In the Matter of

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

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 12 FSIP 60

ARBITRATOR'S OPINION AND DECISION

The National Treasury Employees Union (Union or NTEU) 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, 5 U.S.C. § 7119, between it and the Department of Homeland Security, Bureau of Customs and Border Protection, Washington, D.C. (Employer, CBP or Agency).

After an investigation of the request for assistance, which arises from bargaining over a new rotation assignment for certain Customs and Border Protection officers, the Panel directed the parties to mediation-arbitration with the undersigned. Accordingly, on June 20 and 21, 2012, a mediation-arbitration proceeding was convened in the Panel's offices in Washington, D.C. with representatives of the parties. During the mediation phase, the parties addressed their interests and positions with respect to the issues, but they were unable to come to a voluntary resolution of all issues at impasse and, in particular, the key issue of the length of the initial overseas tour of duty. The matter, therefore, has been submitted for arbitration. In reaching my decision, I have considered the entire record, including the parties' final offers, documents submitted during arbitration, and the parties' post-hearing written statements of position.[1/]

1/ It is noted that at no time has the Employer raised a duty-to-bargain issue to the Panel.

BACKGROUND

The Employer's mission is to prevent terrorists and terrorist weapons from entering the U.S. It also is charged with the interdiction of drugs and other contraband, and the prevention of individuals from illegally entering the country. The Union represents a nationwide unit consisting of approximately 24,000 employees, who work primarily as CBP officers.[2/] The parties' are covered by a master collective-bargaining agreement (MCBA) that is in effect until May 11, 2014.

The events that gave rise to this bargaining dispute began with successive missteps by CBP's legacy agencies, the U.S. Customs Service, INS and the Department of Agriculture that went unnoticed for many years by the Department of State, the ultimate authority for determining the number of U.S. Government employees working abroad and the conditions under which they are employed. Starting in 1987, INS and Agriculture hired certain persons already living abroad to undertake immigration and agricultural inspections, respectively, and placed them in preclearance[3/] locations under the wrong appointment authority--an "overseas limited appointment" of indefinite duration. Such an appointment neither confers permanent civil service status on the employee, nor does it allow an employee to receive certain benefits for working in an overseas post of duty, such as housing or education allowances. These employees were then assigned to the preclearance locations where they were living.[4/]

2/ On May 18, 2007, the Federal Labor Relations Authority certified NTEU as the exclusive representative of a consolidated unit that consists of employees from other bargaining units within the former U.S. Customs Service; the Department of Justice, Immigration and Naturalization Service (INS); and the Department of Agriculture, Agriculture Quarantine and Inspection Service.

3/ Preclearance allows U.S.-bound air passengers to obtain advance approval to enter the country from established airport locations in Canada, the Caribbean and Ireland. A key objective of passenger preclearance is to interdict those who may be a threat to the U.S. before they board planes bound for the U.S.

4/ According to the Union, as of June 28, 2011, there were 23 such employees working in preclearance locations in Shannon and Dublin Ireland, Aruba, Bermuda, Freeport and Nassau. Currently, only seven of those employees are affected by

Similarly, during the same time period, INS hired other personnel who also were living abroad in preclearance locations, mostly in Canada, where they were ultimately assigned. Unlike the first group of locally hired employees, those in the second group were hired as permanent civil service employees, although many were part-time. Neither group of locally employed staff received the traditional preclearance benefits such as housing and education allowances because of a State Department regulation, and rotation to the U.S. was affirmatively stated as not being a condition of their employment. Their preclearance posts were designated as their permanent duty stations.

In 2005, after the Department of Homeland Security was created, preclearance local hire employees were informed that they were required, as a condition of continued employment, to attend and pass a 16-week CBP training course at the Federal Law Enforcement Training Center (FLETC). Those with overseas limited appointments were told that, upon completion of the training, their hiring status would be converted to "full time permanent positions." The employees attended and passed the training given in the U.S. and returned to their foreign posts of duty; however, they were later informed by CBP that it had made an error regarding the conversion of their status to full time permanent positions and, therefore, they would not be converted because of the manner in which they were initially hired.

