

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION
WASHINGTON, D.C.

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 09 FSIP 65

DECISION AND ORDER

The National Treasury Employees Union (NTEU or Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse, under 5 U.S.C. § 7119 of the Federal Service Labor-Management Relations Statute (Statute), between it and the Department of Homeland Security, Bureau of Customs and Border Protection, Washington, D.C. (CBP or Employer).

Following an investigation of the Union's request for Panel assistance concerning the Employer's Use of Force Policy Handbook, the Panel determined that the matter should be resolved through an informal conference with a Panel representative. Under this procedure, if no settlement were reached during the meeting, the Panel representative would notify the Panel of the status of the dispute, including the final offers of the parties, and his recommendation to the Panel for resolving the issues. After considering this information, the Panel would take whatever action it deems appropriate, which may include the issuance of a binding decision.

In accordance with this procedure, Panel Member Donald S. Wasserman met with the parties on January 26 and 27, 2010, in the Panel's offices in Washington, D.C. During those sessions, the parties were able to resolve 13 of 14 issues. The remaining issue concerns whether Customs officers who carry weapons should be able, at their discretion, to routinely store their weapons at the workplace when off duty. At the close of the meeting,

the parties were directed to submit to the Panel and each other their final offers and summary statements of position. The Panel has now considered the entire record, including the parties' post-conference statements and Member Wasserman's recommendation for resolving the dispute.

BACKGROUND

The mission of the CBP is to protect U.S. borders from terrorism, human and drug smuggling, illegal migration, and agricultural pests while simultaneously facilitating the flow of legitimate travel and trade.^{1/} The Union represents a bargaining unit consisting of approximately 22,000 professional and non-professional employees; the majority hold positions that require them to carry weapons. Until an initial master collective-bargaining agreement between NTEU and CBP is effectuated, the parties generally are following the provisions of the agreements that existed between NTEU and the legacy agency, the U.S. Customs Service, Department of Treasury.

The dispute arose during negotiations over the Employer's decision to implement a CBP-wide handbook that establishes policy on the use of force. Prior to becoming part of CBP, the U.S. Customs Service had its own handbook that governed the use of force, as did the U.S. Border Patrol. Recently, CBP determined to develop a single generic policy on the use of force that would replace the previously separate policies. The dispute herein arose during negotiations over the impact and implementation of the new policy on the bargaining unit represented by NTEU.

^{1/} In 2003, Congress created the CBP as part of the Department of Homeland Security. The CBP consists of parts of three "legacy" agencies: (1) U.S. Customs Service, Department of the Treasury, where NTEU was the exclusive representative; (2) the U.S. Border Patrol, Immigration and Naturalization Service (INS), Department of Justice, where the American Federation of Government Employees (AFGE), Border Patrol Council was the exclusive representative of employees; and (3) the Agriculture Quarantine and Inspection Service, Department of Agriculture, which was represented by the National Association of Agriculture Employees. Currently, the Customs and Border Patrol components of CBP have separate bargaining units of employees represented by two different labor organizations, NTEU and AFGE, respectively.

Under existing CBP policy, armed employees are issued gun locks and lockable storage containers so their weapons can be stored at their residences when off duty. Employees are trained on the use of that safety equipment and the proper storage of their weapons. According to the Employer, employees who have safety or security reasons for not storing their Government-issued weapon at their residence typically are accommodated by managers who allow the weapon to be stored at the workplace when the employee is off duty. While management currently finds a way to accommodate a need for off-duty storage of weapons because of safety and security concerns expressed by officers, many posts of duty do not have the space and/or secure facilities to routinely store weapons at the workplace. The Union believes that employees should have the option of off-duty workplace storage of their weapons, without having to divulge to management a reason for doing so; to that end, the Employer should take the steps necessary to accommodate employee interest.

ISSUE AT IMPASSE

The parties essentially disagree over whether Customs officers should be allowed to store their weapons at their workplace when off duty, on a routine basis, without having to articulate a reason for wanting to do so.

