**FEDERAL MEDIATION AND CONCILIATION SERVICE**
**LABOR ARBITRATION TRIBUNAL**

**IN THE MATTER OF THE ARBITRATION BETWEEN**

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| **INTERNATIONAL BROTHERHOOD** | : | |
| **OF ELECTRICAL WORKERS,** | : | |
| **SYSTEM COUNCIL U-4** | : | **FMCS Case No. 12-0232-3** |
| | : | **Grievance No. 11-0171** |
| **and** | : | **(Zero Tolerance Weapons Policy)** |
| | : | |
| **FLORIDA POWER & LIGHT COMPANY** | : | |

**ARBITRATION PANEL**

John M. Skonier, Esq.
Neutral Arbitrator

Ms. Kelly Tveter
Company Arbitrator

Mr. Kenneth R. Sims
Union Arbitrator

**APPEARANCES**

**FOR THE UNION:**

Noah Scott Warman, Esq.

**FOR THE COMPANY:**

Pamela M. Keith, Esq.

## Procedural History

The undersigned was notified by letter of his selection by the International Brotherhood of Electrical Workers, System Council U-4 (Union) and Florida Power & Light Company (Company or Employer) to hear and decide a matter then in dispute. Pursuant to due notice, a hearing was held on May 13, 2013, in Palm Beach Gardens, Florida, at which time both parties were afforded a full opportunity to present testimony, examine and cross-examine witnesses, and introduce documentary evidence in support of their respective positions. Following the close of the hearing and the receipt of the Notes of Testimony[1], the parties submitted post hearing briefs. The matter is now ready for final disposition.

## Background Facts

The Employer is one of the largest rate-regulated utilities in the United States and is the largest electric utility in Florida, serving approximately 4.5 million customer accounts in Florida and employing more than 10,000 employees. The Employer is a subsidiary of Juno Beach, Florida-based NextEra Energy, Inc.

The Company operates two nuclear power plants in Florida: Turkey Point, located in southeastern Dade County, Florida (which has been in operation since 1976); and St. Lucie on the east coast of Florida in St. Lucie County(which has been in operation since 1969). The Company also operates three other nuclear power plants in the north: Seabrook in Seabrook, New Hampshire; Duane Arnold in Cedar Rapids, Iowa; and Point Beach, just south of Green Bay, Wisconsin.

The Union is composed of several IBEW-affiliated local unions that represent the Company's employees throughout the state of Florida. It represents a bargaining unit of more than 3,000 Company employees, of which more than 600 employees work in the Nuclear Division. IBEW, Local 359, in Miami, has jurisdiction over the Turkey Point nuclear power plant and IBEW, Local 627 has jurisdiction over the St. Lucie nuclear power plant. While local unions represent employees during investigations and process first step grievances, second step grievances become the "property" of the System Council, which then handles the matter.

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[1] References to the transcribed Notes of Testimony will be "NT-" followed by the relevant page number(s).

The parties' collective bargaining agreement, which the parties refer to as the Memorandum of Agreement (hereinafter "MOA"), was to expire on October 31, 2011. One Master MOA applies to the entire bargaining unit, with supplements for particular divisions, including the Company's Nuclear Division. (Exhibit J-1)

In May of 2011, the Company informed the Union that it would implement a zero tolerance weapons policy, effective November 1, 2011. The weapons policy at issue applies to both the Turkey Point and the St. Lucie, Florida nuclear power plants. The Company unilaterally changed the penalty an employee would receive for inadvertently bringing a weapon into a nuclear power plant from a previously negotiated agreement between the parties, which provided for a three-day suspension up to immediate discharge. Under the proposed zero tolerance policy any employee inadvertently bringing a weapon into a nuclear power plant would be fired. The Company informed the Union that any discussion regarding the matter would be limited to the impact of this unilateral change.

During the spring and summer of 2011, the Company and Union negotiated a new MOA, however, the Company chose not to bargain its proposed zero tolerance weapons policy. The Union asked the Company if it were under statutory or regulatory mandate to impose a zero tolerance policy and was told that the Company had no such mandate. As November 1, 2011 approached, the Company requested that the Union meet with them to discuss the impact of its decision to implement the zero tolerance policy. The parties met two times in early October regarding the matter, however, no change in the Company's position was achieved. The Company reiterated that on November 1, 2011, the policy would be implemented and immediate discharge would result for any bargaining unit member bringing a weapon inadvertently into a nuclear power plant.