The other group of preclearance local hires (the permanent employees) also was ordered to take the FLETC training. Those working part-time were given the option of choosing a fulltime appointment upon completion of training but were told they would have to agree to rotate to the US as a condition of going full time. At least some employees completed the training but declined to be converted to fulltime because of the disruption to their lives posed by agreeing to a rotation requirement.

By letter dated August 6, 2008, the Employer informed NTEU that it had come to its attention that 15 local resident American employees hired and working in Ireland on overseas limited appointments in preclearance were serving under improper appointments and that action was necessary to "remove these

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the parties' dispute, the majority of whom are stationed in Ireland. The rest either have agreed to rotate to the U.S., pursuant to an *interim* NTEU-CBP agreement entered into by the parties in May 2011, or they have left CBP employment.

employees from their current appointment authority." Three options were described. Employees could: (1) resign from CBP and work for the Department of State; (2) apply for a position with CBP in the U.S.; or (3) resign from CBP. Finding all three options unsatisfactory, NTEU began working with Members of Congress to correct the original mistake of hiring the Ireland-based employees under the wrong appointment authority. Ultimately, Public Law 111-252 was passed, and signed by the President in 2010, which changed the original hiring status of the employees from "overseas limited appointments" to "permanent appointments." The law also provided that employees whose positions were converted to permanent appointments were to receive equivalent "services and monetary payments" provided by CBP to other CBP officers hired under the correct appointment authority but which had been denied to those serving under overseas limited appointments. The legislative history contained language encouraging the Employer to avoid negative consequences for the impacted employees, as they were at no fault in the situation, with the House Report specifically stating its concern with involuntary rotation. This language is set forth in the footnote below.[5/]

5/ In passing H.R. 1517, which became Public Law 111-252, the House included in its report the following:

> The Committee recognizes that there is a general rotation policy in place for CBP employees but believes that this small, distinct group is in a unique position that warrants special consideration. Therefore, the Committee encourages the Commissioner to ensure that this conversion of these employees shall be implemented in a manner that does not negatively affect employees currently serving in these posts. In particular, it is the Committee's intent that the Commissioner should take the past histories and individual circumstances of each employee into consideration to the greatest extent practicable, especially with respect to CBP's personnel rotation policy. Further, it is the Committee's intent that employees covered by this Act should not be involuntarily relocated from their current posts of duty, unless the Commissioner demonstrates that doing so is necessary to meet CBP's operational requirements.

At the time, the parties were unaware that there were other employees, hired under the same types of appointments as those in Ireland, working in Aruba, Bermuda, Freeport and Nassau. Apparently, they also were not aware of the situation involving the permanent local hires in Canada. Although the record is not clear about the details, at some point, the Agency determined that all these US resident local hires working for CBP in preclearance would be subject to the rotation policy, hence the parties' negotiations concerning both groups. The Employer and the Union agree that their MOU covers:

- "Recently converted employees pursuant to PL 111-252 and the Parties' MOU dated May 27, 2011 who did not volunteer to rotate to the United States in accordance with Article 40 of the Collective Bargaining Agreement."

(This group also may be referred to as the "Ireland group" since most are based in Ireland. Currently, there are seven employees in this group.)

- "All other locally hired employees working in Preclearance serving under permanent appointments in the competitive service."

The Senate report, that accompanies H.R. 1517, includes the following:

> Neither CBP nor the Department of State have been able to provide the Committee with a satisfactory answer as to how these individuals could have been hired outside of State's usual process for overseas limited appointments and why their status has not been addressed before now. Nevertheless, the individuals in question have, by all accounts, been exemplary employees and should not be held responsible for irregularities and inconsistencies in the hiring processes for overseas limited appointments at the INS, the Department of Agriculture, and the Department of State. . . . The Committee urges CBP and the Department of State to work together in order to minimize the impact on these individuals and their families.

