

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 BORDER PATROL COUNCIL,  
AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO

Case No. 09 FSIP 47

DECISION AND ORDER

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

After investigating the request for assistance the Panel determined that the dispute, which concerns CBP's Use of Force Policy Handbook, should be resolved by directing the parties to submit the issues to a facilitator/factfinder of their choosing. If any issues remained unresolved after the facilitation phase, the factfinder was to issue a report with recommendations to the parties for resolving the issues.<sup>1/</sup> If a party did not accept the factfinder's recommendations, it was to notify the Panel and the other party. Thereafter, the Panel would take whatever action

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1/ Ultimately, the factfinder issued a report with recommendations on three issues, two of which were resolved voluntarily by the parties. On the remaining issue, the factfinder recommended adoption of the Employer's proposal.

it deemed appropriate to resolve any remaining issues. Pursuant to its procedural determination, the Union notified the Panel and the Employer that it did not completely accept the factfinder's recommendation on the one issue that remains at impasse and submitted its proposal concerning the matter. Subsequently, the Panel directed the parties to show cause why it should not adopt the recommendation of the factfinder. In accordance with the Panel's instructions, the parties timely submitted their responses to the *Order to Show Cause*. The Panel has now considered the entire record.

### BACKGROUND

CBP's mission is to protect U.S. borders from terrorism, human and drug smuggling, illegal immigration, and agricultural pests while simultaneously facilitating the flow of legitimate travel and trade. The Union represents a bargaining unit consisting of approximately 15,000 non-professional employees; the majority are law enforcement officers who hold positions as Border Patrol agents. The parties follow, as past practice, a collective-bargaining agreement (CBA) that expired in 1998.<sup>2/</sup>

### ISSUE AT IMPASSE

The parties disagree over whether an employee who is involved in an incident where intermediate force (baton, Oleoresin Capsicum spray, etc.) is used should complete the form (CBP Form 318) that documents the incident.<sup>3/</sup>

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2/ The CBA was between the Union and a "legacy" agency, the Immigration and Naturalization Service, Department of Justice.

3/ The form is used by CBP's Office of Training and Development, among other things, to evaluate the need for additional training. The parties agreed to adopt the portion of the factfinder's recommendation requiring supervisors to complete CBP Form 318 when the incident involves a shooting.

POSITIONS OF THE PARTIES

1. The Union's Position

The Panel should not impose the factfinder's recommendation that, "(i)n addition to the other reporting procedures contained in Chapter 6.F of the Handbook, employees shall report intermediate force incidents to UFPD<sup>4/</sup> by utilizing CBP Form 318--Reportable Use of Force Incident Data (Appendix VI, also available as an e-form on CBPnet."<sup>5/</sup> Instead, it should order the adoption of the following wording to resolve the parties' impasse:

CBP supervisors shall send reports through their respective chains of command. Copies of the written reports shall be sent to the appropriate AC and to the Director of UFPD within 10 business days or as soon as practical. Incident reports shall also be made to UFPD by supervisors on CBP Form 318--Reportable Use of Force Incident Data (Appendix VI, also available as an e-form on CBPnet), based on reports submitted in accordance with the provisions of this chapter. Note: Bargaining unit employees shall not be required or allowed to complete, modify and/or submit CBP Form 318.

The Union is "extremely concerned" that imposition of the factfinder's recommendation "would needlessly place employees in administrative or even civil or criminal jeopardy" by requiring them to provide information that could be used against them in such proceedings. This is the case notwithstanding the fact that employees have the right to Union representation. In this regard, it is likely that a fair number of them would fail to recognize the need for such representation when they fill out the form "because they routinely fill out a variety of forms without adverse consequences." The recommendation also is inconsistent with the Use of Force Policy Handbook, which

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4/ UFPD refers to the Use of Force Policy Division which is part of CBP's Office of Training and Development.

5/ In recommending the adoption of the Employer's proposal, the factfinder commented that it "be adopted with the understanding that employees have the right to Union representation in accordance with the parties' collective bargaining agreement."

establishes two different types of reporting requirements for the intermediate use of force, one for incidents that result in serious physical injury or death and another for all other intermediate use of force incidents. The factfinder's recommendation would require employees involved in the former type of incident to fill out CBP Form 318 even though the policy prohibits them from making a written statement regarding such incidents. Inasmuch as the information sought on the form can be found in other reports submitted shortly after an intermediate use of force incident "there is no valid justification for requiring" employees to complete the form. Finally, the Employer's unilateral implementation of the form during the pendency of this impasse is the subject of a grievance and it would be improper for the Panel to rule on this issue until the matter is resolved through the arbitration process.

## 2. The Employer's Position

The Union has failed to demonstrate why the Panel should deviate from its "long history" of adopting factfinders' recommendations. In this connection, the factfinder had a fully developed record and resolved all the remaining issues before him. The Employer adopted his findings, "despite some misgivings," to maximize the chances of an agreement, and "there is neither compelling evidence nor arguments which would warrant non-adoption of the factfinder's recommendation." Contrary to the Union's position that unit employees should not be required to complete the form, a first-person description of events would ensure the accuracy of event data and allow the UFPD to improve training, equipment, tactics and policy throughout the CBP. Moreover, as acknowledged by the factfinder, any information collected from employees on the form would be in accordance with the safeguards and protections included in the CBA. Finally, the Panel should be persuaded to adopt the factfinder's recommendation "inasmuch as the plain language of the Union's proposal would create an absolute prohibition on management directing an employee to fill out CBP Form 318 for intermediate force incidents and therefore excessively interferes with management's statutory rights."

## CONCLUSIONS

Having carefully reviewed the parties' responses to the *Order to Show Cause*, we shall impose the factfinder's recommendation to resolve the impasse, supplemented to require that the following statement be included on CBP Form 318:

"Employees covered by a collective-bargaining agreement are advised that they have the right to Union representation in accordance with their agreement." In our view, factfinders' recommendations deserve deference, particularly where, as here, extensive efforts are made to develop the record, the recommendations are supported by clear rationale, and they otherwise appear to be legal. Given the Union's legitimate concerns that the information employees provide could be used against them in a disciplinary, civil or criminal proceeding, and that employees may fail to recognize the need for Union representation when filling out the form, it is reasonable to supplement the factfinder's recommendation by requiring that a reminder of a unit employee's right to Union representation be included on the form. This is particularly so because the factfinder was clear that his recommendation to adopt the Employer's proposal was conditioned on his understanding that employees have the right to Union representation in accordance with the parties' CBA. The Panel's decision perfects the factfinder's intention.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel under § 2471.11(a) of its regulations hereby orders the following:

The parties shall adopt the factfinder's recommendation supplemented to include the following wording on CBP Form 318, "Reportable Use of Force Incident Data":

Employees covered by a collective bargaining agreement are advised that they have the right to Union representation in accordance with their agreement.

By direction of the Panel.



H. Joseph Schimansky  
Executive Director

July 2, 2010  
Washington, D.C.