



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

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Grievance between the Parties

March 23, 2009

To: Brenda Sprague, Deputy Assistant Secretary of State for Passport Services
cc: Florence Fultz, Managing Director of Passport Services
Gary Roach, Passport Operations Director
Dottie Flaak, Director – Passport Services Office of Field Coordination
Winnie Fuentes, Operations Officer
Steve Rojas, Operations Officer
Steve Polson – Chief, Labor-Management Relations - Department of State
Steve Flory – Business Representative, National Federation of Federal Employees
Susan Grundmann – General Counsel, National Federation of Federal Employees

Re: Notational policy and notational error rates

In accordance with Article 20, Section 8 of the Agreement Between Passport Services and the National Federation of Federal Employees-Local 1998 (hereafter referred to as “the Agreement”), I am filing this Grievance between the Parties on behalf of the bargaining unit employees of Passport Services regarding changes in notational policy and notational error rates in violation of statutory and contractual authorities. These changes are in violation of the Agreement and 5 U.S.C. Chapter 71.

Some relevant portions of the Agreement and Statute

Article 4, Section 1:

The goals of the Union/Management Cooperation Agreement are to further the agency mission, foster more productive and cost effective service to the agency's customers, and enhance the working conditions and morale of the employees.

Article 6, Section 3:

Employees shall be kept informed of rules, regulations and policies under which they are obligated to work. Such information will be given to each new employee and will be highlighted during orientation sessions for new employees.

Article 4, Section 6:

It is the purpose of this Agreement to involve employees and union representatives as full partners with management representatives. To this end, the Union/Management Council shall consider problems at the predecisional stages, crafting solutions to promote the Department's objectives, serve the customers, and meet employee needs; and design and create procedures and practices to achieve bilateral resolution of issues between labor and management....

Article 12:

1. The Parties to this agreement have the responsibility to conduct negotiations and other dealings in good faith and in such a manner as will further the public interest.

2. MANAGEMENT OBLIGATION:

a. The Employer agrees to give reasonable advance written notice to the Union and the opportunity to negotiate any new or change in personnel policy or practice affecting working conditions of unit employees, which is proposed during the life of the Agreement. Negotiation as appropriate on issues which are Management rights will also be handled in accordance with this Article.

b. Notification may include a final date for the Union to request negotiations with respect to the proposed change.

In no case shall such final date be less than fifteen (15) calendar days from receipt of the notification of the proposed change. When the notification does not include a final date for the Union to request negotiations, and the Union wishes to negotiate, the Union shall make such a request within thirty (30) calendar days from the date of receipt of the notification. Nothing herein shall preclude the Parties, by mutual consent, from extending or reducing any time limits imposed under this Section.

Article 18, Section 2:

The performance appraisal system and the parts that make up the system as applied to bargaining unit employees will permit, to the maximum extent feasible, the accurate evaluation of job performance on the basis of objective criteria, and will be fair, reasonable, equitable and job related....

Article 18, Section 4:

The development of performance standards and critical elements will be established in writing for each unit position and will be provided to the employee within 30 days after the beginning of an appraisal period. They will be consistent with the duties and responsibilities covered in each employee's position description. Employees will be afforded an opportunity to participate in the establishment of performance standards, the identification of critical elements, and may make suggestions about the methods used to measure the quality and quantity of work being

done. Before the date of implementation all employees will be provided a copy of any new performance standards and critical elements....

5 U.S.C. § 7116. Unfair labor practices:

- (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;
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 - (5) to refuse to consult or negotiate in good faith with a labor organization 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.

Facts of the case

No nationwide notational policy

There is no standardized notational policy. In accordance with Article 1, Article 4, and Article 12, Management had sent most draft copies of revisions to the Passport Services Green Instructions to the Union in advance for comments, and possible negotiations, and then later sent all draft copies of the 7 FAM revisions to the Union for the same purposes after the decision was made to replace the Green Instructions with 7 FAM instructions.

On November 9, 2007 Management sent to the Union the draft 7 FAM 1340 (mislabeled as 7 FAM 1370 in the email subject line), titled "Examination and Adjudication of Passport Applications", with a response due by November 30, 2007. The Union voiced disagreement with some elements of the draft. To begin with, a number of the notations no longer made any sense, having been rendered obsolete by steps now performed on-screen for every passport application. Secondly, the sheer number of notational requirements made it unlikely that any passport adjudicator could actually perform them to a 99% degree of accuracy.