The Union filed an Unfair Labor Practice (ULP) charge with the National Labor Relations Board (hereinafter "NLRB") on November 1, 2011, which the NLRB deferred to this arbitration.

The instant grievance was filed by Union Business Manager Gary J. Aleknavich on October 26, 2011, and reads, in pertinent part, as follows:

> I request that FPL abstain from implementing the change to the Nuclear Site Weapons Policy as indicated in M.D. Bryce letter dated May 16, 2011, and any Bargaining Unit employee adversely affected by this unilateral change to their condition of employment be reinstated

and made whole. I further request that the FPL abide by the agreed to settlement of General Office Number 97-0001 and that any change to our working conditions be negotiated.

(Exhibit J-2)

The Company denied the grievance and the matter was processed to the instant arbitration for final resolution.

**Relevant Contract Provisions**

ARTICLE I
GENERAL CONDITIONS

1. RECOGNITION AND REPRESENTATION

The Company recognizes the rights of its employees to organize and to bargain collectively through representatives of their own choosing. The Union is hereby recognized as the exclusive collective bargaining representative with respect to rates of pay, hours of work, and other conditions of employment for all employees of the Company working in the classifications listed in Exhibit "A" attached hereto, except as otherwise provided in Paragraph 3 hereinafter. The Company agrees to meet and deal with the duly accredited officers, committee or representatives of the Union on all matters covered by the terms of this Agreement.

* * *

**Position of the Union**

The Union argues that the Company violated the collective bargaining agreement between the parties as well as the National Labor Relations Act (NLRA or Act) by its action of unilaterally implementing its zero tolerance weapons policy.

The Union points out that in 1999, the parties entered into a written settlement agreement to resolve the appropriate level of discipline for an employee who is guilty of inadvertently bringing a firearm into a nuclear power plant. The agreement was reached after lengthy settlement discussions and resolved a class action grievance, GO 97-0001, and a related ULP. The Manager of Labor Relations at the time was Michael Bryce, a prior Union officer. He is the current Vice President of Human Resources for the

Company and he sent the May 16, 2011 letter regarding the change to the Nuclear Site Weapons Policy. (Exhibit J-2) The Union notes that the Company abided by the 1999 agreement for over a decade, during which time no more than 10 bargaining unit members violated the agreed upon weapons policy. The Union argues that in this matter, the Company chose to violate the 1999 settlement agreement by unilaterally implementing its zero tolerance policy without bargaining. The zero tolerance policy is not supported by the MOA and it directly conflicts with the parties' negotiated settlement agreement.

The Union emphasizes that it does not condone bringing a gun into the workplace, inadvertently or otherwise; however, the dispute at issue concerns the penalty for an accidental, inadvertent action on the part of an employee. While it agrees that discipline should result for an employee who unintentionally brings a firearm into the facility, it insists that discharge is too severe. The Union points out that, at times, an employee unintentionally brings a firearm into the facility. The employees have been given "blue bags", a small duffel bag provided by the Company or the Union, in which they keep personal items. They take these bags in and out of the facility. The Union notes that in the 1990's, the Company's current Labor Relations Manager, Rick Curtis, a former local Union President in the bargaining unit, inadvertently carried his personal handgun into the nuclear power plant in his personal bag. He received a 3-day suspension.

The Union maintains that if this dispute was "not about guns at all, but instead about clothing allowances, lunch breaks, wearing proper work boots or other working conditions, the analysis would remain the same: is one party to a binding agreement entitled to simply ignore that agreement over the objections of the other and unilaterally impose new working conditions? The answer is no, it is not." (Union's Brief, p. 13) The Union asserts that such unilateral action is violative of the Act and the parties' MOA.

