



LOCAL 2266

NATIONAL BORDER PATROL COUNCIL

LOCAL 2266

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AFFILIATED WITH AFL-CIO

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August 8, 2013

Michael J. Flemmi (designee)
Assistant Chief Patrol Agent
Swanton Sector

Re: Union Initiated Grievance.

Mr. Flemmi

In accordance with Article 33 F of the 1995 Agreement between the U.S. Immigration and Naturalization Service and National Border Patrol Council ("CBA"), the following constitutes a Union Initiated Grievance regarding the failure of Chief Patrol Agent (CPA) Pfeifer to adhere to the negotiated Articles two, three, four, six, fourteen, fifteen and nineteen of the Collective Bargaining Agreement.

Synopsis:

CPA Pfeifer has implemented a number of changes in working conditions throughout Swanton Sector. These changes are taking place persistently within stations of the Swanton Sector. Furthermore, all of these changes were unilaterally implemented without any notice or any opportunity to bargain over the impact and implementation of these changes. CPA Pfeifer at no time provided a 3A notice to Local 2266 and subsequently failed to allow Local 2266 any opportunity to negotiate the impact and implementation of any change of existing Service regulations covering personnel policies, practices, and/or working conditions. CPA Pfeifer's unilaterally adopted practice of mandating bargaining members to ride All Terrain Vehicles (ATVs) has violated the CBA and placed agents at unnecessary risk. CPA Pfeifer's unnegotiated policy mandating bargaining members to ride ATVs has gone against Border Patrol's long standing practice of utilizing volunteers and or specialty units. The use of ATVs has never been assigned as a standard mandated assignment. CPA Pfeifer's notion that agents should be ready to ride ATVs at management's whims may lead to an increased chance of accidents, injuries, and possibly deaths. According to the Consumer Product Safety Commission, over 135, 000 people are injured every year due to ATV accidents; Over 700 people are killed in these accidents every year and many of these accidents could have been prevented if proper safety advice was followed. Mandated agents who are ordered to ride ATV's for eight hours in dangerous and perilous environments are far more susceptible to accidents, injuries and deaths.

1. Violation of Article 2

Article 2 of the CBA states, in part:

B. Should any conflict arise in the administration of this Agreement between the terms of this Agreement and any government-wide or agency rule or regulation such as the Federal Personnel Manual or Department of Justice Orders, Policy Letter, Manuals (other than a rule or regulation implementing 5USC2302), issued after the effective date of this Agreement, the terms of this Agreement will supersede and govern.

C. In any conflict between the terms of this Agreement and any provisions of Service Orders, Policy Letters, Manuals, etc., regardless of date of issuance, the terms of the agreement will govern.

D. The requirements of this article shall apply to all understandings or agreements between the parties.

Swanton Sector has no policies, procedures, and/or guidelines supplemental to the CBA regarding All Terrain Vehicles (ATVs). In the absence of such agreements, Swanton Sector management must abide by the terms of the CBA. Swanton Sector management's unannounced and unilateral decision to certify bargaining members in the use of ATVs using non-certified instructors and subsequently mandating bargaining members to ride ATVs violated Article 3A, Article 4, Article 6, Article 15 and Article 19. In doing so, management violated Article 2 by unilaterally implementing a policy and/or procedure that is not in accordance with the CBA.

2. Violation of Article 3A

Article 3A, section (A) of the CBA states, in pertinent part:

The parties recognize that from time to time during the life of the agreement, the need will arise requiring the change of existing Service regulation covering personnel policies, practices, and/or working conditions not covered by this agreement. The Service shall present the changes it wishes to make to existing rules, regulations, and existing practices to the Union...

Swanton Sector management, under the direction of CPA Pfeifer, advised bargaining unit members at the Beecher Falls Border Patrol Station that they will be mandated and assigned ATVs to patrol the border. PAIC Kuhn directly informed bargaining unit members at the station that the failure to comply with these orders will be grounds for insubordination and/or a Fit for Duty Examination (FDE). Local 2266 advised Swanton Sector management of the concerns and was advised by Swanton Sector management that these practices would cease until further notice. However, on July 11, 2013, Union Steward Troy Land was advised by PAIC Kuhn that bargaining members will be mandated to ride ATVs. PAIC Kuhn stated that when four agents are scheduled to work, two of those agents will be mandated on ATVs. PAIC Kuhn also stated that if an Agent refused to ride an ATV, the Agent would be written up for insubordination. In addition, if the Agent alleged he/she could not ride due to health reasons, the Agent will be ordered to use sick leave. Subsequently if an Agent refused to ride an ATV for medical reasons more than once, the Agent would be ordered to undergo a FDE. At no time did CPA Pfeifer or any other agency official notify the Union and/or seek to negotiate any of the following changes it wished to make to existing rules, regulations, and existing practices:

