

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. 07 FSIP 34

DECISION AND ORDER

The National Border Patrol Council, American Federation of Government Employees (AFGE), AFL-CIO (Union or NBPC) 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 (DHS), Bureau of Customs and Border Protection, Washington, D.C. (Employer or CBP).

Following an investigation of the request for assistance, the Panel determined that the dispute, arising from the Employer's decision to require Customs and Border Protection Officers (CBPOs) and Border Patrol Agents (BPAs) to take annual Web-based training on the proper treatment of unaccompanied minors,^{1/} should be resolved through single written submissions. After considering the

^{1/} According to the Employer, the training consists of four learning modules followed by a 10-question test that should take no more than hour to complete. Employees are required to answer 7 out of the 10 questions correctly to complete the training successfully. The Employer decided to require the annual training because CBPOs and BPAs often come into contact with unaccompanied minors, and it is "important that CBP personnel understand the appropriate guidelines and protocols for the processing of these individuals." It provided the Union with additional justification for the initiative by citing its consistency with Section 462 of the Homeland Security Act of 2002, a court-approved settlement agreement, and a report by its Office of Inspector General (OIG).

entire record, the Panel would resolve the dispute through the issuance of a *Decision and Order*. The parties' final offers and written supporting statements were submitted pursuant to this procedure, and the Panel has now considered the entire record.

BACKGROUND

The Employer is a bureau within DHS charged with regulating and facilitating international trade, collecting import duties, and enforcing U.S. trade laws. Its other primary mission consists of preventing terrorists and terrorist weapons from entering the U.S. CBP also is responsible for apprehending individuals attempting to enter the U.S. illegally, stemming the flow of illegal drugs and other contraband; protecting U.S. agricultural and economic interests from harmful pests and diseases; and protecting American businesses from theft of their intellectual property. The Union represents approximately 10,500 General Schedule and Wage Grade employees, most of whom are BPAs at grades GS-5 through -11.^{2/} They are considered law enforcement officers for retirement purposes. Other bargaining-unit employees work as detention enforcement officers, communications specialists, electrical technicians, and secretaries. The parties are still operating under the terms of the master collective bargaining agreement (MCBA) negotiated between the now defunct Immigration and Naturalization Service and the Union, which was to have expired in October 1998.

ISSUES AT IMPASSE

The parties disagree over five issues involving: (1) whether their agreement should include wording that limits the training to "lawfully implemented" procedures; (2) the amount of remedial training BPAs should receive if they fail to complete initial training requirements; (3) the number of times BPAs may take the exam during remedial training; (4) how successful completion of the course during remedial training should be determined; and (5) how the consequences of failing to pass the exam during remedial training should be addressed.

^{2/} The most recent budget request submitted to Congress by the President would increase the number of BPAs to 18,000 by the end of Fiscal Year 2008.

POSITIONS OF THE PARTIES

1. Scope of Training

a. The Union's Position

The Union proposes that the "training concerning the procedures to be followed in processing unaccompanied minors [] be limited to those policies and procedures that have been lawfully implemented." This "would merely require the Agency to follow Federal labor laws by limiting the content of the training to those policies and procedures that have been lawfully implemented." If the Employer wants to expand the training to include policies and procedures that were not identified as part of the current notification to the Union, "it would simply have to fulfill its collective bargaining obligations to do so." The three Federal Labor Relations Authority (FLRA) decisions cited by the Employer do not support its argument that the proposal is nonnegotiable because it infringes on management's right to assign work, nor is there any merit to its "preposterous" claim that the proposal would lead employees and managers to perceive CBP as having a limited ability to train employees. Management's contention that the proposal is "superfluous because it merely reiterates existing laws" also should be rejected. The Union's wording does not address a one-time procedure, such as a specific negotiation, but an on-going training that is subject to change as laws, regulations, and policies are modified. It should be noted in this regard that the Employer's draft curriculum for the training refers to a number of unilaterally-implemented policies. Its desire to avoid further bargaining in connection with the training "explains, but does not excuse, its resistance to the Union's proposal."

