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*Representing the bargaining unit employees of Passport Services, a division of the Department of State's Bureau of Consular Affairs*

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### **Step 2/Final Step Grievance**

July 29, 2009

To: Dottie Flaak, Director – Passport Services Office of Field Operations (PPT/FO)  
cc: Lori Voelz, Director – Office of Field Coordination (PPT/FO/FC)  
Steve Rojas, Operations Officer – Office of Field Coordination (PPT/FO/FC)  
Marc Saint-Victor, Operations Officer – Office of Field Coordination (PPT/FO/FC)  
Steve Polson, Chief Labor-Management Negotiator – Department of State

Re: Suspension without pay

This Step 2/Final Step Grievance is being submitted in accordance with the provisions of the collective bargaining agreement between NFFE Local 1998 and Passport Services, effective July 20, 2009 (hereafter, the "CBA") – specifically, Article 20, Section 7 and Section 5g(1). This grievance concerns the suspension without pay of PPT/CPC Passport Specialist EMPLOYEE A.

### **Preliminary matter**

On May 21, 2009 Ms. EMPLOYEE A received a notice of a proposed suspension. On June 5, 2009, she submitted a response to the proposal. On June 30, 2009 a decision on the proposal was made by Judith Chammas, Deputy Assistant Secretary for Human Resources. That June 30<sup>th</sup> decision was procedurally defective in that it advised Ms. EMPLOYEE A that if she decided to grieve the decision that she must submit the grievance within 30 days to me. On the contrary, the grievance should be submitted to the appropriate Management official, not to a Union representative. I believe that this is a misunderstanding – the decision should advise the potential grievant that he/she can contact me, but should also advise him/her

which Management official should receive the grievance. I respectfully request the all future decision letters properly advise the employees of the procedure.

### **Just Cause**

Article 24, Section 1 of the CBA states:

The Employer agrees that action taken against unit employees will be consistent with applicable laws and be taken for just cause, and be fair and equitable. The Parties agree that the concept of progressive discipline, designed primarily to correct and improve employee behavior rather than to punish, will be followed.

Management did not implement a timely procedure or policy regarding privacy protective measures. Passport Specialists were not aware of the serious nature of the PIERS searches since no action was taken by Management to routinely audit PIERS Searches done by government employees and contract employees. The PIERS searching by government employees and contract staff was found to be a widespread problem not confined to CPC, but throughout Passport Services. Based on information requests previously made by the Union, it appears that no employees, supervisors, or managers were ever disciplined for PIERS searches prior to 2008.

Last year over 30 Passport Specialists at multiple agencies received Letters of Warnings issued for their supposed "passport snooping". This shows that there were no clear guidelines as regards to accessing PIERS and that Passport Specialists across the board were not aware that their actions were a violation. It also shows that PIERS audits were not being performed by management. If PIERS audits were properly conducted, then Passport Specialists would have had the opportunity to correct their behavior prior to 2008.

Regarding Ms. EMPLOYEE A, the records show that PIERS searches allegedly began six years ago when she was a contractor for a period of almost three years, ending shortly after she was hired as a Passport Specialist; 3 years has elapsed since she had accessed PIERS in that manner. Any employee who violated any rules regarding PIERS searches in 2003, 2004, etc. should have received a timely Letter of Warning, so as to correct his/her behavior and not jeopardize the integrity of the Department or his/her position. However, the issuance of these Letters of Warnings and these charges were a direct result of the media controversy from March 2008.

It is evident that Management was negligent in implementing clear and timely procedures and policies regarding PIERS searches.

Consistent with Article 24, Section 1, and Article 6, Section 3, here's what should have happened:

- Employees should have been informed back in 2003, etc., that they should not access PIERS at all, except for work-related reasons

- Management should have notified the Union of this working condition back in 2003, such that the Parties could have implemented the MOU back in 2003 that was agreed to in 2008
- Management should have actively monitored the use of PIERS, including having more than the 38 or so applicants who were in the “alert” category, and conducting random audits
- Any employee conducting a curiosity search in 2003, after having been notified and trained on the policy, should have been given a Letter of Warning, a verbal admonishment, or some other first-step, low level action consistent with the concept of progressive discipline
- Employees should not have been allowed to believe for so many years, and indeed even trained and advised, that it was okay to conduct curiosity searches
- Employees should not have been allowed by Management to conduct enough curiosity searches over the years, unimpeded by Management, to accumulate to a level that the Department of State would then attempt to have the Department of Justice file criminal charges over their actions

This obviously didn’t happen. Who is at fault for that? The answer is the managers of Passport Services.