1. Mandate and assign bargaining members to ride ATVs;
2. Mandate and assign bargaining members to ride ATVs when four or more Agents are on duty;
3. Train and certify bargaining members to ride ATVs without the proper certification and training;
4. Mandate and assign bargaining members to ride ATVs without proper safety gear;
5. Mandate and assign bargaining members to ride ATVs without another Border Patrol Agent;
6. Mandate and assign bargaining members to ride ATVs after a bargaining member requested to patrol the border by other traditional means, such as by foot or vehicle;
7. The unilateral changes of Article 14 of the CBA;
8. The unilateral changes of Article 19 of the CBA.

3. Violation of Article 4

Article 4 of the CBA states, in pertinent part:

A. Nothing in this Contract shall preclude the Service and the Union from negotiating:

(1) at the election of the Service on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, or on the technology, methods and means of performing work;

(2) procedures which management officials of the Service will observe in exercising any authority under this Article;

At no time did CPA Pfeifer, or any other agency official, notify the Union and/or seek to negotiate any supplemental policies or procedures regarding CPA Pfeifer's declaration of having the right to refuse to bargain over how a management's right shall be exercised. CPA Pfeifer's failure to allow the Union to negotiate the impact and implementation for bargaining member employees who will be adversely affected by the exercise of a management right has disregarded Article 4. Notwithstanding management's right to assign work, the Union believes being mandated to this assignment and threatened with possible discipline for refusing to ride an ATV is now a condition of employment therefore CPA Pfeifer has a duty to bargain over these changes. To include as stated in Article 4 (b), 2.2 "procedures which management officials of the Service will observe in exercising any authority under this Article."

4. Violation of Article 6

Article 6 of the CBA states, in pertinent part:

A. The Service shall not impose any restraint (except as may otherwise be provided in the CSRA or this agreement), interference, coercion, or discrimination against employees in the exercise of their rights to organize and designate representatives of their own choosing for the purposes of collective bargaining, Labor-Management Relations, or upon duly designated employee representatives acting on behalf of an employee or group of employees within the bargaining unit.

CPA Pfeifer's actions of intentionally mandating bargaining members to ride ATVs, succeeding the Union's notification of the contractual and safety concerns, has imposed restraint, interference, coercion and has discriminated against the Union. CPA Pfeifer allowed Swanton Sector management to use threats and paraphrased statements of CBA Articles as measures to mandate bargaining members to ride ATVs. CPA Pfeifer's failure to adhere to the CBA, using threats of disciplinary action and/or management employing FDEs on bargaining members unquestionably imposed restraint (except as may otherwise be provided in the CSRA or this agreement), interference, coercion, or discrimination against employees in the exercise of their rights to organize and designate representatives of their own choosing for the purposes of collective bargaining, Labor-Management Relations, or upon duly designated employee representatives acting on behalf of an employee or group of employees within the bargaining unit.

5. Violation of Article 14

Article 14 of the CBA states, in pertinent part:

H. For sick leave periods of not more than three consecutive workdays, the employee shall not be required to submit Form SF-71, unless there is reasonable evidence of abuse. Sick leave in excess of three days shall be reported on form SF-71, including a medical certificate or a statement of the nature of the illness and why a medical certificate is not furnished.

K. Annual leave or sick leave balances will not be factors for promotion. However, evidence of leave abuse may be used as an aid in determining reliability of an employee and/or his or her physical ability to perform the duties of a position.

CPA Pfeifer violated this policy by allowing management the ability to force the use of sick leave. CPA Pfeifer's new policy of requesting a medical certificate or statement after using two sick days, either non-consecutive or consecutive, days restricted Article 14. Additionally, allowing management to automatically use a daily assignment, as "reasonable evidence of abuse" as a predetermination of an agent's ability to perform the duties of a position, does not comply with Article 14.

