

Gate Inspections

REFERENCES

- Title 5, U.S. Code (5 U.S.C.), Chapter 71, The Federal Service Labor-Management Relations Statute (Statute)
- Title 50, U.S. Code (50 U.S.C.), Chapter 23, Internal Security (2000)
- DoD Directive 5200.8, “Security of DoD Installations and Resources,” April 25, 1991
- The Air Force Law Review, Vol.19, No.2, 1977

PURPOSE

The purpose of this guide is to:

- Highlight the statutory and regulatory authority on gate inspections at military installations;
- Highlight the opinions of the courts on gate inspections at military installations;
- Review applicable Federal Labor Relations Authority (Authority) case law that concerns proposals related to gate inspections;
- Review the Merit Systems Protection Board (Board) decisions that concern disciplinary actions based upon contraband discovered during gate and internal inspections; and
- Provide an overview of the topic from a labor and employee relations perspective. This guide is not intended to be an exhaustive review of all applicable decisions or a substitute for researching your individual cases.

INTRODUCTION

The statutory authority to conduct gate inspections at DoD facilities is contained in Section 797 of 50 U.S.C. (Section 21 of the “Internal Security Act of 1950”). That statute makes it a crime for an individual to violate certain regulations or orders promulgated or approved by the Secretary of Defense, or a military commander designated by the Secretary of Defense. Those regulations or orders must enhance the protection or security of a military facility, property, or places subject to DoD jurisdiction or a military conveyance (to include ingress or egress to such places).

The Secretary of Defense has implemented Section 797 through Department of Defense Directive (DoDD) 5200.8, “Security of DoD Installations and Resources,” dated April 25, 1991. In paragraph 4, the “Secretaries of the Military Departments and the Heads of the Other DoD Components” are responsible for establishing policies and procedures to implement the Directive. In paragraph 5, the Secretary has designated, by position, a comprehensive list of commanding officers who “shall issue necessary

regulations” to protect and secure the places under their command. Those commanders must conspicuously post and enforce the orders and regulations they issue.

In general, these regulations provide for gate inspections at closed bases, i.e., installations whose entrances are protected from routine public access. Inspections may be directed to every vehicle or follow a random pattern, though certain vehicles may be more likely to be searched than others. The use of drug dogs, bomb dogs, and various types of mechanical devices are permissible. The occupants of the vehicles and individuals entering by bicycle or on foot are also subject to inspection.

Gate inspections are not limited to perimeter gates, but may be employed at other secure locations within the DoD reservation. Common examples include fenced areas, flight lines, buildings, parts of buildings, and conveyances.

Individuals who drive onto the installation, or up to the gate and are then informed of an inspection, sometimes ask to be permitted to drive back out without having their vehicle inspected. Those situations are determined on a case-by-case basis, depending on specific circumstances such as security level required at the time.

FEDERAL COURTS HAVE UPHELD GATE INSPECTIONS

Federal Courts have relied on several legal theories to uphold the constitutionality of gate inspections. Gate inspections have been analogized to Customs Service and Immigration inspections conducted at points of ingress and egress to the country. Courts have also held that when an individual enters a military reservation, that person has no reasonable expectation of privacy and has consented to inspection as a condition of entry.

The law on inspecting and searching vehicles and individuals on open bases or on unsecured internal areas of closed bases is complex. Questions about the legality of a particular installation’s procedure should be referred to the servicing Judge Advocate or the appropriate legal office that advises the command. DoDD 5200.8, paragraph 5.3 requires that all security orders and regulations “shall be submitted for a review to ensure legal sufficiency.”

As noted above, the courts have opined on the issue of gate search, see for example, United States v. Crowley, 9 F.2d 927 (N.D. Ga. 1922), and United States v. Vaughan, 475 F.2d 1262 (10th Cir. 1973). In Crowley, a district court upheld a nonconsensual gate search that was conducted without a warrant. The court stated that the search would have been illegal if it were made by a civil officer in a civilian community, but held that the search was not unreasonable for a military installation.

Many might ask if Crowley is still good ruling? More than fifty years later, in 1973, the 10th Circuit cited it approvingly in United States v. Vaughan. There are other cases following Vaughan, that involved searches of persons and vehicles conducted at a military base that have also cited Crowley in stating their positions. See for example,

United States v. Burrow, 396 F.Supp.890 (D. Md. 1975), which involved a warrantless search of persons and a vehicle at Fort Meade, Maryland, an open post.