### **Application of the Douglas Factors**

The Douglas Factors are required to be considered when disciplinary action is being weighed or taken against an employee. The factors are listed in Article 24, Section 5 of the CBA. We believe that an appropriate and fair application of the Douglas Factors would favor rescinding the suspension of Ms. EMPLOYEE A.

*Section 5j: The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question*

There was absolutely no notice to Ms. EMPLOYEE A or to any other Passport Services employee, during the time period that the searches cited by the proposed disciplinary action were done, that looking at PIERS records was a violation of policy or a violation of law. No employees were ever told that they could face disciplinary action or even criminal charges for looking at someone’s passport file.

Management has a contractual obligation to notify employees of the rules, according to Article 6, Section 3 of the CBA:

**INFORMING THE EMPLOYEE:** Employees shall be kept informed of rules, regulations and policies under which they are obligated to work. Such information will be given to each new employee and will be highlighted during orientation sessions for new employees and will be placed on the Passport Services Intranet.

Management did not fulfill the requirements of Article 6, Section 3 and did not clearly inform and warn employees that they should not perform curiosity searches in the past. Indeed, the relevant 7 FAM provision on this topic was not released until February 13, 2008, and yet employees were disciplined for searches done years prior to that date. Management should have clearly and unmistakably warned employees that this behavior was prohibited and if Management had done so then violations of that known policy would be appropriately subject to disciplinary action.

During Ms. EMPLOYEE A's initial training phase many Passport Specialists were instructed to access PIERS and to try it out for familiarization; however, they were instructed not to share the information with third parties. The only PIERS guidance clearly stressed was not to share any information with third parties or use any of the information for any other purposes.

In August of 2008, all Passport Specialists were individually notified of the serious violation of PIERS searches. At that time it became clear to everyone that viewing PIERS records for unofficial purposes was a serious offense. Then, all Passport Specialists were provided with a Memorandum of Understanding (MOU) agreed upon and signed by the Union and Management that clearly informed them of the negative consequences of searching PIERS. Employees were required to read that MOU. The Department of State then changed the PIERS home page warning statement from thin black lettering to **bold red lettering**. Additionally, in order to access PIERS, you would be warned twice prior to accessing PIERS. Prior to August of 2008, none of these warnings or notices had been implemented.

Passport Specialists were not and, to this day, have not ever been notified of the Computer Fraud and Abuse Act and its requirements – that's the law that Ms. EMPLOYEE A is accused of violating. Specifically, employees were trained on and taught about the Privacy Act, which prohibits sharing information with others but does not prohibit looking at information such as that contained in PIERS. On the contrary, hundreds of employees were told to look random applicants up in PIERS during training sessions, just as they were told to explore and look up applicants when first learning about TDIS inquiry, PLOTS, CLEAR, or other databases.

Based on this Douglas Factor alone, the disciplinary action against Ms. EMPLOYEE A should be rescinded. Management had the responsibility and the resources to notify and train employees about the Computer Fraud and Abuse Act. Management could and should have warned employees not to randomly look up applicants in PIERS. However, not only did Management utterly fail to fulfill its responsibility in this regard, but Management allowed practices and training classes to go on for years in which employees were explicitly told to look up random passport applicants. This was even confirmed by Department of State spokesperson Sean McCormick, as reported in this March 22, 2008 Bloomberg Press story:

#### Training Exercise

Senator Clinton's campaign said in a statement that Rice contacted the senator to tell her that the senator's passport file was breached in 2007.

“Senator Clinton will closely monitor the State Department's investigation into this and the other breaches of private passport information,” the campaign said.

McCormack cited an incident last summer when a trainee had unauthorized access to Hillary Clinton's passport file. It was part of a training seminar in which people usually “are encouraged to enter a family member's name,” he said. The individual was “immediately admonished,” he said.

The State Department also detected earlier this year that one of the people who accessed Obama's file also accessed Senator McCain's, McCormack said. That individual was disciplined.

#### Passport Application

The State Department's inquiry began March 20 after a reporter asked about the breach of Obama's records. After senior management researched the incidents surrounding Obama, they decided to examine whether Clinton's and McCain's records had been breached. Yesterday morning, it became clear that they had, McCormack said.

Mr. McCormack's explanation is similar to what the Union has heard from numerous employees, supervisors, and managers. There was simply a pervasive, permissive atmosphere allowing curiosity searches to be done that went on for years.