(Hereinafter the "Canada group." There are eleven employees in this group.)[6/]

The Union's final proposal requests one additional "catch-all" category as indicated below.

CBP's overseas preclearance operations employ about 500 employees. The rest of CBP's 24,000 employees work in the United States.

ISSUES at IMPASSE [7/]

The parties disagree over these issues:

(1) The language of the MOU's introductory section I and the description of the groups of employees to be covered by the parties' agreement contained therein.
(2) The duration of the preclearance overseas assignment.
(3) The duration of the rotation period in the U.S.
(4) The extent to which employees will be guaranteed return to their prior overseas post of duty at the conclusion of their U.S. tour.
(5) Whether part-time employees will be entitled to consideration of a request for fulltime status upon return to overseas assignment after a U.S. rotation.
(6) The effective start date of the initial overseas tour of duty.
(7) The timing of notices concerning the rotation requirement to be given to employees by the Employer.
(8) The timing of notices to be given by employees concerning rotation for a U.S. tour of duty.

6/ In effect, this means that the Employer has agreed to treat these two groups the same with regard to rotation and related matters even though only the situation of the first (Ireland) group was considered by Congress and addressed by P.L. 111-252. The one area where the two groups do differ is in regard to eligibility for allowances. The Union's final proposal assumes that the Canadian group is not currently eligible, and that the point when that might change is after such employees have served a rotation in the U.S., which is also the Employer's view.

7/ The Parties are in agreement concerning some provisions in the MOU. Essentially, this list of issues describes the matters on which they remain apart.

(9) Whether a "formal discussion" should be scheduled with the affected employees to explain the agreements reached in the MOU and whether this must occur prior to the notice;
(10) Whether employees may request leave in excess of 40 hours to make arrangements for their U.S. rotation.
(11) Under what conditions employees returning to an overseas post after a U.S. rotation will no longer be considered "local employed staff" and receive all preclearance benefits.
(12) Whether the agreement will require that the Union be given an opportunity to bargain in the event that preclearance operations in the host country, including the assignment of any employee covered by the MOU to preclearance, is not approved by the State Department.

POSITIONS OF THE PARTIES

1. **The Union**

The Union would have the Memorandum of Understanding (MOU) apply not just to the two groups agreed upon by the parties but also to: "Any other preclearance employees who were hired with the understanding that they would not have to rotate to the United States or were given permission to work in pre-clearance without the requirement to rotate to the United States." This is meant to encompass any employees who are not presently identified.

The Union would allow employees to remain at their preclearance posts for up to 14 years through a succession of seven "virtually automatic" 2-year tours of duty, acknowledging that for most of the effected group this will mean no rotation will be necessary.[8/] According to the Union, the Employer's decision to require rotation by CBP officers hired with the understanding that they would not have to rotate to the U.S. directly contravenes the intent of Congress. The legislative history of the law clearly indicates that, in converting the officers to permanent positions, there should be minimal impact on their personal lives. Many employees have worked at their foreign posts for many years and have never worked in the U.S.; all have families who reside near their current posts, and several employees are the sole caretakers of elderly parents and children living in the communities where the employees work.

8/ It appears that after 14 years the majority of affected CBP officers would be eligible for Federal retirement.

They have married foreign nationals, purchased homes, and they and their families have established deep roots in the communities where they reside, on the understanding that they had permanent work assignments. Testimony and letters submitted by these officers demonstrate the extent of disruption to their personal lives should they be required to rotate to the U.S., including the impact of leaving behind elderly parents and children who may be receiving special services from local schools and the devastating economic effect of having to sell a home abroad and move to the U.S. Those married to foreign nationals would face separation, or the spouse's loss of employment and important benefits. The Union contends that the Employer has failed to identify any countervailing Agency operational interest that would require the rotation of these employees to the U.S.[9/] Although it believes that the Employer's rationale for rotation is unpersuasive and management should exercise a "grandfather" option whereby affected employees would not have to rotate to the U.S. at all, since the Employer refuses to abandon a rotation requirement the Union must contain the impact of the change.