The Union argues that the Company violated Paragraph 1 of the MOA, "Recognition and Representation", which states that the Company recognizes the Union as the exclusive bargaining agent of its employees with respect to wages, hours of work, and conditions of employment. (Exhibit J-1, at Master 1-2) "The Company agrees to meet and deal with the duly accredited officers, committee or representatives of the Union on all matters covered by the terms of this Agreement." (Id. at Master 2) The Union notes that, among those "matters covered by the terms of this Agreement", is discharge for cause. (Exhibit J-1, at Master 34, ¶22)

The Union points out that the MOA, in Paragraph 27(d), provides that with respect to a grievance settlement, "[t]he words 'without prejudice' or words of similar import mean that the settlement in which the words were or are used does not constitute a precedent of any kind, nor can the settlement be again referred to in any future grievance or arbitration procedure." (Exhibit J-1 at Master 37). Clearly, if a grievance is settled without such language, it is settled with prejudice and constitutes precedent and may be referenced in future grievances and arbitration. The Union asserts that the 1999 grievance settlement of GO 97-0001 is itself a binding and enforceable agreement. and, as such, constitutes binding precedent for the interpretation of Paragraph 1 of the MOA

In addition, the Union maintains that the Company violated the law by unilaterally changing the weapons policy. While the Company argues that the 1999 settlement agreement had ceased because the parties were at impasse, the Union asserts that this is contrary to established NLRB case law and the facts of this dispute. The NLRB has acknowledged that "it is unlawful for an employer to refuse to bargain with respect to mandatory subjects of bargaining . . . Termination of employment constitutes such a mandatory subject." *N.K. Parker Transport, Inc.*, 332 NLRB 547, 551 (2000). "Disciplinary policies are a mandatory subject of bargaining and may not be changed unilaterally by an employer absent agreement or impasse." See, *e.g.*, *Alan Ritchey, Inc.*, 359 NLRB 40 (2012), *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006), ("[i]t is well established that rules governing the imposition of employee discipline are mandatory subjects of bargaining"); *The Toledo Blade, Inc.*, 343 NLRB 385 (2004); *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991) ("A grievance about a discharge is clearly a mandatory subject of bargaining"). The Union argues that in the instant matter, the Employer's unilateral decision to go from a three-day suspension to immediate termination for any employee inadvertently bringing a gun into the plant unilaterally changed a mandatory subject of bargaining and it is not a valid exercise of management prerogative.

The Union recognizes that one of the few circumstances in which an employer may change a mandatory subject of bargaining is when the parties reach a *bona fide* impasse in negotiations. The NLRB held in *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989), that "[t]he Act requires that the parties bargain in good faith until agreement is reached or until any realistic possibility of reaching agreement is exhausted." In *Bottom Line Enterprises*, 302 NLRB 373 (1991), the NLRB stated, in pertinent part, as follows:

> [W]hen, as here, the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to

> bargain; it encompasses a duty to refrain from implementation at all, *unless and until an overall impasse has been reached on bargaining for the agreement as a whole.*

(*Id.*, at 374, emphasis in original)

The Union points out that in 2011, the parties were negotiating not only the Master MOA, but also the Nuclear Supplement, which contains the terms and conditions of employment specific to those employees working at the Employer's two Florida nuclear power plants. By not including the change to the nuclear weapons policy in these negotiations, the Union argues that the Employer was attempting to engage in piecemeal bargaining. The NLRB has held that "an employer may not engage in piecemeal bargaining where the employer bargains to impasse and then implements changes in a particular matter without first bargaining to an overall impasse for the agreement as a whole." *Mail Contractors of America, Inc.*, 346 NLRB 164 175 (2005). By separating out a mandatory subject of bargaining from overall contract negotiations, an employer violates the duty to bargain in good faith. *E.I. DuPont & Co.*, 304 NLRB 792, n. 1 (1992); see also *Trumballl Memorial Hospital*, 288 NLRB 1429, 1446-49 (1988). The Union cites to *Duffy Tool & Stamping LLC v. NLRB*, 233 F.3d 995 (7th Cir. 2000), in which Judge Richard Posner outlined the reasons why such piecemeal bargaining would undermine labor peace and frustrate the bargaining process:

> It would empty the duty of bargaining of meaning and this in two respects: (1) by removing issues from the bargaining agenda early in the bargaining process, it would make it less likely for the parties to find common ground; (2) by enabling the employer to paint the union as impotent, it would enable him to hold out for a deal so unfavorable to the union as to preclude agreement. A negotiation is more likely to be successful when there are several issues to be resolved (integrative bargaining) rather than just one because it is easier in the former to strike a deal that will make both parties feel they are getting more from peace than from war ... If by deadlocking on a particular issue, the employer is free to implement his proposals with respect to that issue, he signals to the workers that the union is a paper tiger.