In Vaughan, a case involving a gate search at Tinker Air Force Base, a closed base, the Court stated, “Once within the area where military security is imposed, a search conducted without probable cause and without consent can be proper. Also the submission to search can be imposed as a valid condition to gaining access to a military base.” The importance of this case is that the court had presented a strong and clear opinion concerning searches conducted within a military base where security is imposed. The court stood for the proposition that where a military base is in a “closed” status, not open to the general public, warrantless searches could be conducted on persons and vehicles without consent or even probable cause.

NEGOTIABILITY DECISIONS

Gate inspections concern agency security practices. Military commanders use gate inspections as a method to enhance installation security. Gate inspections may prevent or detect acts of terrorism, sabotage, espionage, theft of government property, contraband, etc. Section 7106 of 5 U.S.C., set forth below, recognizes the reserved right of commanders and Federal managers to determining their internal security practices.

§7106. Management rights

- (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
 - (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
 - (2) ...
- (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
 - (1)...
 - (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
 - (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

The relationship between agency security practices and negotiable proposals was highlighted in AFGE Local 987 and Dept. of Air Force, Robins AFB, 37 FLRA 197, 200 (1990): “An agency’s right to determine its internal security practices under section 7106(a)(1) of the Statute includes the right to determine policies and take actions which are part of its plan to secure or safeguard its personnel and physical property.”

It is well established in Authority case law that where the agency shows a reasonable link between a management practice, like gate inspections, and the security of its operations, the practice falls within the scope of section 7106(a)(1), to determine internal security practices. See for example, POPA and Commerce, PTO, Washington DC, 56 FLRA No. 10, February 29, 2000, (proposal 31). In determining the negotiability of a

proposal, the Authority will not examine the extent to which the practices employed by management to achieve its security goals actually facilitate the accomplishment of those goals, so long as the “reasonable link” is established. See for example, IBPO and Dept. of Army, Watervliet Arsenal, 46 FLRA 333, 337 (1992).

In NFFE Local 1214 and U.S. Army Training Center and Fort Jackson, South Carolina, 49 FLRA 725 (1994), the Authority held nonnegotiable three proposals that would have established the criteria of probable cause to conduct random gate inspections of unit employees and their vehicles at an open post. In its decision, the Authority noted that the agency had established a reasonable link between random gate inspections and management’s right to determine internal security practices. The Authority also concluded that proposals that preclude an agency from conducting random inspections of employees and their properties (unless those inspections are conducted in accordance with external legal limitations, such as probable cause), directly interfere with management’s right to determine its internal security practices.

Where a proposal is found to directly interfere with management’s right to determine internal security practices, the same proposal cannot be characterized as a negotiable procedure under 5 U.S.C. 7106(b)(2). See AFGE Local 987 and Air Force, Robins AFB, cited above. However, a union proposal which addresses to certain indirect consequences might constitute a proposed “appropriate arrangement” as described in 5 USC 7106(b)(3). A few proposals relating to gate inspections have been held to be negotiable as appropriate arrangements. In NAGE Local R14-22 and HQs, U.S. Army Air Defense Artillery Center, Fort Bliss, Texas, 45 FLRA 949, 967-68 (1992), the Authority determined a proposal to be negotiable, as an appropriate arrangement, that allowed employees not to lose pay or leave or be disciplined for tardiness due to delay from gate inspections. In this decision, the Authority rejected the agency’s argument that prohibiting the imposition of discipline in particular situations is a “complete abrogation of management’s rights.” The Authority, in balancing the interests of the parties, noted that the proposal provides a significant benefit to employees compared to the burden being placed on management’s right to discipline, which “is at most, negligible.”