b. The Employer's Position

The Panel should either impose the following wording: "The Unaccompanied Minors Training will include the policies and procedures that have been lawfully implemented"; or order the parties to withdraw their respective proposals. By limiting management's "ability to assign certain training substance and curriculum content," the Union's proposal is nonnegotiable.^{3/} Even

3/ The Employer cites three cases in support of its contention that the FLRA previously has found proposals similar to the Union's outside an employer's duty to bargain: Patent Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office, Washington, D.C, 56 FLRA 69 (2000); National Federation of Federal Employees, Local 422 and Department of the Interior, Bureau of Indian Affairs, Colorado River Agency, Parker, Arizona, 14 FLRA 48 (1984); and

if it is within the duty to bargain, it should not be adopted by the Panel because it would "prompt employees and managers to have an unnecessary perception that CBP has a 'limited' ability to train employees" on issues related to its critical mission requirements. The Union's proposal also is unnecessary, as the Employer's legal responsibility under the Statute is not an issue related to the change that prompted the bargaining in this case, and because the Union can file unfair labor practice charges and grievances to ensure its interests are met. Finally, if the Panel does not order the parties to withdraw their proposals, it should adopt the Employer's "since it better meets the intent of the parties to use legally implemented policies and procedures when conducting this training."

CONCLUSIONS

Having carefully considered the evidence and arguments presented by the parties on this issue, we shall order them to withdraw their respective proposals. In our view, neither side has established the need to include wording addressing this matter in their agreement. In this regard, if the Employer implements procedures and policies illegally in connection with the training, the Union is well aware of the mechanisms it can use to enforce its bargaining rights under the Statute.

2. Remedial Training

a. The Union's Position

The Union proposes the following wording:

Employees who fail to successfully complete the training after three attempts will be afforded sufficient remedial training to enable them to successfully complete the course, but in no case more than twelve (12) hours. Such training will be scheduled in segments of no less than four (4) hours.

Given the complexity of portions of the policy and procedures to be covered in the training, "it is quite conceivable that some employees will initially find it difficult to fully grasp all of the concepts in the course." Its proposal was designed to reassure "struggling employees that they will be provided enough remedial training to help them understand" how juveniles are to be handled. The amount of proposed remedial training is the maximum the

American Federation of Government Employees, AFL-CIO, Local 1749 and Department of the Air Force, 47th Flying Training Wing, Laughlin Air Force Base, Texas, 12 FLRA 149 (1983).

employee would be entitled to, and the Employer's obligation to provide such training would end once an employee successfully completes the course. By contrast, the Employer's "draconian procedure" provides an unspecified amount of "personal remedial training" followed by "one final attempt to pass the course." It justifies its approach by asserting that employees will have access to practice questions that are "practically identical" to the actual questions and answers. Because the Employer has stated that "it is virtually impossible not to obtain a passing score," it is clear that "the entire course is nothing more than a sham designed to offer the appearance of providing training when in fact it can be successfully completed in a matter of minutes by mindlessly copying provided answers."

b. The Employer's Position

The following is proposed by the Employer:

If after three attempts the Agent still has not obtained a 70 percent passing score, the Agent will be provided personal remedial training and be afforded one final attempt to pass the course.

Under CBP's training and proposed remedial policy, a BPA can: (1) print out a text version of the training course that includes the knowledge review questions and answers; (2) have two opportunities to answer preparatory knowledge review questions during the Web-based instruction; (3) after initially failing to obtain an overall 70-percent score, take the test three additional times; and, (4) if a passing score is not achieved during the previous opportunities, get personal remedial instruction from a CBP management official, not confined to any time frame, and a final opportunity to obtain the necessary 70-percent score. In light of these safeguards and protections, "it is obvious that not only the instant proposal, but all of the NBPC's proposals, are patently unnecessary since it is virtually impossible to not obtain a passing score when there is access to the questions and answers." In addition, the Union's proposal is "excessive and unreasonable" because it would require 12 times the amount of time allotted for the entire training, including the End-of-Course Assessment. It also is administratively burdensome by requiring CBP training officials to track individual remedial training times to ensure that 4-hour personal sessions are conducted. Finally, the adoption of the Employer's approach is further supported by the recent experience of CBPOs in the Office of Field Operations where the training already has occurred.^{4/} As of March 27, 2007, a total of