POSITIONS OF THE PARTIES

1. The Union's Position

The Union proposes the following:

A. CBP will ensure that either a lockbox or other secure and locked container such as a safe, file cabinet, locker or desk is available at all Government offices where armed employees work or are assigned. Routine off-duty storage of a firearm in a Government office, including overnight storage, is permitted.^{2/}

^{2/} A substantively identical proposal was found negotiable by the Federal Labor Relations Authority (FLRA) in National Treasury Employees Union and United States Department of the Treasury, United States Customs Service, 62 FLRA 321 (December 14, 2007) (Chairman Cabaniss dissenting), on remand from the U.S. Court of Appeals for the District of Columbia Circuit in National Treasury Employees Union v. FLRA, 404 F.3d 454 (D.C. Cir 2005) (reviewing National

B. CBP will provide routine off-duty storage of a firearm at all locations where armed employees work for those who express an interest in off-duty storage. CBP will solicit employee interest in off-duty storage within the first 30 days of the effective date of this policy. Employees will have at least 14 days to provide a response. All responses will be provided to the local NTEU Chapter. CBP will consult with the local NTEU Chapter to discuss the best way to solicit employee interest.

C. CBP will make off-duty storage of a firearm available to those who expressed an interest pursuant to the procedures set forth in B above, within 6 months of the effective date of this policy.

D. CBP will solicit employee interest in off-duty firearm storage as set forth in B, above, on either an annual or fiscal-year basis as determined by CBP. CBP will provide off-duty storage to those who expressed an interest immediately, if available, but in no case no later than 3 months from the solicitation of employee interest.

E. In those locations where routine off-duty storage of a firearm is not yet available, CBP will provide such storage upon request, absent just cause.

F. Either party may reopen this provision after the new policy has been in effect for 1 year.

The Union's proposal would guarantee routine off-duty storage of a firearm for any employee who expresses an interest. The Union contends that having this option would remove the "burden" of off-duty storage of weapons from officers who, involuntarily, are required to keep their weapons at their residences when off

Treasury Employees Union and United States Department of the Treasury, United States Customs Service, 59 FLRA 749 (2004) (Member Pope dissenting)), where the FLRA held that the Union's proposal was an appropriate arrangement for employees because it does not excessively interfere with the Agency's right to determine its internal security practices, affect its right to assign work to employees or determine the technology, methods or means by which work is performed.

duty and, instead, shift that burden to CBP which has an obligation to maintain security for weapons. Allowing weapons to be stored at the workplace would have the collateral effect of potentially reducing an officer's liability associated with theft or loss of a weapon. Moreover, children and other members of the officer's household would not be exposed to the dangers of having a deadly weapon at the residence. Management would have the discretion to determine how it would secure the weapons at the workplace, thereby allowing the Employer to make judgments regarding its internal security practices. As to implementation, the proposal establishes reasonable time frames for CBP to solicit employee interest in routine off-duty storage and make it available to those who expressed an interest in it. According to the Union, off-duty storage of weapons already is available at 259 of 326 duty locations and, therefore, it would be possible for CBP to make off-duty storage available immediately to officers at some duty locations on a routine basis, and not only for cause.^{3/} The provision that requires annual solicitation of employee interest would keep current the level of employee interest in off-duty storage of weapons. Finally, a reopener provision, after 1 year, would allow the parties to make adjustments to the off-duty storage policy, as necessary.

2. The Employer's Position

The Employer's preferred position is for the Panel to order both parties to withdraw their proposals; in the alternative, it proposes the following:

22.A. In areas that do not provide discretionary off-duty storage for Agency-issued firearms, the Port Director (or designee) will consider individual authorized officer requests for temporary off-duty storage. In reviewing requests, management must consider if the facilities provide adequate security to accommodate off-duty storage. At duty locations that do not already provide for discretionary off-duty storage, each request will be considered on a case-by-case basis and the authorized officer's need to

3/ Information concerning the number of duty locations where off-duty storage of weapons currently is available was provided by CBP to NTEU in response to an information request by the Union. It is unknown, however, whether the 259 locations that currently permit off-duty storage do so merely upon request or for cause.

temporarily store their weapon based on the hierarchy below:

- 1) Authorized officers experiencing significant hardships will be provided off-duty storage.
- 2) Remaining off-duty storage at a duty location will be open to authorized officers for discretionary use.
- 3) In the event a duty location cannot accommodate discretionary off-duty storage, the authorized officer will continue to use the current acceptable methods and means for off-duty storage provided by CBP.