Thus, barring the possibility of managers and supervisors at the local level turning a blind eye to a literal reading of the instruction, the entire adjudicative passport workforce would be rated unsuccessful based on the draft instructions. The Union did respond on time with numerous suggested and proposed changes, and also timely invoked the Union's right to bargain over this subject. The Union subsequently inquired on the status of this draft but it has never been implemented and no reply has been received from Management either to the Union's proposals or to the suggested changes.

The Union made it exceedingly clear how important this draft instruction was, as it goes to the heart of one important duty that adjudicators perform on a daily basis – namely, making notations on passport applications.

Since that input from the Union, a new and different version of the passport application form has gone into use (with a further form revision in progress). In that nearly 1 ½ year time span, Management has not announced any subsequent draft (or final version) of a nationwide notational policy. The draft from

2007 was never implemented. The Union has not heard of any progress on the notational error rate since.

The notational policy has never been shared with the Union or the employees, or posted online where the other 7 FAM provisions are contained.

Employees in 2008, and on into 2009, continued to make notations as they had been trained to do previously. Considering different offices, different trainers, different supervisors, different versions of the National Training Program (NTP), and the fact that many adjudicators never attended the NTP, there are a wide range of different notations being made by adjudicators in each office and from office to office.

No notational error rate

In 2007, the Union filed a grievance regarding the notational errors being charged to a Passport Specialist, arguing that the rating the employee received was not fair or reasonable.

Starting in late 2007, and in accordance with Article 1, Article 4, and Article 12, Management worked with the Union on the development of new performance elements for Passport Specialists that were announced on May 22, 2008 and made effective on June 1, 2008.

As agreed to by the Parties, the wording of the new performance elements were largely a combination of the previous elements with the standardized wording to be used Department of State-wide on the new DS-7644 appraisal form. Those new elements for 2008 did include the *date error rate* for Passport Specialists exactly as it had done in 2007, 2006, 2005, and 2004 (e.g., 1% allowable data error rate for the GS-9/11 levels). They also included a line about accurately recording “citizenship” and “identification” documents (e.g., birth certificates and driver’s licenses) that was in the previous elements since 2004. However, the new elements omitted the notational error rate for Passport Specialists that had been in the appraisal for 2004, 2005, 2006, and 2007 (e.g., 1% allowable notational error rate for the GS-9/11 levels). The Union agreed to this, and assumed that Management had intended this on purpose, in response to the issues raised in the 2007 grievance and considering the unfinished notational policy begun in late 2007.

Apparently the omission was an oversight, as Management communicated with the Union about adding the notational error rate back into the elements for 2008 after they were implemented. The Union did not agree and expressed this, along with invoking bargaining rights once again, on June 6, 2008.

There was no notational error rate proposed to the Union for inclusion in the 2009 elements. The 2009 elements distributed to employees still did not contain any notational error rate. Employees were never notified of any notational error rate requirement in advance.

To be clear, the line in the job elements about accurately recording citizenship and identification evidence was a separate and distinct requirement from the notation error rate in 2004, 2005, 2006, and 2007, and when Management noted that the notational error rate was missing in 2008 it stated a desire to include a notational error rate for 2009 after the Union rejected the idea of adding it late for 2008. The notational error rate covered issues like circling the place of birth, marking the application for names to be cleared, and circling an “R” for regular passport, etc.

Advance notice

On Thursday, February 26, 2009 HQ Management emailed the Union with a “courtesy copy” of a memo titled “Adjudication Program in all Agencies/Centers”. The text of the email said nothing about notational policy or error rates. The same memo was sent by HQ Management that same day to all Regional Directors and Assistant Regional Directors, but in the email text it stated:

Attached is a memorandum on our 2009 Adjudication Program. In the last paragraph and as mentioned during the teleconference yesterday, employees will not be rated on production number averages for the 2009 rating period. We will rate employees on notational and data errors in 2009. I know that the notational error language was not included on the 2008 performance plan. We will need to add it to the plan for 2009, but don’t make any changes to your employee’s plans at this time. I will get back to you on that.

A Regional Director forwarded the memo to staff in her office and the Union received the email text above about the notational error rate in that manner.

The Union did not receive notice of any changes in performance elements relating to notational error rates for 2009. Nevertheless, the Union invoked our right to bargain (and submitted some proposals) over any proposed change in notational error rates on February 27, 2009.