^{4/} The training was implemented after the Employer met its bargaining obligations with two unions representing CBPOs. A

16,874 CBPOs completed the training "with no employee failing to obtain a passing score."

CONCLUSIONS

After carefully reviewing the record established by the parties concerning the amount of remedial training BPAs should receive if they fail to complete the initial training requirements, we are persuaded that the Employer's approach provides the more reasonable basis for resolving the parties' impasse since there is significant previous experience and employee success in meeting the course requirements. In this case, the Employer reports that 16,874 CBPOs have successfully completed the training without any instances of failure, initial retake of the test, or remedial training. There also is no reason to believe that BPAs would have greater difficulty assimilating the course material than CBPOs. Given these circumstances, the Employer's final offer appears more than adequate to meet employees' needs. Accordingly, we shall order its adoption.

3. Re-Examination

a. The Union's Position

The Union proposes the following:

Contingent upon the instructor's approval, an employee may take the examination at any time(s) during remedial training. An instructor may require a student to take the examination at any time(s) he or she believes that the student is capable of achieving a passing score.

The difference between the parties' proposals on this issue "is subtle, yet significant." Under the Employer's approach, an employee would only have one additional opportunity to attempt to pass the examination during remedial training. This restriction is "unreasonable as well as unfair," particularly where BPAs' inability to successfully complete the training would be reflected in their performance evaluations.

Memorandum of Understanding was signed with the National Treasury Employees Union on October 17, 2006, essentially requiring CBPOs to be fully compensated if the training has to be completed after normal duty hours, and that, "in the event a [CBPO] does not obtain a passing score, the [CBPO] will be permitted reasonable attempts, e.g., three, to take the assessment." The National Immigration and Naturalization Service Council, AFGE, agreed to the training requirement on October 24, 2006, without requesting bargaining.

b. The Employer's Position

Contingent upon the instructor's approval, an employee may take the examination at any time during remedial training. An instructor may require a student to take the examination at any time he or she believes that the student is capable of achieving a passing score.

Its proposal permits an employee, who has failed to obtain a 70-percent score during four previous attempts, a fifth and final opportunity to successfully complete the course during personal remedial training provided by a CBP management official. This "provides sufficient safeguards and adequate protections in the most unlikely event that someone does not obtain a passing score." The Union, on the other hand, is "proposing an unnecessary procedure by allowing an endless number of attempts" during the personal remediation phase.

CONCLUSIONS

Consistent with the rationale provided in connection with our decision on the previous issue, the Union has failed to demonstrate a need for providing employees with an unlimited number of opportunities to take the examination during remedial training. Therefore, we shall order the adoption of the Employer's final offer to resolve the parties' dispute over this issue.

4. Certification

a. The Union's Position

The Union proposes that:

Once an employee passes the examination, the employee [] be certified as having successfully completed the course and the remedial training [] cease unless the instructor believes that additional remedial training is required.

This would remove the possibility of an instructor "arbitrarily" withholding certification, while preserving management's ability to require additional remedial training to ensure an employee fully understands the material. Contrary to the Employer's assertion, however, "nothing in the Union's final offer would permit an employee who passes the examination to 'stand up and leave at that exact moment'."

b. The Employer's Position

The Employer offers the following proposal on this issue:

CBP has determined that when an employee passes the examination, the remedial training will normally cease and the employee will be certified as having successfully completed the course.