B. To ensure that new or retrofitted facilities will have adequate (e.g., storage to accommodate at least 25-percent of armed employees) off-duty firearms storage, CBP will add on-site storage capability to the technical design standards. Once a new facility is scheduled for construction or an existing location is scheduled for retrofitting, CBP will inform NTEU in accordance with existing agreements and practices.

C. Inasmuch as it is unclear how many authorized officers may take advantage of off-duty storage access, in the event CBP is saturated with off-duty storage requests (or the inverse) and the demand cannot be accommodated (or the inverse), either party may reopen this section and address these issues in negotiations using data obtained from implementing sections A and B above.

According to the Employer, the Panel should order the parties to withdraw their proposals because the Union has failed to demonstrate a need to change existing policies and practices concerning firearms storage. In this regard, it has submitted no evidence to support its position that employees should have absolute discretion to leave their firearms at the workplace when off duty; thus, it is questionable that there is a problem that needs to be addressed. The established practices are highly effective in both accommodating employees who may have a hardship reason for wanting to store their weapons at work and, at the same time, utilizing the storage capacity at the diverse physical plants of the more than 300 CBP duty locations. A recent Inspector General report on firearms control concluded

that CBP's policies for safeguarding firearms were sufficient, but it reported problems (theft and loss) when personnel failed to comply with the established safeguarding procedures. Other than those unique situations when having a weapon stored at an officer's residence may pose a safety hazard, there is no need to keep firearms at duty locations when officers are off duty. Officers are thoroughly trained in how to safeguard their weapons, and are issued a gun lock and pistol case for secure storage at a residence, including a temporary residence such as a hotel while on TDY. Changing existing practices concerning off-duty storage of firearms could be costly to implement because it would require additional construction at facilities to accommodate off-duty storage since not all facilities currently have capacity; moreover, additional security measures may have to be implemented to safeguard weapons kept on site.

If the Panel is not persuaded that the parties' proposals should be withdrawn, the Employer's proposal should be adopted because it provides a better resolution of the issue. In essence, management would consider requests for temporary off-duty storage on a case-by-case basis at facilities that do not already provide for discretionary (routine) off-duty storage. Requests by officers who seek off-duty storage of their weapons for hardship reasons would be accommodated first; thereafter, if any storage at the duty location is still available, it would be open to officers for discretionary use. At duty locations that cannot accommodate discretionary off-duty storage, officers would continue to use the current acceptable method and means for off-duty storage provided by CBP. Any new or retrofitted facilities would be designed to accommodate off-duty storage for at least 25 percent of armed employees, providing future benefits to bargaining-unit employees who work in areas that currently do not permit off-duty storage at the employee's discretion. Inasmuch as it is unclear how many officers may want off-duty storage, if CBP is "saturated" with such requests (or the inverse) and the demand cannot be accommodated (or the inverse), either party would be permitted to reopen bargaining to make adjustments to the policy, as needed.

CONCLUSIONS

After carefully considering the record established by the parties in this case, we are not persuaded that either side has proposed a satisfactory resolution of the issue. The Union has provided only anecdotal evidence concerning the extent of employee interest in off-duty storage of firearms at the

workplace.^{4/} In fact, its proposal places the burden on the Employer to solicit officer interest in routine off-duty storage. Without such evidence, we are reluctant to require the Employer to make significant changes in current practices, particularly where the cost of implementation is uncertain. Additionally, requiring the Employer to conduct a yearly survey appears administratively burdensome, and it is unclear how the parties would deal with data from surveys revealing both an overcapacity of off-duty storage at a duty location and diminishing employee interest in off-duty storage of weapons. Moreover, the 30-day time frame for completing employee surveys may be difficult to meet at some locations should the parties at the local level disagree over how they should be conducted. We also believe that some of the terminology used in the proposal is vague and may lead to grievances over its interpretation and application; for example, it is unclear how CBP is to "solicit employee interest," whether CBP has to negotiate with the Union over the solicitation process, and how the results of the employee survey should be interpreted.