(233 F. 3d at 998)

Similarly, in *Visiting Nurse Svcs. of Western Mass. V. NLRB*, 177 F.3d 52 (1st Cir. 1999) the Court explained the effect of authorizing piecemeal bargaining:

> ... would be to permit the employer to remove, one by one, issues from the table and impair the ability to reach an overall agreement through compromise on particular items. In

> addition, it would undermine the role of the Union's collective bargaining representative, effectively communicating that the Union lacked the power to keep issues at the tables.

(*Id.* at 58)

The Union contends that it is well recognized that presenting a proposal as a "done deal" is not good faith bargaining. The NLRB addressed this "take it or leave it" approach to bargaining in *Winn- Dixie Stores, Inc.*, 243 NLRB 972, 974-975 (1979). In that case, the Board recognized that:

> Bargaining presupposes negotiations-with attendant give and take-between parties carried on in good faith with the intention of reaching agreement through compromise.... "the duty to bargain - to meet and treat - was imposed in the hope that negotiations would lead to the kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement." Clearly this duty requires more than going through the motions of proffering a specific bargaining proposal as to one item while others are undecided and merely giving the bargaining agent an opportunity to respond. Such tactics amount to little more than a ritual or pro forma approach to bargaining and hardly constitute the "kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement."
>
> We find here that Respondent's conduct concerning the wage increase falls within the above description of ritual or *pro forma* bargaining. The facts show that, from the time it announced its wage proposal, Respondent intended to implement the increase regardless of whether the Union agreed or objected to it. Thus, the Respondent stressed that the proposed increase would be "put into effect immediately." When the Union rejected the proposal and suggested bargaining first as to other related "money" matters such as premium pay and benefits, Respondent adhered to its position and at the parties' meeting on July 2 in effect informed the Union that the increase would be implemented with or without the Union's acquiescence. In these circumstances, and in the absence of an impasse, Respondent's offer "to bargain" about the wage increase was really more in the nature of a proposal that the Union accept the increase "or else." In other words, the Union was not so much presented with an opportunity to bargain about the wage increase as it was afforded a chance to give approval to Respondent's decision to grant it. Even under the most permissive or limited view of the bargaining process, such conduct on the part of Respondent did not constitute good-faith bargaining, and we so find.

The Union argues that the Company has clearly violated the Act by presenting the zero tolerance policy as a "done deal". Mr. Bryce sent the Union a notice on May 16, 2011, that "[e]ffective November 1, 2011, coincident with the expiration of the 2008-2011 Memorandum of Agreement, an employee who attempts to introduce a firearm, explosive, or incendiary device into any of our nuclear facilities will have his or her employment terminated." (Exhibit J-3) Although it announced its intention to unilaterally change the nuclear power plant weapons policy in May 2011, the same time that the parties

were at the bargaining table to negotiate a successor collective bargaining agreement, the Company chose to remove that policy from the ongoing negotiations for a new MOA, in order to avoid impasse on the entire collective bargaining agreement. The Union points to Mr. Bryce's testimony in which he acknowledged that, as the Company's representative at the bargaining table, he proposed the change to the nuclear power plant weapons policy and then he chose to pull it from the table. (NT-157-160) He felt that having the zero tolerance policy on the table "was going to block those negotiations. If we were going to end up there anyway, let's do it away from the table. It was a strategy that I decided." (NT-159)

Subsequent to the negotiations, Mr. Bryce told the Union that the Company would be available to "discuss the impact of this decision", however, he reiterated that this change would take effect regardless of any objection from the Union. The Company engaged in piecemeal bargaining on that one issue and then, after it specifically stated that the parties were not at an impasse, it unilaterally implemented its policy over the Union's objections.