As the Employer's recent experience with CBPOs who have taken the training demonstrates, "personal remediation is a proposed final safeguard that CBP anticipates will never need to be used." The difference between the parties' proposals in the unlikely event that it is needed is that, under the Employer's approach, "successful completion of the Assessment does not allow the [BPA] to just stand up and leave at that exact moment as implied by the NBPC during bargaining." If a BPA needs remedial training there is cause for concern, as that situation would not be normal. It is important in such circumstances for there to be no perception that management cannot continue training if, in the instructor's opinion, it is necessary to confirm the employee's understanding of the principles being imparted.

CONCLUSIONS

Having carefully reviewed the evidence and arguments presented on this issue, we shall order the adoption of the Employer's final offer to resolve the parties' impasse. In this regard, there is no basis in the record to support the Union's concern that a CBP instructor would arbitrarily withhold certification.

5. Performance Improvement Plan

a. The Union's Position

The following is proposed by the Union:

Employees who are unable to attain a passing score following the completion of sixteen (16) hours of remedial training will be afforded a reasonable number of additional opportunities to take the examination as part of their performance improvement plan.^{5/}

The consequences of performance evaluations "are far-ranging, and can affect pay, awards, assignments, retention in a reduction in force, etc." By providing employees who are unable to achieve a passing score after remedial training with a reasonable number of opportunities to take the examination as part of a performance

^{5/} We note that the portion of the Union's proposal specifying 16 hours of remedial training appears to be inconsistent with its proposal on Issue 2, where it proposes 12 hours of remedial training.

improvement plan, its proposal recognizes the potential impact that such failure could have on BPAs. Moreover, contrary to the Employer's contention that the proposal is nonnegotiable because it would "require exact training, i.e., the questions, be specified in an employee performance improvement program," nothing in the proposal specifies the content of the examination. The Employer's proposal to treat a failure to pass the examination as a performance deficiency, but not allow an employee an opportunity for improvement, "runs counter to Government-wide" performance management regulations, and should be rejected on that basis alone.

b. The Employer's Position

The Employer's counter-proposal is as follows:

If after three attempts an employee still has not obtained a 70% passing score, the employee will be provided personal remedial training and be afforded one final attempt to pass the course. If after 5 total attempts an employee still does not score at least 70% on the test, the failure will be considered like all other assignments during the annual performance review. The mere act of failing this test will not result in termination.

Its proposal provides numerous reasonable safeguards to assist BPAs and recognizes that, even in the unlikely event that a BPA is unable to answer 70 percent of the questions after remedial training, the impact on the employee "remains minimal." The BPA will continue to perform the full range of duties, and his or her failure to complete the course "will be noted to the supervisor like feedback on any other work assignment." The Union's proposal, however, "would require exact training, i.e., the questions, be specified in an employee performance improvement program," and is nonnegotiable because it interferes with management's right to assign work.^{6/} It is also speculative, given the fact that "no other employee in CBP has failed this training or needed initial retakes of the test or remedial training," nor has the Union articulated why the proposal is needed for BPAs when it has not been needed for any other CBP employee taking the same training.

CONCLUSIONS

On this issue, we conclude that the Employer's final offer provides the better basis for resolving the parties' dispute. The

^{6/} The Employer cites AFGE, Local 32 and Office of Personnel Management, Washington, D.C., 16 FLRA 40 (1984) in support of its contention.

rate of success that CBPOs have had in completing the course successfully without the need for retests or remedial training clearly establishes that the Union's concerns are unrealistic. Nor has the Union substantiated its claim that the Employer's proposal is inconsistent with Government-wide regulations regarding performance management. Accordingly, we shall order its adoption.

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

1. Scope of Training

The parties shall withdraw their final offers.

2. Remedial Training

The parties shall adopt the Employer's final offer.

3. Re-Examination

The parties shall adopt the Employer's final offer.

4. Certification

The parties shall adopt the Employer's final offer.

5. Performance Improvement Plan

The parties shall adopt the Employer's final offer.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

May 31, 2007
Washington, D.C.