The Union proposal, therefore, contains these additional provisions. Between 180 and 120 days before a 2-year preclearance tour of duty ends, officers would be required to indicate whether they desire to rotate to the U.S. or extend their tour abroad for another 2 years, not exceeding a total of 14 years. The U.S. rotations would be for a 3-year period at the home port of the employee's choice. Upon completion of the U.S. assignment, the officers would be permitted to return to their prior preclearance post abroad, whether a vacancy exists or not. The first 2-year tour of duty abroad would begin on the date when the Employer notifies the officer of the requirement to rotate to the U.S.(after the Panel decision.) Such notice would

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9/ According to the Union, the Employer has offered the following reasons in support of its "forced rotation proposal," none of which implicate CBP operational considerations:

> Management wants to make all employees equal and uniform . . .
>
> Management would like to make the converted preclearance employees as much like the ones covered under the contractual article as possible.

be served on the employees and the Union, no sooner than 1 month of the effective date of the MOU.

The Union further proposes that since employees may not have lived in the U.S. for many years, they should have the ability to request more than 40 hours of administrative leave or excused absence to make relocation arrangements. In this regard, employees may require more than 40 hours to find and furnish housing and enroll children in U.S. schools.

The Union is proposing that all employees completing a US rotation be given status that makes them eligible for housing allowances and educational benefits. This would extend to employees not covered by PL 111-252 the benefits provided by that law since there is no reason to treat this group differently. When NTEU went to Congress it was simply without knowledge of how many employees were facing a mandatory requirement to rotate to the U.S. despite the hardships presented, and despite being hired and working for many years with a clear understanding that rotation was not a condition of their position. It is only because of the difference in the nature of their appointment that some employees remain ineligible for allowances even though they do the same work, are similarly trained, and now, will be subject to rotation.[10/]

To address an inequity in the legislation, where part-time employees hired under limited appointments were not covered, the Union proposes that the Employer give fair and objective consideration to converting those employees to full-time status, if the work is available, thereby allowing them to receive the usual benefits of working abroad at a preclearance post. Allowing employees to convert from part-time to full-time status, if the work is available, would circumvent an arbitrary aspect of State Department regulations that denies preclearance benefits to employees working a part-time schedule. Preclearance benefits would not attach in this situation until the employee fulfills a U.S. rotation and returns to the prior preclearance location.

10/ Adopting a 3-year U.S. rotation, rather than the 5-year period proposed by the Employer, creates an incentive for employees in this group to volunteer sooner for a U.S. rotation knowing that completion of a U.S. tour requirement would permit them to receive allowances they cannot receive now.

The Union proposes that the Employer convene formal discussions with affected employees, with the Union fully participating, before employees are given notice of the new rotation requirement. It maintains that such a meeting would be useful in dispelling any misconceptions, explaining the rotation requirements, and addressing employee concerns about a change that would surely impact their personal and professional lives.

Finally, the Union urges that it should be given an opportunity to bargain if the State Department fails to approve preclearance operations in a particular country and/or the assignment of any employee covered by the MOU to a preclearance post of duty. This is necessary given that there has been a significant amount of misinformation and breached promises on the part of the Employer leading up to this impasse.

Although the Employer is not relying on economic reasons to justify its position, the Union points out that limiting the frequency of rotation to the U.S., as it proposes, would save the Employer large sums of money for expenses it would otherwise incur in more frequently relocating employees and their families to and from the U.S.[11/]

2. **The Employer**

The Employer proposes that coverage of the MOU should be limited to the two categories of "unique" employees about which the parties agree, and include no "catch-all" category.

The Employer agrees that the "overarching issue" in this dispute is the number of years employees covered by the MOU should work abroad at their preclearance posts before they rotate to a U.S. assignment. It proposes that the preclearance assignment for these employees should last for no more than 7 years, and consist of three tours lasting for 2-year periods, followed by a 1-year tour of duty. Each successive tour would be "automatic."