Notational error rate for 2009 – being applied or not?

As the email from HQ did not state when or how the notational error rate would be added, it was certainly within the realm of possibilities that it would be added in accordance with contractual and statutory requirements (e.g., notifying and negotiating with the Union, and applying prospectively). After hearing from many employees and Union representatives that it appeared that a notational error rate was being implemented already, on March 5, 2009 the Union inquired about the following:

1. We are seeking confirmation that, consistent with the contract (especially Article 12 and Article 4), Management will not enact a notational policy and add a notational error rate until bargaining with the Union is completed
2. Employees will not be measured against the notational error rate from the 2007 elements because they are not included in the 2009 elements at this time
3. Management will respond to the Union’s November 2007 input and proposals on the notational policy, and work with the Union consistent with Article 4 and Article 12, prior to promulgating a new national notational policy

On March 10, 2009 the Union emailed HQ to check on whether a response was going to be forthcoming, and noted that it appeared that an Unfair Labor Practice (ULP) had been committed by implementing the change in working conditions without negotiating with the Union. The Union inquired again on March 10th and March 13th about whether responses were being sent by hard copy/regular mail or if an email reply was being sent. To this day, the Union has received no reply.

At the same time, the Union kept hearing from numerous employees that it appeared that a notational error rate was being applied. To determine whether this was just a misunderstanding or whether a change had actually been made, Union representatives in various offices checked with supervisors and managers.

Supervisors and/or managers in Seattle, Colorado, Miami, NPC, Los Angeles, New Orleans, Washington, and CPC said that employees are being measured against a notational error rate. Supervisors and/or managers at NPC, Boston, or CPC said either that a notational error rate is not being applied or that notations are being looked at but no strict 1% rate is being applied (CPC and NPC are mentioned twice because we received conflicting information from different supervisors).

Therefore, in many Passport Agencies/Centers, employees are in fact having their performance measured against a notational error rate standard.

Union's Argument

Advance notification required; changes should be prospective

The Union did not receive advance notice of the change to apply a notational error rate, and employees did not receive advance notice either. Management is required by law and contract to provide the Union with advance notice of any new change in working conditions, whether at the local level or implemented nationwide. Certainly, a notational error policy would be among the most significant changes Passport Specialists would deal with.

A supervisor in one office emailed a manager about whether it was required to notate the place of issuance for Naturalization Certificates, and the reply from the manager was:

I asked our RTC about this issue. She stated that the place of issuance was not consistent at all agencies and that specialists were advised to follow their agency procedures. There were advised that it is good practice to include the place of issuance. Here at <OMITTED> we use the place of issuance.

The new 7FAM draft that is currently being reviewed does list the place of issuance.

This reveals that the draft 7 FAM provision is being “currently” reviewed, yet despite repeated requests to bargain the Union has not heard a word from Management about this instruction.

Employees have received numerous and changing instructions on what notational policies to follow. There is mass confusion. There is a contractual requirement to notify employees of what policies they should follow. It goes against reason, and the contract, to count as notational errors things that employees have not done before. It is not fair to count notations, or the lack of notations, as errors, and then use that as a negative basis in determining whether to “release” the employee to adjudication or in evaluating the employee’s performance. Employees should not be negatively impacted in their evaluations, opportunities for assignments, awards, and promotions on the basis of notational policies and error rates that are being implemented in violation of the law and the Agreement.

A “notational error” is a failure to properly notate the application in accordance with the notational policy – because there is no standardized notational policy, and employees have been trained differently from one office to another and even within the same offices, then it is putting the cart before the horse to charge errors against the ill-defined and unfinished policy.

Regarding the notational policy, first the policy should be developed, next employees should be informed and trained on the policy, and then – and only then – employees can be expected to make the desired notations. Regarding the notational error rate, first the rate should be proposed to the Union by

Management, next any relevant bargaining (Article 12) or cooperative discussions (Article 4) should ensue, next the performance work requirements would have to be updated to reflect the additional duty, and then – on a prospective basis only – employees could be measured against the notational standard.