The Union points out that there is a major difference between "impact" or "effects" bargaining, which results from management unilaterally making a decision it has the right to do, such as subcontracting or going out of business, and bargaining over the change to a mandatory subject of bargaining. See, e.g., *O.G.S. Technologies, Inc.*, 356 NLRB No. 92 (2011). By using the term "impact" when discussing the change to the nuclear weapons policy, Mr. Bryce signified the Company's position that it had the unilateral right to change the policy. Because discipline is a mandatory subject of bargaining, the fact that the Company indicted it was only willing to discuss the impact of its unilateral decision regarding a change to a mandatory subject of bargaining is a violation of the Act. *Id.*, see also *Pan American Grain Co., Inc.*, 351 NLRB 1412, 1413 (2007); *First Nat. Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666 (1981).

The Union notes that when the Union specifically asked Mr. Bryce if the parties were at impasse over the weapons policy during the October 11, 2011, meeting, Mr. Bryce stated, "... we did not say we are at impasse." (Exhibit U-28, p. 2) (NT-88-89) The only time the Company used the term "impasse" was in a grievance meeting which occurred well after the two meetings that addressed the weapons policy and after the Company had already implemented its policy. (Exhibit J-2) The Union argues that the Company's contention that impasse had occurred reflects an after-the-fact justification of its bad faith bargaining and its unilateral change in working conditions.

The Union asserts that the notion of bargaining to impasse means that there is **no** binding agreement in place that the Union could enforce. The Union could then strike, thereby utilizing the most effective remedy a union has to challenge a bona fide impasse in bargaining. It points out that for the Company to believe that the Union could not strike in order to challenge the change in the weapons policy would mean that it believed there was a binding agreement in place with a "no strike" provision. The Company cannot have it both ways. The Union argues that "the Company's impasse defense smacks of after-the-fact justification, itself flies in the face of the NLRB's case law on impasse, and merits no deference. (Union's Brief, p. 24)

The Union asks that the Panel rescind the zero tolerance weapon policy and reinstate the policy to which the parties agreed in the 1999 settlement of Grievance GO 97-0001. The Union further asks that because this case also concerns a violation of the National Labor Relations Act, that the Company be ordered to post a notice signed by the appropriate authorized Company agent on all employee-accessible bulletin boards at its two Florida nuclear power plants for a period of not less than 60 days. Such notice should state, as would a notice from the NLRB, that the Company violated the NLRA, that it has rescinded its unlawful policy, that it will abide by the prior agreement, and that it will prospectively comply with its duty to bargain in good faith with the Union. The Company should also be directed to send the notice to all members of the bargaining unit employed at those two plants.

**Position of the Employer**

The Company asserts that the instant matter arose as an unfair labor practice charge filed by the Union on November 1, 2011, that was deferred by the NLRB to the parties' grievance and arbitration procedure for resolution. The Union's charge reads, in pertinent part, as follows:

> Since on or about November 1, 2011, and continuing, the above named employer, by and through its Officers, Agents and Representatives unilaterally changed the employee disciplinary rules concerning the introduction of firearms into their facilities.

(Exhibit U-26)

Therefore, the Company maintains that the issue before the Arbitration Panel is whether the Employer violated the Act by unilaterally implementing a change to its nuclear security policy.

The Employer argues that it has not violated the Act if it unilaterally implements a change in policy after reaching an impasse in bargaining. The Employer maintains that once an issue has been bargained to impasse, it is free to make unilateral changes in terms and conditions of employment. Citing *TruServ Corp. V. NLRB*, 254 F.3d 1105, at 1115 (D.C. Circuit 2001), the Employer points to the Court's language, which reads, in pertinent part, as follows:

> A bargaining impasse . . . which justifies an employer's unilateral implementation of new terms and conditions of employment . . . occurs when "good faith negotiations have exhausted the prospects of concluding an agreement," leading both parties to believe that they are at the "end of their rope." For an impasse to be found, the parties must "have reached 'that point of time in negotiations when [they] are warranted in assuming that further bargaining would be futile.'" Whether the parties have reached that point is a case-specific inquiry; "[t]here is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations." Among the factors that the Board considers in evaluating the existence of an impasse are "(a) the bargaining history, (b) the good faith of the parties in negotiations, (c) the length of the negotiation, (d) the importance of the issue or issues as to which there is disagreement, [and] (e) the contemporaneous understanding of the parties as to the state of negotiations." After weighing these factors, the Board will find an impasse if there is "no realistic possibility that continuation of discussions . . . would have been fruitful."