11/ During the arbitration proceeding, a former CBP fiscal manager testified (and this was subsequently confirmed) that the Agency budgets an average of $50,040 per family for moves to and from preclearance duty locations. One Union witness testified that it cost the Employer $77,983 to move his 3-member family from a preclearance post and another testified that it cost CBP $87,951 to move his 5-person family to a preclearance post of duty.

The Employer points out that the legislation does not waive the rotation requirement, and maintains that its proposal satisfies the intent of Congress in that it both meets the operational needs of CBP and, to the greatest extent practicable, is not disruptive to the employees affected. The Employer sites two primary operational reasons for its proposed 7-year rotation. First, it is important for security reasons that officers not remain at a foreign post of duty for extended periods lest they become too friendly with the locals and open up opportunities for security lapses. No other Government agency allows its employees to remain at duty posts abroad for extended periods. The reason is to help ensure vigilance of the mission. Maintaining ties with the US is also important. "All officers rotate because that helps protect the Officer and helps protect the CBP mission." The Employer relies on a decision of the Panel in *Department of Justice, Immigration and Naturalization Service and National INS Council, American Federation of Government Employees*, Case No. 98 FSIP 162 (1998), (*DOJ*) to support its argument that the Panel has recognized the operational need it cites here and approved instituting rotations to the U.S. in a much shorter period than is being proposed here.

The second operational need of the Agency is for uniformity. It is essential to treat all officers in the bargaining unit in a consistent manner in order to avoid "animus" among employees based on differential treatment that can lead to a "volatile mix" at Preclearance locations. PL 111-252 created equality in eligibility for allowances; there should be equality in the application of rotation requirements as well. The purpose of allowances is to compensate employees for overseas assignments. Employees covered by PL 111-252 became eligible for allowances when their positions were converted in July 2011. If employees are receiving allowances "it is with the understanding that they will have to rotate back to the US." This "goes to the heart of the rotation issue."

The MCBA provides for 5-year preclearance assignments. While the Employer is willing to give employees affected by this impasse 2 additional years at a preclearance post, to take employees' personal needs into account, extending their tours any longer would not only jeopardize their mission-critical ties to the U.S., but promote resentment by other employees who have to relinquish their preclearance assignment after only 5 years. There may also be resentment by bargaining-unit employees working Stateside, particularly those assigned to less desirable locations, who want the opportunity for a preclearance

assignment. If officers are allowed to remain at their current preclearance posts of duty for 14 years, as the Union proposes, these others will be denied the chance for a career-enhancing assignment at a preferred location.

The Employer would make the initial 2-year tour start on the date that positions were converted under PL 111-252.[12/] For those not covered by the legislation, an employee's initial 2-year tour would commence on the date of the FSIP decision in this case. The Employer opposes the Union's position that the "clock" for determining an initial 2-year rotation should start on the date notice of the rotation requirement is served on the employees because it would have the effect of allowing employees, the majority of whom already have had their positions converted to competitive service over a year ago, to add another year to their time abroad before the clock starts for determining their initial tour under the MOU.

As to the period of rotation in the U.S. for affected employees, the Employer maintains that its proposal of 5 years is aligned with the provisions in the parties' MCBA which requires, after a preclearance assignment is fulfilled, that an officer must have a 5-year rotation assignment in the U.S. before becoming eligible for another preclearance assignment. One of management's objectives in seeking a five-year U.S. rotation is to integrate these officers, who have been working abroad for extended periods of time, into the mainstream of CBP officers. All CBP officers should have the same period of rotation in the U.S. so that they have an opportunity to experience other duties consistent with their position, deal with new environments, and receive greater opportunities for training.

Once the 5-year U.S. rotation has been completed, the employee would have priority for returning to their prior preclearance location if there is a vacancy; if no vacancy exists, the employee would have priority for filling the next available vacancy. For employees not currently receiving allowances, if they return to their preclearance location, such benefits may be afforded to them presuming that they have met legal requirements and the State Department concurs with the authorization of allowances for officers returning to their overseas posts of duty.