Management “encouraged” employees to apparently violate the law (the Computer Fraud and Abuse Act) by looking up family members' applications. Other employees looked up Senator Clinton's and other's passport files (we are also aware of someone looking up then-President George Bush's application), and were only verbally admonished.

There was a huge firestorm of bad publicity for the searches that were reported in the media. Management could have prevented all of this from happening by properly notifying and training employees, by putting proper safeguards into the use of PIERS, and by taking timely disciplinary action against those who violated the rules. Management is belatedly trying to make up for this failure by scapegoating employees – including Ms. EMPLOYEE A.

Section 5c: The employee's past disciplinary record;

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Section 5d: The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

These Douglas Factors support the Union's argument that no action should be taken against Ms. EMPLOYEE A.

EMPLOYEE A has been employed as a Passport Specialist at the Charleston Passport Center (CPC) for over three and a half years. She has proficiently performed her job by exceeding overall satisfactory standards by maintaining overall ratings of excellent on her performance evaluations. Ms EMPLOYEE A has served in several Special Assignments including short & long term rotations in the Fraud & Customer Service Departments. Periodically, she has effectively performed duties as the Acting Supervisor for her team. She has been a positive mentor to her team members and they have developed great respect for her. In addition, she has also gained the respect of other co-workers, contract staff members and supervisors. She was recognized by CPC Management as "Employee of the Month" in 2007.

Although Ms. EMPLOYEE A is a part-time employee and was not required to work overtime, on every occasion that overtime was required she readily worked overtime to assist in decreasing the work backlog at CPC. She always demonstrated a team player attitude and behavior. She was never rated unsatisfactorily in the area of security awareness. She maintained the integrity of the Department and has never shared an applicant's information with unauthorized third parties.

It is also important to note that the large majority of the searches cited against Ms. EMPLOYEE A were done prior to becoming a bargaining unit employee. It is not proper to discipline here for actions that were allegedly taken and permitted while she was a contractor employee. The contractor allowed Ms. EMPLOYEE A and many other contractors to perform curiosity searches in PIERS. That should not count against her.

*Section 5k: Potential for the employee's rehabilitation*

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*Section 5e: The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties*

The proper application of this Douglas Factor leads to the conclusion that no action should have been taken against Ms. EMPLOYEE A. She has not done any of the "curiosity searches" in over three years, according to the report of the applicants searched and the dates searched. If there was anything to rehabilitate, she was already rehabilitated.

Management can remain exceedingly confident that Ms. EMPLOYEE A will not conduct any other searches, especially after the notification received by all employees in mid-2008 and all that Ms. EMPLOYEE A has gone through this year.

*Section 5b: The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position*

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*Section 5f: Consistency of the penalty with those imposed upon others within the Department of State for the same or similar offenses*

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Section 5h: Consistency of the penalty with any applicable agency table of penalties

Ms. EMPLOYEE A was not employed as a supervisor or manager or someone involved in developing and implementing rules. She is a Passport Specialist and is supervised by other officials.

Yet, managers and supervisors have done numerous curiosity searches of passport applicants and have been allowed to receive just a slap on the wrist, or even in the worst cases have been kept on administrative leave while charges are pending, unlike Ms. EMPLOYEE A.

Furthermore, the senior managers who were responsible for ensuring the laws were followed did not fulfill their responsibilities, even allowing employees to be told to break the very same law that Ms. EMPLOYEE A is charged with violating. Yet, these managers have not only not been charged, not been disciplined, and not been removed – instead, they have received awards, good appraisals, and even promotions. This is wrong.

What's more, the contractor that hired numerous employees who were doing curiosity searches, including the searches that caused the political and media firestorm in the first place in March 2008, was rewarded with a multi-million dollar expansion and continuation of the contract.

The concept of discipline in the federal sector is clear – a person with more responsibility and authority carries with him/her a higher obligation to abide by the rules. The actions taken against Ms. EMPLOYEE A have turned this upside-down.

Most recently, a local paper in Charleston wrote a news article on July 13, 2009 about CPC and U.S. passports. The news article also notes an employee (Ms. EMPLOYEE A) was “charged” by authorities for passport snooping at CPC. What is alarming is that the news article about CPC makes Internal Controls practices and Passport Fraud and Prevention Programs known to the public with the approval of Management – a more serious violation than file “snooping”:

EMPLOYEE B pulled onto his computer screen the application of a man from a Texas border city along with his naturalization paper and a photocopied driver's license. State Department employees decide, at this juncture, whether to send the application on or to flag it for a fraud prevention specialist.