(*TruServ Corp. V. NLRB*, 254 F.3d at 1115, internal citations omitted)

The Employer argues that the evidence in this matter demonstrates that a lawful impasse between the parties had been reached.

The Employer maintains that the bargaining history between the parties establishes that further discussions would have been futile. The issue of employees bringing firearms onto nuclear power plant property has been an issue between the parties since the early 1990's. At that time, the Company attempted to increase the penalty and the Union argued that a valid past practice existed. The Union filed a ULP in 1996. (Exhibit U-14) The ULP was deferred to arbitration and ultimately resolved by the parties at the third step of the grievance process in a mutually agreed upon settlement agreement. Mr. Bryce explained that there were extensive negotiations over grievance 97-0001 and that he was responsible for the settlement that was reached in 1999. (NT-148) Mr. Bryce recalled that the discussions focused on intentional versus inadvertent introduction of weapons onto nuclear power plant property, similar to the issues in the current matter. Mr. Bryce was persuaded by the Union's arguments in 1999 and agreed to maintain the initial discipline for inadvertent introduction of a weapon into a nuclear power plant as a 3-day suspension. Mr. Bryce explained that in 1999, his Company-view was limited to Florida,

and at that time he ". . . could buy into the fact that somebody like Mr. Curtis [then a bargaining unit member and currently a Company Labor Relations Manager] who had a long career with our company could accidentally grab the wrong bag out of his truck." (NT-163)

Mr. Bryce maintained that in 1999, he only knew nuclear power plants in Florida. As he advanced in the Company, he became knowledgeable of the three northern nuclear power plants operated by the Company. He explained that he learned that at these three northern nuclear facilities, there were

> . . . hundreds of employees working . . . that we were responsible for who didn't forget and grab the wrong bag. The same employees represented by the same kind of unions that we were paying the same kind of salaries, all proud professional union workers, it worked there. It should work here. And it has worked. That was my position.

(NT-163-164)

Mr. Bryce explained that after two discussion sessions regarding the Company's proposed implementation of the zero tolerance policy, the Company was "hard parked on zero tolerance" and from his perspective, Mr. Bryce believed that the Union was "hard parked on not accepting zero tolerance." (NT-169)

The Employer argues that the Company explained all of its reasoning and justifications to the Union; however; the Union was not persuaded to accept what was clearly an effective policy. (NT-171, 189) The Employer maintains that the bargaining history shows "that the parties fully explored their respective positions and were at loggerheads." (Company's Brief, p. 22)

The Employer asserts that the parties acted in good faith to reach an agreement. There was no showing by the Union that the Company acted in bad faith during any negotiation session. The Company does not claim that the Union acted in bad faith in their mutual endeavor to discuss the issue of the Company's zero tolerance policy.

Mr. Bryce testified that his May 2011 letter to the Union indicating that the Company was changing the nuclear power plant weapons policy, was not a *fait accompli*. He explained that it was a letter to Mr. Aleknavich telling him what his intent was, and he was not surprised when Mr. Aleknavich demanded that they bargain. (NT-165) When asked if he was not, in fact, foreclosing bargaining, Mr. Bryce responded, "No. I think I

ended with we are available to discuss this." (*Id.*) Mr. Bryce testified that his intent in meeting with Mr. Aleknavich was to reach an agreement.

The Company points out that the parties had been negotiating on the Company's weapons policy for more than a decade. The Company asserts that, while the current round of discussions consisted of only two meetings, the Union could have raised new proposals on the issue, but it failed to do so. There was no movement and the Company maintains that this would not have changed with more meetings.