12/ The record reflects that the positions held by preclearance employees covered by the legislation were converted to competitive service appointments on July 3, 2011.

The Employer is willing to provide officers with 40 hours of administrative leave to attend to relocation arrangements, which is in accordance with the MCBA. In addition to administrative leave, employees working in foreign posts of duty also have the right to "home leave" which they could use to make relocation arrangements.

The Employer's proposal gives it the right to determine the timing of its communication to employees about the matters covered by this case, and provides that it will not be delayed by any formal meeting involving the Union. As to the Union's proposal that the Employer conduct formal meetings or discussions with employees there remains the question of whether the Employer would pay for a Union representative to travel to the meeting or meetings. The issue was not discussed during bargaining and the Employer has not agreed to it.

Finally, the Employer proposes that the terms of the MOU expire "once all of the negotiated terms . . . are fulfilled." (The Union has no expiration date.)

CONCLUSIONS

Having carefully considered the arguments and evidence presented in this case, I conclude that the impasse should be resolved on the basis of a modified version of the Union's proposal.

The issue here is not whether the parties' agreement will contain a rotation requirement. Both sets of proposals contain one. The question is how that rotation requirement should balance the appropriate considerations presented. The Arbitrator takes no exception to the operational needs for a general rotation policy for officers assigned overseas that have been presented by the Employer. She appreciates the particular concerns about those working in law enforcement. However, the issue here is not whether a general rotation policy should be in place, but whether there is an operational need to insure that *these particular employees* rotate to the United States when Congress has expressed itself thusly: "[I]t is the Committee's intent that employees . . . should not be involuntarily relocated from their current posts of duty unless the Commissioner demonstrates that doing so is necessary to meet CBP's operational requirements." While the *potential* problems that a rotation policy is designed to prevent are well laid out by the Employer, as to these specific employees, there was nothing demonstrated as to actual or likely problems. For this

specific small group of unblemished employees, mandatory rotation is being put forward as the only way to "protect them and the CBP mission" from compromise when there was no evidence at all of any concern ever being raised about these individuals or any reasons to suspect that they might compromise the Agency. Consequently, the Arbitrator does not find that the integrity issues raised by the Employer rise to the level of an operational necessity for having all these employees rotate.

The other pillar of the Employer's rationale for insuring rotation is uniformity. The difficulty is that the situation involving these employees is simply not the same as that of CBP officers. Making this group "uniform" is to subject them to consequences to which their peers are not exposed. There is no evidence that any Stateside employee can be forced to go to Ireland for 5 years with no right of return. The fact is that, relying on formal hiring documents and repeated supervisory pronouncements, these employees made critical personal decisions that will now lead to substantial hardship if they are forced to rotate on the schedule proposed by the Employer. This means their situations are not the equivalent of other officers.

But will allowing them to be under different rotation rules create such a level of animus from other employees that an operational necessity exists in any case, as the Employer argues? Only one specific, identified complaint was provided to the Arbitrator and, frankly, that letter is full of assumptions and suggestions that make the Arbitrator question whether the writer had full possession of the facts concerning these employees. The possibility that misinformation may be the more serious cause of animus is confirmed by the testimony of two Ireland-based employees who described some resentments being expressed at the time of the Congressional action based on misinformation, for example, that the impacted officers were not trained in law enforcement or doing law enforcement functions. In truth, they have gone through the training and they do what all CBP officers do in overseas locations. None of the testimony, from Union or Employer witnesses, described a continuing problem of conflict between employees or poor morale.[13/]

13/ Given that the Employer created this entire situation it is disturbing that apparently little or no effort was made to create understanding in the rest of the workforce about the special situation of these officers and the fact that they had all gone through officer training in recent years. It seems to the Arbitrator that an effort of that type might