However, in Fort Bliss, seven other proposals that would have regulated the means and methods of gate inspections were found nonnegotiable, because of impairment of internal security and were inappropriate as an arrangement under section 7106(b)(3) of the Statute. Some of these proposals include allowing a union representative to observe gate inspections and confer with employees prior to the inspection, and distributing to employees information concerning their rights during the inspection period.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

The Board, in a number of decisions, has addressed the use of evidence seized during gate inspections, internal base inspections and vehicle searches to take disciplinary action against the employee driver. In defending these appeals, management may take a two-pronged approach. First, management might argue that the search and seizure clause of the Fourth Amendment to the Constitution cannot be applied to exclude evidence (if

illegally seized) in a Board proceeding, see *Delk v. Department of Interior*, 57 MSPR 528 (1993). Second, management may argue that the employee has given his or her implied consent to any inspection or search by their entry on the installation where appropriate notice is given. See for example, *McClain v. Navy*, 20 MSPR 464 (1984); *Scheurman v. Army*, 29 MSPR 313 (1985); and *Wiley v. DOJ*, 89 MSPR 542 (2001).

The *McClain* case arose from a consensual gate inspection where the agency's police officer found illegal drugs in the vehicle of the appellant. Consequently, the appellant was removed from service. The Board rejected the appellant's Fourth Amendment argument to suppress the drugs, and noted, "Freely given consent to a search is one of the situations which constitutes an exception to the search warrant requirement of the Fourth Amendment."

In *Wiley*, the Board sustained the agency's removal action of the appellant, a teacher in a federal correctional institution, for refusing to submit to a search of his vehicle on the agency's premises. There were notices posted at the entrance of the institution indicating that persons entering the premises were subject to searches as a prerequisite to entry; another notice stated that an employee's refusal to undergo a search is a basis for disciplinary action. The institution's warden had authorized a search of the appellant's vehicle at a parking lot based on an allegation that the appellant had a loaded weapon in the vehicle. The appellant drove away and returned after 30 minutes and told officials that they could search the vehicle. A search was conducted and no weapon was found.

The appellant in the case alleged that the search authorized by the warden was "unreasonable" and therefore in violation of his Fourth Amendment rights, which prohibits unreasonable searches and seizure. The Board noted that a reasonable person would conclude that the consent to a search, as a prerequisite to entry, had passed at the gate. As such, the appellant did not consent to a search of his vehicle at the parking lot. However, the Board held that the warden in this case had satisfied the "reasonable suspicion" standard when he ordered a search of the appellant's vehicle, and therefore did not violate the appellant's rights under the Fourth Amendment.

The significance of the *Wiley* case is that the Board considers that a reasonable person who entered the gate has consented to the search because of the sign posted at the entrance of the facility. In its analysis the Board noted, "Consent to search may be inferred from nonverbal actions... courts have held that the act of driving a vehicle onto a federal installation may constitute consent to a search of the vehicle while it is on the installation's grounds, when the driver is shown to have knowingly and voluntarily waived his Fourth Amendment rights with respect to such a search."

CONCLUSION

In the decisions cited above, the FLRA, MSPB and the Courts recognized the unique status of Federal agencies and military installations, and the need for these entities to implement internal security requirements. The courts have long recognized that persons who enter a military base may have to surrender some of their individual rights

so that military security can be maintained. An inspection of persons and vehicles at the gate of a military base does not have to comply with Fourth Amendment standards imposed on a public street.

The Authority's decisions have established that an agency's right to determine internal security practices includes the right to determine the policies, practices, and investigative techniques that are necessary to safeguard its operations, personnel and physical property against internal and external risks. Where an agency demonstrates a reasonable link between any of its practices and its security objective, a union contract proposal that directly interferes with that practice would conflict with the agency's right under section 7106(a)(1) of the Statute.

Each Component has specific policies and guidelines related to gate inspections. The DoD Directive noted above states, in section 4.2, that the Secretaries of the Military Departments and Heads of other DoD Components should establish policies and procedures for the security of installations and resources. We recommend that you reference your Component and local policies and guidelines regarding gate inspections that apply at your installation.

Employees who refuse to consent to an inspection of their vehicle could be denied access to the installation. These employees, who are prevented by their own actions from reporting to work during their scheduled duty hours, could suffer a loss of leave or pay, and may also be subject to disciplinary actions, depending on the specific circumstances, and the applicable government-wide, Component and local policies and regulations. Employees may also be disciplined if contraband is discovered during an inspection or a search. Fourth Amendment claims present complex legal issues; we recommend that you consult the appropriate legal office for advice when preparing cases that involve attempts to exclude evidence based upon Fourth Amendment argument.

If you have any questions about union proposals on this topic, please contact the Field Advisory Services, Labor and Employee Relations Branch, at (703) 696-6301, Press 3. Our DSN is 426-6301.