily.

The evidence does not support the Agency's contention that the circumstances which caused it to initiate the PED ban also justified its immediate implementation. The PED policy was designed to be comprehensive and to apply to all individuals inside a facility's hardline. This included all managers, as well as individuals who may not be subject to the same security clearance and background checks as Agency employees, including visitors and contract employees like the one whose theft of PII triggered the PED ban. With respect to bargaining unit employees who are covered under the CBA, the Agency was required to implement the PED policy in accordance with the language of Article 12, Section 7. In relevant part, this provision prohibits the Agency from unilaterally implementing changes in conditions of employment "unless Management is taking an action due to an emergency or in accordance with 5 U.S.C. 7106(a)(2)(D)."

The Agency points out that Section 7106(a)(2)(d) of the Statute recognizes management's right "to take whatever actions may be necessary to carry out the agency mission during

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[13] Shortly thereafter, the Agency also learned of an attempt by two brothers to install a customized device in a server room in the basement of the building in Washington which houses Agency's facilities, as well as its headquarters. One of the brothers was a contract employee who worked in the building but not for the Agency, and the Agency has not shown how its PED policy, even if fully implemented, would have protected its sensitive information from theft had the brothers' attempted installation been successful.

emergencies," and it points to Authority decisions which establish that this right also includes the right to assess independently whether an emergency exists. In this case, however, the Agency was obligated to make that assessment in accordance with the agreed-to definition of "emergency situation" set forth in Article 3: "A sudden, unexpected occurrence or set of circumstances demanding immediate action."

The evidence shows that the Agency decided to enact the PED ban after it discovered in 2015 that a contract employee had been using her PED to steal PII in two different passport offices since 2010. Cell phones with camera capability have been ubiquitous in the general population for many years, and identity theft through various electronic means has been an increasingly common and well publicized occurrence in all sectors of contemporary life. Nonetheless, I am unwilling to find on the basis of this record that the Agency should have expected the sort of internal security breach which occurred in its facilities before it learned of the contract employee's illegal activity. For purposes of the present decision, the controlling question under the Article 3 definition of emergency situation is whether the evidence establishes that the Agency's discovery of the contract employee's use of her PED to compromise the security of its files "demand[ed the] immediate action" of implementing the PED ban as an exception to the Article 12, Section 7 prohibition against the Agency's unilateral implementation of a change in the working conditions of the bargaining unit employees covered under the Agreement.

The evidence fails to establish the Agency's contention that it could not wait until the completion of bargaining to implement the PED policy because, based on its history with the Union, it believed bargaining the PED policy to completion could have taken up to a few years. Following the Agency's April 8, 2015 notice to the Union of its intention to implement the PED policy no later than 60 days later, the Union invoked bargaining and then took all available measures to expedite the completion of the bargaining which took place. The Union agreed to ground rules which included a tight timeline, including an agreement to participate in two days of mediation if the parties failed to achieve resolution during two days of bargaining. When the parties failed to achieve agreement after those steps, the Union also took independent action to expedite

resolution by requesting the assistance of the FSIP on May 27, 2016.

Moreover, the evidence reflects that all bargaining took place in the context of a bargaining dynamic which was shaped by the tight deadline for implementation which was maintained throughout by the Agency. The Agency's April 8, 2015 notification stated its intention to implement the policy no later than 60 days thereafter. After the bargaining and mediation which took place on May 18 through 21, 2015, the parties corresponded in an attempt to clarify their understandings. In a May 25, 2015 correspondence, the Agency stated its intention to move forward in implementing the policy as provided in its notification. By this time, the 60-day period set forth in the notification was due to expire very soon.

Under §7116(a)(1) and (5) of the Statute, the Agency had a duty to complete bargaining with the Union before implementing the PED policy. There is no way to know in hindsight how long it would have taken the parties to bargain the PED policy to completion before implementation, as required under the Statute. But the Agency's failure to satisfy its legal duty to do so cannot now be justified on the basis of its contention that the process would have taken too long.