But what about the impact of lengthy rotations on the opportunities of other CBP officers to have overseas Pre-clearance assignments? Is this such a real prospect as to create an operational necessity for getting these employees out of their positions? What the record offers is a speculative problem, not a demonstrated one. No evidence of actual complaints was offered nor were statistics offered demonstrating how many officers seek the preclearance assignments. Given that almost the entire 24,000 CBP officer workforce is U.S.-based, it is not self-evident that working overseas is a widespread expectation or desire for many people. Nor do we actually know that 482 (rather than 500) preclearance slots are insufficient to meet the demand. We do not know whether, currently, there are "waiting lists." Here, the number of "occupied slots" will predictably and steadily decrease as the "protected group" retires. The Arbitrator cannot help but note that the Agency was for years *itself* blocking U.S.-based officer rotation to some preclearance positions by using "local hires" like the employees involved here. How does this align with the concern now being urged? Did officers complain about this? It is notable that the Employer was still filling preclearance jobs this way as late as 2002, and sending people back to open-ended preclearance jobs after officer training as late as 2009.

Beyond urging that insuring rotation is needed to "protect the Officers and . . . protect the CBP mission," and to achieve necessary uniformity, the Employer insists that having accepted allowances (through conversion of their positions) the employees (at least those covered by the legislation) have accepted rotation, and they cannot have one without the other. Perhaps that argument could make sense in a situation like the one presented to the Panel in the *DOJ* case, but here it misses the point that Congress, which provided the conversion and eligibility for allowances, made no such linkage. It did not make rotation a *quid pro quo* for the benefits. The Report language makes clear there was no automatic connection being made in this instance, even if it exists as a general rule.

Thus, given the options presented, the Arbitrator will adopt the Union's proposals on the length of overseas and U.S. rotations. It is fully acknowledged that the Employer made special provisions and alterations from the standard rotation rules in its proposal: employees are guaranteed the US work location they choose, they are given 7 years as their initial

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actually have prevented the "animus" the Employer is citing as problematic.

overseas rotation instead of the usual five and they are given priority consideration for returning to their previous Preclearance post. But the fact remains that the case for "operational necessity" has not been made, in my view, at the same time that the hardship on employees is uncontroverted.

That leaves the rest of the disputed issues. Starting with the Introductory section, the Arbitrator believes that the simplest language is the best, and that applying the MOU to a known universe of employees is the most prudent. As to the return to the original Preclearance post, the Arbitrator will adopt the Union's language. The Union's current proposal on part time employees is to allow them to request a change to fulltime status and receive "fair and objective consideration" "based on available work." Given the past link made by the Employer between fulltime status and applicability of rotation, it seems appropriate to include this language since there is now a rotation policy applicable to these employees. As to the effective date for starting the initial overseas tour of duty the Arbitrator disagrees with the Employer's assertion that employees covered by the legislation knew, upon conversion of their positions and eligibility for allowances, that they were now subject to rotation. Actually, there was no reason for them to assume that fact since the law did not state this and Congressional reports discouraged involuntary changes in work location that would cause individual hardship. The matter has been in dispute between the Employer and Union ever since. The Arbitrator will therefore adopt a modified version of the Union's proposal. For the language about the timing of employee requests concerning rotation back to the U.S., the Arbitrator will adopt the Union's formulation that mirrors the language in Article 40. Concerning time for making relocation arrangements, the Arbitrator will adopt the Union's language accepting the existing 40 days but allowing employees additional time, if a request is approved by the Employer. With regard to the change in status of employees returning to a Preclearance post after rotation to the U.S., the Arbitrator will adopt a version of the Employer's language since the reality is that this is conditioned on certain legal requirements and State Department approval. As to timing of notices about the rotation requirement, the "no less than one month" from the MOU in the Union's language does not create an undue delay but the Employer's concern is addressed by making it clear that this period is not to be extended because of the timing of formal discussions with employees. Finally, the order adopts the Union's language requiring bargaining should Preclearance operations not be continued or State Department approval of an

employee assignment not be forthcoming with no prejudgment about the scope of that bargaining.