Asked what he looks for, EMPLOYEE B said: "If the state ID is recently issued, and the birth certificate is recently issued, there's nothing concrete to say the person has been using that ID for five years."

The Texas man passed.

The Post and Courier, 7/29/09

The Department's internal control requirements were clearly violated in the course of this Management-approved article. The reporter states that he was able to examine a passport file closely enough to view the applicant's Personally Identifiable Information. In the process of the managerially-controlled interview, the reporter was shown the onscreen information for a private citizen, **in violation of the same section of the law that Ms. EMPLOYEE A is being prosecuted for:**

Whoever...intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains...information from any department or agency of the United States;

Title 18 USC 1030(a)(2)(B)

If a CPC Passport Specialists came across a stray journalist wandering unescorted through the Charleston Passport Agency, and decided to show the reporter passport files on the computer, then he bears the responsibility for this infraction. However, because the reporter's presence, his activities, and his freedom of movement at CPC was sanctioned by the Agency, then the Agency has broken the law.

*Section 5a: The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated*

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*Section 5i: The notoriety of the offense or its impact upon the reputation of the agency*

The scandal and controversy in the media over the file searches certainly makes what happened, in its totality by all staff, a notorious event.

However, the Douglas Factors pertain to the individual employee. Ms. EMPLOYEE A did not commit a serious offense. Indeed, what she did was not an offense at all – it was permitted and “encouraged”. The notoriety for all of this falls on the shoulders of the Management officials who allowed all of this to happen by not properly training employees and taking other actions spelled out elsewhere in this grievance.

*Section 5l: Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter*

This is an important Douglas Factor to consider.

*Section 5m: The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others*

As of mid-2008, the measures in place to prevent and deter such alleged conduct by Ms. EMPLOYEE A and others in the future appear to be satisfactory. It is not believable that any employee would conduct such a search now.

However, the measures in place could be improved by properly and adequately complying with Article 6, Section 3 – specifically, by informing employees and training them on the requirements of the Computer Fraud and Abuse Act (which was not mentioned in the PII training).

**Other violations of the CBA**

Article 6, Section 5 of the CBA states, in relevant part:

All unit employees and Employer officials deserve and shall be entitled to be treated with mutual respect, dignity, common courtesy and consideration, and will be treated fairly and equitably.

The television media, local newspapers, news reporters and internet bloggings have defamed Ms EMPLOYEE A's character. She was labeled as a criminal on the "Smoking Gun's" internet blog. Ms EMPLOYEE A had no idea that she was being charged with a criminal offense until news reporters began harassing her at home one week prior to a scheduled hearing - a hearing for which she had not yet received notification. Ms EMPLOYEE A will have to work hard to erase all the emotional hurt and pain it has caused her life. She knows that she is being unjustly characterized, but it has still caused her emotional damage. As an excellent employee, a person would only expect for their employer to take careful consideration into such a harsh and demeaning charge, without first considering the overall performance of their employee. Ms. EMPLOYEE A feels violated and betrayed by Management, because she continuously worked hard to support and meet their mission objectives.

Ms. EMPLOYEE A was originally told by CPC Management that she would be placed on administrative leave; this decision was made after her story had already made national news. Then she was suddenly told she was being suspended without pay. Management blindsided EMPLOYEE A with this suspension.

Managers and supervisors in Passport Services have been accused of similar PIERS searches and yet they have been allowed to stay on administrative leave. This is disparate and inequitable treatment.

### **Requested Relief**

We respectfully request that Management make Ms. EMPLOYEE A whole, including back pay plus interest. We further request that either Management return Ms. EMPLOYEE A to her duties, or place Ms. EMPLOYEE A on admin leave, with pay, as Management originally determined was the correct course of action.

We further request that Management take no further action against Ms. EMPLOYEE A until she has had her day in court, and been found guilty or not guilty.

Finally, we request that all employees be adequately briefed and trained on the requirements of the Computer Fraud and Abuse Act (the law that Ms. EMPLOYEE A is charged with violating), and that warnings about this law be added to PIERS and other systems.

Sincerely,

Colin Patrick Walle  
Union President, NFFE Local 1998

### **Information Request**

In the event that the requested relief is denied, we request the following information: names of all Passport employees and officials determined to have committed serious PIERS breaches, their grade level, and action Management has taken against them, including the time period they continued to receive pay after criminal proceedings were initiated. Note: this information has been previously requested and Management already agreed to provide it. This is simply a request for updated information.