Turning to the Employer's position, ordering the parties to withdraw their proposals is unacceptable because it would: (1) permit differing practices on off-duty storage of weapons to continue, depending on the duty location, including those that give management total discretion to determine which officers should be permitted to store their weapons at the workplace and for how long; and (2) require employees to divulge the reason for wanting off-duty storage of their weapons, even when there may be enough secure storage available to accommodate all employees. In our view, it is preferable for the parties to be guided by a single consistent approach to off-duty storage of weapons instead of relying on local practices at over 300 duty locations. As to the Employer's alternate proposal, it appears to guarantee off-duty storage of weapons only for those who articulate a hardship that requires accommodation. Although the proposal would allow off-duty storage of firearms in "areas" that already provide discretionary off-duty storage, it is unclear how many or few such areas there may be. We note that, while there is information in the record that 259 of 326 duty locations permit off-duty storage of weapons, the data do not show whether any of those locations routinely accommodate off-duty storage or whether storage capacity is reserved only for "hardship" situations. Furthermore, the proposal does not

^{4/} The Union's failure to provide hard evidence is conspicuous given the many years it has been attempting to bargain with the Employer over its proposal.

provide a time frame for reopener bargaining; without one, a dissatisfied party could immediately reopen negotiations without having "lived" under the terms of the agreement for any length of time.

Given the absence of evidence concerning the extent of employee interest in routine/discretionary off-duty storage of weapons at the workplace, we shall order the parties to adopt compromise wording that, among other things, permits such storage at work locations where management determines that its facilities are adequately secure. In this regard, allowing officers to keep their weapons at work, instead of storing them at home while off duty, may reduce their liability for lost or stolen weapons and keep household members out of harms way. In the event that there is some secure space available at a facility for off-duty weapons storage, but not enough to accommodate all interested officers, priority for off-duty storage is to be given to those with a demonstrated need, followed by those who have seniority status at their post of duty. Since it is unclear how many employees would avail themselves of discretionary off-duty storage of their weapons, we shall not require CBP to expend funds to renovate current facilities merely to provide such an option for armed employees which may never be fully utilized. New or retrofitted facilities, however, should be constructed to accommodate off-duty storage for a minimum of 25 percent of armed employees, thereby ensuring that many officers would be able to exercise discretion to store their weapons at work when off duty. Should the parties engage in reopener bargaining over off-duty storage, they may do so after the agreement has been in effect for 1 year. In preparation for such negotiations, they will be required jointly to determine the level of employee interest in routine/discretionary off-duty storage. Gathering such information will allow the parties to negotiate on an informed basis and, ultimately, provide a third party with record evidence to resolve any impasse that may arise. Finally, requiring the agreement to run concurrently with the parties' MCBA will provide them with some stability on the issue of off-duty storage of weapons.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted pursuant to the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal

Service Impasses Panel under § 2471.11(a) of its regulations hereby orders the parties to adopt the following wording:

Off-Duty Storage of Firearms

A. Off-duty storage for Agency-issued firearms at the discretion of armed employees, including overnight storage, shall be permitted only at facilities the CBP determines currently have storage available that is adequately secure.

B. Where CBP determines that a facility has adequately secure storage, but the facility does not have the capacity to fully accommodate employee interest in off-duty storage, employee requests for off-duty storage of their weapons shall be granted in the following order:

1. Authorized officers experiencing significant hardships will be provided off-duty storage.

2. Remaining off-duty storage at a duty location will be open to authorized officers for discretionary use with priority granted on the basis of seniority service at the post of duty.

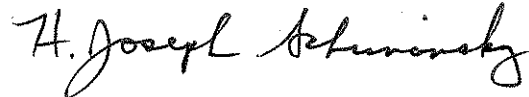
3. This language is not intended to diminish the availability of secured storage provided under current practice at individual facilities.

C. To ensure that new or retrofitted facilities will have adequate off-duty firearms storage (*i.e.*, storage to accommodate at least 25 percent of armed employees), CBP will add on-site storage capability to the technical design standards. Once a new facility is scheduled for construction or an existing location is scheduled for retrofitting, CBP will inform NTEU in accordance with existing Agreements and practices.

D. Either party may reopen the provisions concerning off-duty storage of firearms after the policy has been in effect for 1 year. In preparation for reopener bargaining, the parties shall jointly determine employee interest in off-duty firearm storage. Thereafter, the provisions, including any modifications thereto, shall remain in effect

concurrently with the master collective-bargaining agreement.

By direction of the Panel.

A handwritten signature in cursive script, reading "H. Joseph Schimansky".

H. Joseph Schimansky
Executive Director

May 17, 2010
Washington, D.C.