

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

DEPARTMENT OF STATE
PASSPORT SERVICES AGENCY
WASHINGTON, D.C.

and

LOCAL 1998, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, FEDERAL
DISTRICT NO. 1, IAMAW, AFL-CIO

Case No. 14 FSIP 89

DECISION AND ORDER

The Department of State, Passport Services Agency, Washington, D.C. (Employer) 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 Local 1998, National Federation of Federal Employees, Federal District No. 1, IAMAW, AFL-CIO (Union).

Following investigation of the request for assistance, which arose during bargaining over the impact and implementation of the Employer's decision to require passport specialists to upgrade their security clearance from high public trust to secret, the Panel directed the parties to resume negotiations over numerous unresolved provisions with the assistance of Federal Mediation and Conciliation Service Commissioner Gary Eder. The parties were advised that if any issues remained at the conclusion of mediation, the mediator would submit their final offers to the Panel and, at his discretion, make written recommendations for settlement to the parties and the Panel on those issues. The Panel would then issue a binding decision after taking whatever procedural action it deemed appropriate to resolve the dispute.

Two issues remained at the conclusion of mediation. One issue subsequently was resolved voluntarily by the parties. With respect to the second issue, Commissioner Eder made a

recommendation to the parties. The Union accepted the mediator's recommendation but the Employer did not. Consequently, the matter was returned to the Panel for further consideration. Subsequently, the Panel issued the Employer an *Order to Show Cause (OSC)* why the recommendation of the mediator should not be imposed to resolve the remaining dispute over whether employees who are unable to achieve a secret security clearance for their positions as passport specialists should be assigned to other positions in the agency that do not require such a high level clearance. The parties were informed that, in the event the Employer continued to oppose the mediator's recommendation, it could provide alternative wording to resolve the impasse. The Union was given the opportunity to respond to the Employer's submission.

Pursuant to the Panel's *OSC*, the Employer submitted alternative wording that it proposed the Panel should adopt in lieu of the mediator's recommended wording. The Union submitted a reply statement. On April 3, 2015, Panel Chairman Mary E. Jacksteit convened a conference call with the parties to clarify their positions and obtain additional information. Other options for resolution of the issue were explored with the parties, but they were unable to agree on a resolution. In reaching its decision, the Panel now has considered the entire record.

BACKGROUND

The Employer's mission is to adjudicate applications for U.S. passports. The Union represents a bargaining unit consisting of approximately 1,300 non-professional employees stationed nationwide. The parties are governed by a collective-bargaining agreement (CBA) that was due to expire in July 2014 but remains in effect until a successor is implemented. They are currently bargaining over their successor CBA.

Approximately 95 percent of the bargaining unit is comprised of passport specialists, most at the GS-11 level. The decision to change from a "high risk-public trust" security clearance to a "secret" clearance was precipitated by the Department of State. In this regard, because passport specialists have access to certain databases, processes and technologies in the passport approval process that could make them potential targets of those wishing to exploit their position to obtain information or services, it was determined that a secret clearance background check could uncover potential threats or vulnerabilities that may not be obvious. A secret

security clearance would require the employee to undergo recertification every 5 years. Paralegals and passport operations officers, who also are in the bargaining unit, already have "secret" security clearance status, as do many passport specialists who either voluntarily chose to undergo the process because a secret clearance, ostensibly, would open up other employment possibilities within the Department of State, or as new hires were required to obtain a secret clearance. About 600 employees will be required to get secret clearances. Anyone denied a clearance will be subject to removal for failure to meet the requirements of their position. Neither grievance arbitrators nor the Merit Systems Protection Board have the authority to rule on the substance of an underlying security-clearance determination in the course of reviewing an adverse action where an employee has been denied a security clearance.

THE MEDIATOR'S RECOMMENDATION

Commissioner Eder recommended that the parties adopt the following wording to resolve their dispute:

For those BUEs who are denied a secret clearance, where the Department of State has opportunities to place an employee in a position that does not require a secret clearance, the Department of State will offer that position to that employee if [he or she] qualif[ies] for that position and will offer any appropriate training to support that employee's ability to qualify. The Department of State will notify the affected employees of the availability of such training at the time their clearance[s are] denied or suspended.

ISSUE AT IMPASSE

The parties disagree over whether the Panel should adopt the mediator's recommendation to resolve the parties' dispute over accommodations for employees who are unable to achieve a secret security clearance.