The Company emphasizes that the security of a nuclear power plant is of extreme importance to the workforce and to the public. While the Company recognizes that the NLRB "is generally reluctant to find impasse where the parties have reached agreement on many issues, and only a minor dispute creates the deadlock that would permit the parties to resort to self-help, that is not the case here." (Company's Brief, p. 25) Here, the only issue in dispute is the weapons policy and it is common sense that the physical safety of nuclear power plants is of critical importance. The Company points to the testimony of the Director of Nuclear Security for the Company's nuclear fleet, Gerald Mocello. When asked, "How does security in the nuclear environment differ from other types of security?", Mr. Mocello replied, in pertinent part, as follows:

> For nuclear, I mean this is not just unique to nuclear, but absolute for nuclear, it's absolute. You cannot have -- you can't be right and you can't be effective ninety-nine point nine nine percent of the time. It's absolute. Security of nuclear materials and special nature of nuclear materials and nuclear generating plants the security has to be absolute. There cannot be an exception.

(NT-123-124)

The Company argues that the importance of the issue is further demonstrated by its "willingness to take bold action, even in the absence of Union agreement." As Mr. Mocello testified, "This was important to us, really important to us, and we felt it wasn't unreasonable and that the change in policy would have the effect that we felt was necessary, and it has."(NT-170-171)

The Company asserts that "the final and most important element of the Board's test for impasse is determinative in this case, and weighs heavily in favor of finding that a bargaining impasse was reached." (Company's Brief, p. 26) The Company notes that Mr. Aleknavich admitted that the Union was never going to accept the Company's zero tolerance policy. Mr. Bryce had been specifically directed to move the weapons policy to

a zero tolerance policy and he was not to accept anything less. Neither party was going to move, they were deadlocked, and that clearly describes an impasse.

The Company notes that no bargaining unit employee has been harmed by the change in the Company's weapons policy. Despite the Union's belief that its members cannot be expected to remember to check their bags for weapons every time they enter the nuclear power plant, the record evidence proves otherwise. The Company points to the 18 months that the zero tolerance policy has been in effect. In that time, not one bargaining unit member has attempted to introduce a gun into the nuclear power plants. When compared to the last 10 years during which there were at least one incident in 9 of those years, the Company maintains that this is demonstrable proof that a zero tolerance policy was the appropriate method to achieve the necessary change.

Despite the implementation of the zero tolerance policy, no bargaining unit member has been denied any benefit under the contract. The Company argues that the act of bringing a gun into a nuclear power plant should be recognized as a "cardinal sin" in the labor/management context and one that warrants immediate discharge. The Company argues that surely placing hundreds, if not thousands of people at risk, should bear the same consequences as drug usage or theft.

The Company maintains that it is not too much to ask that employees who are gun owners take extra care to ensure that they do not create unnecessary risk to the public and their fellow workers.

Mr. Bryce maintained that the implementation of the zero tolerance policy has had no impact on anyone to date. He explained that if someone is found to have brought a weapon onto nuclear power plant property and is discharged, the Union is free to challenge the discharge under the just cause standard. The policy would be reviewed for a determination of whether it met the requirements of just cause.

The Company points out that in drafting the NLRA, Congress recognized that employers periodically have to make changes to terms and conditions of employment in response to business needs and market forces. The Act requires that the exclusive bargaining representative of the bargaining unit in question be allowed to engage in the decision making process to fight for the interest of their bargaining unit members. The Company recognizes that the Act is "satisfied when a union and employer engage with each other in good faith, and bargain robustly until such time as further discussion would be fruitless." (Company's Brief, p. 29) The Company argues that management may

unilaterally implement change, as the Union can turn to self-help, should such be permitted under the terms of the parties' collective bargaining agreement.

The Company maintains that the parties have fully explored their respective positions with regard to the nuclear power plant weapons policy and there was nothing left to be said on the subject. So, the Company implemented the necessary security change which has resulted in a safer working environment and has caused no bargaining unit member to be harmed. The Company argues that it has adhered to the tenants of the Act, that it fully engaged the Union before making the change, and that the Union was able to be heard and to advocate for its members, which is all that the law requires.

The Company asks that the undersigned find that the parties had reached a lawful impasse, that the Company was within its rights to unilaterally implement the zero tolerance policy and that the ULP is without merit.