DECISION

The parties shall adopt the following to resolve the impasse:

Memorandum of Understanding between the U.S. Customs and Border Protection and the National Treasury employees Union Concerning Preclearance Employees Who Have Not Been Required to Rotate to the United States

I. Introduction

This Memorandum of Understanding (MOU) between United States Customs and Border Protection (CBP or Agency) and the National Treasury Employees Union (NTEU or Union) specifically addresses these preclearance employees who have not previously been required to rotate to the United States:

Recently converted employees pursuant to PL 111-252 and the parties' MOU dated May 27, 2011, who did not volunteer to rotate to the United States in accordance with Article 40 of the collective-bargaining agreement, and

All other locally hired employees working in preclearance serving under permanent appointments in the competitive service.

II. Terms

1. The procedures of Article 40 of the CBP-NTEU collective-bargaining agreement will apply to the above-referenced employees as modified by this MOU.

2. Subject to continuation of preclearance operations in the host country and Chief of Mission and Department of State approval, the following rotation requirements will apply. Absent such "continuation" and/or "approval" CBP will provide notice and bargain with NTEU in accordance with the procedures set forth in

Article 26 of the parties' national collective-bargaining agreement.

A. Employees will be allowed to remain at their preclearance overseas locations for up to 14 years.

B. For purposes of this 14-year period, employees will serve up to seven successive 2-year tours of duty.

C. No more than 180 days before the end of the tour and not less than 120 calendar days prior to the end of the initial tour, as well as the conclusion of any extension, employees are expected to formally request an extension or express intent to return to the United States. Employees expressing intent to return to the United States will indicate the home port where they will be reassigned.

D. Subsequent to their rotation to the United States, employees will be reassigned to their prior preclearance location, upon request, after they have served at least 3 years in the United States.

E. For employees currently ineligible for preclearance allowances (housing, education), upon returning to their prior preclearance location as set forth in D above, they will no longer be considered ineligible to receive such benefits on the basis of being "locally employed staff" subject to meeting legal requirements and State Department approval.[14/]

14/ The Employer both verbally and in its proposal has stated that it believes that eligibility may be achieved in this situation subject to establishing residence in the United States and subject to State Department agreement with this interpretation of the regulations concerning allowances. The intent of the language ordered by the Arbitrator is that the Employer will make a *bona fide* effort to achieve approval of allowances for this group of employees.

F. For purposes of rotation to the United States, the date to be used for determining the beginning of the employees' first 2-year tour of duty will be the date of the arbitration award, August 7, 2012.

G. Notice of the rotation requirement contained in this MOU will be served on affected employees, with a copy to NTEU National, within one (1) month following the effective date of this MOU as set forth in provision III below.

3. CBP will give fair and objective consideration to an employee's request to convert from part-time to fulltime status based on available work to be performed.

4. A. In accordance with applicable law and regulation (including the Federal Travel Regulations), employees rotating to the United States under this MOU will be entitled to the same relocation benefits provided to other returning preclearance employees.

   B. Employees rotating to the United States under this MOU will be provided up to 40 hours of administrative leave or excused absence without charge to leave in order to make relocation arrangements considering the fact that these employees have not lived in the United States for quite some time, if at all. Upon request and approval, additional administrative leave may be used for such arrangements.

5. Employees covered under this MOU will not be required to execute a service agreement in the current preclearance location requiring them to remain employed in the Federal service for any minimum period. Such employees will be free to seek other employment or to resign without any requirement that they repay any benefits or allowances.

6. The parties shall jointly meet with affected employees, either in person or by teleconference,

to explain the changes in rotation policy and to answer employee questions.

III. <u>Effective Date and Termination</u>

The effective date of this MOU is 31 days after the date signed or after agency head review, whichever occurs first. This MOU may be reopened by either party in accordance with the parties' collective-bargaining agreement.

Mary E. Jacksteit
Arbitrator

August 7, 2012
Takoma Park, Maryland