POSITIONS OF THE PARTIES

1. The Employer's Response to the Order to Show Cause

According to the Employer, its position should not be characterized as rejecting the mediator's recommendation but, rather, it believes that the wording "does not capture all of

what the mediator tried to include in (the parties') mediation sessions." In this regard, the Employer had expressed concerns that there may be factors uncovered during an employee's background investigation for a secret clearance that would make it inappropriate for the employee to be offered job opportunities for other positions that do not require a secret clearance. Where the investigation disclosed negative information about the employee that would warrant suspension or removal of the employee, it would not be in the Employer's interest to consider continued employment for the employee. In its view, the mediator's recommendation does not take such a scenario into consideration. Furthermore, the mediator's wording would require placement of the employee in an open position that may be available anywhere in the Department of State, an outcome that would permit the employee's placement outside the Passport Services Agency where the Union has exclusive recognition. Casting a wider net for job opportunities for Passport Services employees may negatively impact employees in other bargaining units represented by different labor organizations. Finally, with respect to the training aspect of the mediator's recommendation, the Employer maintains that it is not readily apparent what training it could offer employees that may help them qualify for available positions, or what or where those available positions might be. Some jobs require "specialized experience," and there is no training that can be substituted for it.

Having shown cause why the mediator's recommended wording should not be adopted, it offers the following to resolve the parties' dispute:

Other than those employees being denied a secret clearance for reasons that would normally cause a suspension or dismissal, for those BUEs who are denied a secret clearance, where Passport Services has open positions that do not require a secret clearance, Passport Services will offer that position to that employee if they already qualify for that position, as determined by the Bureau of Consular Affairs' Human Resources Division. For employees that fail to gain a secret clearance and do not qualify for any open positions in Passport Services, Passport Services will explore and secure any appropriate training or retraining offered by the Department of Labor that is analogous to that offered to displaced employees during RIF to support that employee's ability to find alternative employment. Passport Services will notify

the affected employees of the availability of such training at the time their clearance is denied or suspended.

The wording limits the Employer's obligation to assist in finding other employment to those who could not achieve a secret clearance but who otherwise would not be recommended for suspension or removal from service as a result of the clearance investigation. Restricting opportunities for other employment to open positions within Passport Services that do not require a secret clearance appropriately limits job opportunities to those within the bargaining unit represented by the Union. Its alternative to the mediator's recommendation also obligates the Employer to explore training opportunities offered by the Department of Labor for displaced employees who the Passport Services Agency would not otherwise have suspended or removed for issues discovered during the security clearance investigation.

2. The Union's Response

The Union agrees with the mediator's recommendation because it would extend opportunities for continued employment to positions that are available throughout the Department of State. This is especially important for long-term employees who do not have enough creditable service time to retire from their position as a passport specialist. A broader opportunity for employees to move into other available positions is critical since nearly all bargaining-unit positions within Passport Services will require a secret clearance.^{1/} Limiting job opportunities for displaced employees to Passport Services as the Employer proposes would be a meaningless gesture because, in fact, there will be no jobs available within that activity.

1/ During the April 3, 2015, conference call with the parties the Employer acknowledged that there are only approximately 24 bargaining-unit positions in the Passport Services Agency for which a secret security clearance is not required, and these are lower-graded administrative positions. Rather than fill future vacancies for those jobs as bargaining-unit positions, however, the Employer has already decided to hire contract employees to reduce its costs.

CONCLUSION

Having carefully considered the Employer's response to the OSC, and the Union's rebuttal, we conclude that the Employer has failed to show cause why the mediator's recommendation should not be imposed to resolve the parties' impasse over accommodations for employees who fail to achieve a secret clearance. As the use of an OSC indicates, the Panel begins with the presumption that a mediator's recommendation should be accorded deference and that a party objecting to its imposition bears a heavy burden of demonstrating why it should not be adopted. The mediator in this case has had the benefit of working with the parties directly, both before and after the case was first presented to the Panel, explored their interests and, where voluntary settlements could not be reached,^{2/} spent considerable time assessing the evidence and arguments presented in support of their respective positions. Moreover, the Employer has not alleged that the mediator's recommendation is outside its duty to bargain. In our view, the mediator's wording would provide employees with a meaningful opportunity for continued employment whereas the Employer's proposal would not. Since there apparently are no other bargaining-unit positions within the Passport Services Agency which may be available to those who cannot obtain a secret clearance, the Employer's wording creates virtually no options for reassignment to preserve their employment. Expanding placement opportunities beyond the Passport Services Agency would better assist employees displaced from their positions as passport specialists.^{3/}

ORDER

Pursuant to the authority invested 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

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- 2/ Indeed, with his assistance the parties reached numerous agreements addressing the impact of the Employer's policy change on employees.
- 3/ Clearly, the Employer retains the discretion to suspend or remove an employee whose background investigation for a secret clearance discloses matters which it determines should exclude the employee from consideration for continued employment in another position.

Impasses Panel, under 5 C.F.R. § 2471.11(a) of its regulations, orders the following:

The parties shall adopt the mediator's recommendation to resolve the impasse.

By direction of the Panel.



H. Joseph Schimansky
Executive Director

April 28, 2015
Washington, D.C.