Developing a standardized, nationwide notational policy

Passport Management has appropriately notified and negotiated with the Union on similar matters in the past, which makes the current silence all the more concerning:

- FAM Changes: Management invited and considered Union suggestions on other Foreign Affair Manual (FAM) revisions in accordance with the Agreement (Articles, 1, 4 and 12).
- Passport Specialist job elements: Last year, Management notified and negotiated with the Union the content and layout of the new national critical elements for Passport Specialists, utilizing input gathered by the Union from Passport Specialists.
- Passport application forms: When the passport application forms (e.g., DS-11) were changed a few years in ways that made them less user-friendly and less effective for Passport Specialists, the Union filed a grievance, and Management committed to working with the Union on the next revisions. Management has followed through on that – in the next set of revisions to the application forms (still ongoing) Management has involved the Union appropriately and put the input to use.

The notational requirements inherently rely on the layout of the application form, the critical element rating system, and content of the FAM. Clearly, if Management can and should negotiate over the latter three subjects, Management can and should notify and negotiate as appropriate over the notational requirements.

As stated in the input provided previously by the Union on the draft 7 FAM 1340, the notational policy needs to be updated to reflect the technology, practices, and needs of adjudication in the new millennium. Archaic and unnecessary notations should be eliminated as they serve no useful purpose. For each notation being considered for inclusion in the policy, we should first ask “Why do we make this notation? What information does it convey? Is it necessary?” If there is no good reason for a notation, then it should no longer be required.

Establishing a reasonable notational error rate

There is a significant difference between the data error rate and the notational error rate. To stay within the allowable data error rate (1% for GS-9’s and 11’s), the adjudicator has to look at the evidence and the application and compare them to the TDIS computer screen. If all is in order, then the adjudicator would take no action on the computer screen and simply approve the application electronically. For many applications, the adjudicator would make no entries or type any changes on the computer screen. To stay within any potential notational error rate, the adjudicator would have to take positive, visible actions to perform the assigned duty of making notations correctly. Contrasted with the data error rate, to meet a notational error rate expectations an adjudicator would never be able to take no action – the adjudicator always has to do something (writing notations) to meet a notational error standard, while often may be able to visibly do nothing (other than looking/checking) to meet the data error standard.

An adjudicator may have to make 15 or 20 notations or marks on a DS-11 application to meet any future notational error rate standard. For an adjudicator producing 156 applications in an 8-hour day (the Fully Successful standard), that would mean between 2340 and 3120 notations (and the draft 7 FAM 1340 would have potentially required thousands more notations each day). That's at least 2340 chances each day to make an error. If just 2 notational errors are made, 1 each on 2 separate applications, that would exceed the 1% allowable notational error rate that was in effect in the past. So, what looks like a performance expectation that requires compliance a lofty 99% of the time would in truth be a performance expectation that requires compliance up to exceedingly difficult 99.94% of the time (3118/3120). That may explain why there are such divergent notational policies from one office to another, from one generation of NTP graduates to another, and from team to another. Whatever allowable notational error rate that will be implemented in the future, in accordance with the Agreement and the law, must be one that is reasonable, fair, and possible of performance.

Requested Relief

The Union respectfully requests that Management honor and abide by the Agreement and the law and not apply a notational error rate and not implement a notational policy until contractual and legal obligations are met first. We respectfully request that Management acknowledge the violation and commit to correcting it. The notational error rate, and a notational policy, should be implemented on a prospective basis, not on a retroactive basis and not in an ongoing, changing basis.

- The Union should receive advance notice of proposed changes in the notational policy and of proposed changes in performance elements, including any notational allowable error rate.
- Only after bargaining is completed should the notational policy and error rate be implemented.
- The notational policy and error rate should be implemented on a prospective basis only.
- Employees should receive advance notice of the notational policy and error rate, and be given sufficient training on the policy and sufficient time to read and understand the policy and error rate and how it will apply to them.

Conclusion

NFFE Local 1998 is ready and willing to work cooperatively with Passport Services Management to quickly develop and complete the notational policy, to draft an MOU addressing training and time requirements for employees to learn the new policy, and to implement the addition of a reasonable allowable notational error rate into the critical performance elements on a prospective basis. The Union does not object to a notational policy. Indeed, we welcome a reasonable policy because notations on the passport application are part of creating a record of the evidence submitted on this important legal document. The Union also does not object to a notational error rate. The allowable error rate should be one that is reasonable fair, and is possible of performance by Passport Specialists. The Union only seeks to have the notational policy and error rate developed and implemented in accordance with statutory and contractual requirements.

Thank you for your consideration.

Sincerely,

Colin Patrick Walle
Union President – IAMAW FD1 NFFE Local 1998