6. Violation of Article 15

Article 15 section (A), (B), and (D) of the CBA states, in pertinent part:

A. The Service and the Union agree that the training and development of employees within the unit is a matter of primary importance to the parties. Through the procedures established for employee-management cooperation, and consistent with the needs of the Service, the parties shall seek the maximum training and development of all employees. The Service agrees to develop and maintain forward-looking effective policies and programs designed to achieve this purpose, consistent with its needs.

B. The Service and the Union recognize that each employee is responsible for applying reasonable effort, time, and initiative in increasing his or her potential value to the Service through self-development and training. Employees are encouraged to take advantage of training and educational opportunities needed to increase their efficiency in the performance of their duties and possible advancement in the Service.

D. The Service agrees to make available to employees training opportunities and seminars consistent with Service goals. Employees may be granted variations within the normal workweek, including leave without pay, for educational purposes consistent with Service needs.

Chief Pfeifer and Swanton Sector management have not established a procedure that seeks the maximum training and development of all employees. The training of bargaining members on the operation and use of ATVs by a non-certified instructor failed to develop and maintain forward-looking effective policies and programs designed to achieve this purpose, consistent with its needs, by neither complying with the CBA nor negotiating a supplemental agreement.

The Service failed to give employees reasonable time to increase their potential value to the Service through self-development and training by publicizing training under false pretenses. PAIC Kuhn stated, ATV training was being conducted to prepare agents in their use in emergencies. PAIC Kuhn neither disclosed mandating agents to regular patrol duties on ATVs nor being trained improperly by a non-certified instructor. PAIC Kuhn denied bargaining members the ability to increase their efficiency in the performance of their duties by improperly authorizing unofficial training.

CPA Pfeifer's intentional violations of the CBA and/or any supplemental policies and/or procedures have discouraged individual employees to develop a personal plan for career self-development. The improper training and false statements by PAIC Kuhn resulted in mistrust by bargaining members regarding any future detail and training announcements.

7. Violation of Article 19

Article 19 of the CBA states, in pertinent part:

A. In directing employees to undergo a fitness for duty examination, the Agency will observe applicable rules and regulations.

B. Employees will be advised of their right to have a Union representative at any time allowed, or not prohibited, by OPM procedures.

PAIC Kuhn's threat to bargaining unit members regarding the use of Fitness for Duty Examinations violated Article 19. PAIC Kuhn's coercive statement concerning bargaining members' medical disclosures, resulting in a bargaining member not riding an ATV, would lead to undergo a Fitness for Duty Examination. This practice, if followed, will surely fail to abide by applicable rules and regulations.

Bypassing the Union (5 U.S.C. 7116(a)(1) and (5))

CPA Pfeifer bypassed the Union and directly notified employees of changes in working conditions by changing existing Service regulations covering personnel policies, practices, and/or working conditions within Swanton Sector. CPA Pfeifer has also bypassed the Union by not allowing the Union to negotiate and/or bargain

over these changes. This constitutes an unfair labor practice in that the Service unilaterally implemented a policy contrary to the negotiated agreement and thus was directly ordering Agents unlawfully.

Remedies:

1. Swanton Sector terminate any changes implemented without being negotiated which was due to either sequestration and/or any claimed or unclaimed budget reduction;
2. Swanton Sector ceases and desists from implementing changes in working conditions without negotiating with Local 2266;
3. CPA Pfeifer post a notice stating, Swanton Sector management knowingly violated the safety of its bargaining members by mandating assignments which bargaining members were not properly trained to fulfill. Swanton Sector management will not use any threats, such as fitness for duty examinations against bargaining members.
4. PAIC Kuhn attend the 80-hour nationally standardized U.S. Border Patrol All-Terrain Vehicle Basic Rider Program (A TVBRP), which prepares Border Patrol agents to operate all-terrain vehicles (ATVs) safely and effectively. The program will teach basic operators ATV safety rules, riding techniques and tactics, and the ability to operate an A TV within personal, vehicle, and terrain limitations
5. CPA Pfeifer supply all ATV certified bargaining members all the proper safety gear to ride ATV's. To include a helmet, protective gloves, goggles and if requested a chest protector.
5. CPA Pfeifer designate a Union office at each station;
6. Abide by the Collective Bargaining Agreement, in whole;

Sincerely,

Sean P. Walsh
Chief Steward
AFGE/NBPC
Local 2266