The Agency also supports its claim that its discovery of the contract employee's use of her PED to steal PII from its files required the immediate implementation of the PED policy by emphasizing the need to protect the security of the PII associated with its adjudication of 30,000 to 40,000 passports each day. But this claim is undermined by the fact that the Agency did not implement the policy until June 22, 2015, approximately 75 days after the Agency notified the Union of its intention to initiate the policy. I find that the Agency's delay of about 75 days shows that implementation of the PED policy was not necessary to the functioning of the Agency.[14]

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[14] As pointed out by the Union, the FLRA upheld the same finding by Arbitrator Vaughn in a case where an agency delayed the implementation of a grooming policy for a month. *Homeland Security United States Customs and Border Protection*, 62 FLRA 263 (2007).

For all the reasons expressed above, I find that the evidence establishes that the Agency violated Article 12 of the CBA and applicable provisions of law when it implemented the PED policy without completing bargaining with the Union. Accordingly, the grievance will be sustained in the Award below.

I conclude that a *status quo ante* remedy is appropriate in the circumstances of the present case. In applying the FCI factors, I note under factor 1 that on April 8, 2015 the Agency gave the Union notice of its intention to enact the PED policy. But it provided only 60 days' notice, even though at arbitration it insisted on the reasonableness of its belief that it would take up to two years to complete bargaining over the implementation of the policy. Under factor 2, the Union promptly requested bargaining and agreed to ground rules which would expedite the process, including two days of bargaining and two days of mediation to be completed by May 21, 2015.

Under factor 3, I do not find persuasive the Agency's claim that the Union did not act in good faith when it presented 67 initial proposals in bargaining, knowing that some of them were not negotiable. These were initial proposals presented at the onset of the process. Also, although the Agency contends that all its actions were taken in good faith belief in their legality at the time, the Agency's approach reflects that it fully realized it had maximized its bargaining leverage by maintaining an inflexible and narrow timeline for implementation starting with 60 days from the initial April 8, 2015 notification. The parties' expedited bargaining and mediation under their agreed guidelines concluded on May 21, 2015, and on May 25, 2015, the Agency notified the Union of its intention to move forward in implementing the policy in accordance with the initial notification, which had set the implementation date as no longer than 60 days after April 8, 2015.

On May 25, 2015, the Union filed a request for assistance with FSIP, and the Agency filed a ULP charge in an attempt to have FSIP deny jurisdiction. On May 28, 2015, the Union filed its first negotiability appeal with the FLRA, and on June 6, 2015 the Agency responded to the Union's request for an update on its negotiability position by stating that it believed

it was required to bargain only one of the proposals in question. On June 22, 2015, the Agency implemented the PED policy. On this record, my assessment under factor 3 favors the Union.

Under factor 4, the evidence establishes that the nature and extent of the impact of the implementation of the PED policy on adversely affected employees was significant. After the policy was implemented, these employees were unable to use their PEDs to stay in touch with loved ones and other people with important connections to their lives. Some of these people, such as doctors and children's teachers, are in a unique position to communicate safety or health-related information which at times is time-sensitive. Also, during the months after implementation before locker installation was completed, there was confusion and uncertainty about the security of employees' PEDs which were stored during working hours.

Under factor 5, I conclude that the Agency's operations would not be substantially disrupted or impaired by an order requiring a return to the *status quo* until bargaining has been completed. There is no evidence that the operation was affected in any way between April 8, 2015, when the Agency gave notice of the PED policy, and June 22, 2015, when the policy was implemented about 75 days later. The potential for disruption further will be diminished because I will stay the order for a *status quo ante* remedy for a period of 120 days to permit the parties to complete bargaining.

Finally, pursuant to Article 22, Section 4, the Agency, as the losing party, will be directed under the Award below to pay the Arbitrator's bill for fees and expenses in the present case. In this circumstance, it is unnecessary to address the Union's contention -- raised at the arbitration hearing -- that the Agency should be responsible for paying the Arbitrator's bill pursuant to Article 20, Section 9(g).

AWARD

For the reasons expressed above, I find that the Agency violated Article 12 of the CBA and applicable provisions of law when it implemented the PED policy without completing bargaining with the Union, and the grievance is sustained. I order a *status quo ante* remedy, which is stayed for 120 days from the date of the issuance of this Award to provide the parties with an opportunity to complete bargaining.

Pursuant to Article 22, Section 4 of the CBA, the Agency is directed to pay the bill of the undersigned Arbitrator, including the cost of fees and all expenses.

Kathleen Miller
Arbitrator