**Discussion and Opinion**

The issue in this matter is whether the Company violated the contract and/or the National Labor Relations Act by unilaterally changing and implementing its policy regarding the level of discipline to be issued to a bargaining unit employee who inadvertently brings a firearm into one of the Company's two Florida nuclear power plants.

The issue of discipline at the workplace, especially the extreme discipline of immediate discharge, is a mandatory subject of bargaining; therefore, the issues become, was there bargaining prior to the Company's unilateral imposition of their zero tolerance policy on the bargaining unit and, if so, did the parties reach an impasse?

There is no question that the parties had a lengthy history with this issue. When the Company attempted to unilaterally increase discipline for an inadvertent violation of the weapons policy in the 1990's, the Union filed a ULP and a grievance, GO 97-001. After several **years** of negotiations over the proposed discipline change, the parties mutually reached a settlement agreement which has governed the issue of the inadvertent introduction of a firearm into one of the two Florida nuclear power plants for over a decade. This settlement is a binding and enforceable agreement and constitutes binding precedent for the interpretation of Paragraph 1 of the MOA.

In the intervening time period, only about ten bargaining unit members were issued discipline. It must be noted that the example raised by Larry Nicholson, the Company's Director of Fleet Licensing for NextEra, that he considered to be one of the most serious breaches, was the introduction of a firearm by an outside independent contractor, and **not** by a member of the bargaining unit. (NT-99) As he was not an employee of the Company, a zero tolerance policy for the bargaining unit would have no relevance to the independent contractor.

The issue arose again in 2011 when, by letter dated May 16, 2011, from Michael D. Bryce, Vice President, Human Resources, to Gary J. Aleknavich, Business Manager, System Council U-4, IBEW, Mr. Bryce informed the Union that the Company was about to change its policy with regard to the attempted introduction of firearms, explosives or incendiary devices into its nuclear power plants. The letter reads, in pertinent part, as follows:

> I am writing to inform you of a pending change to Florida Power & Light Company's policy regarding the attempted introduction of firearms, explosives, or incendiary devices into any of our nuclear facilities.
>
> The world has changed significantly since 1999 when you and I signed the settlement of grievance GO# 97-001. Since the events of September 11, 2001, there has been an ever increasing concern with public safety, and a steady series of increasingly violent terrorist activity around the world. With this comes increased regulatory scrutiny on our Nuclear operations.
>
> Effective November 1, 2011, coincident with the expiration of the 2008-2011 Memorandum of Agreement, an employee who attempts to introduce a firearm, explosive, or incendiary device into any of our nuclear facilities will have his or her employment terminated.
>
> * * *
>
> We truly believe this action is in the best interest of our employees, the Company, and the general public. We are available to discuss the impact of this decision at your convenience.

(Exhibit J-3)

By letter dated May 26, 2011, from Mr. Aleknavich to Mr. Bryce, the Union sought to bargain over the matter. The letter reads in pertinent part, as follows:

> I am writing in response to your letter of May 16th. We agree that the world is a far different place than when in 1999, we agreed to the current firearm policy and we appreciate and agree with your concerns regarding workplace safety.

> From that shared concern and mutuality of interest, the System Council does ask, however, that the Company forgo implementing its proposal. This is a change in workplace rules and regulations with the most severe of disciplinary consequences; therefore, it must be bargained first with the System Council, not unilaterally imposed.
>
> In addition, while after 2001, the world may now be a markedly different place; one constant is that we live in a world where there are few black and white propositions but many shades of gray. While a bright line rule of the sort you propose may seem fine on paper, in practice it may have draconian unintended consequences . . . Given the concern for the safety of our personnel and the security of nuclear power plants in particular, we understand what your proposal attempts to accomplish. . . .
>
> We have the same goal - now let us bargain a more nuanced work rule that serves that shared end. We look forward to negotiating this issue with you further.

(Exhibit J-4)

In May 2011, the parties were engaged in negotiating their successor MOA with supplements, including one for the nuclear power division. By August 2011, the parties had a tentative MOA. (NT-60) Although he had placed the zero tolerance policy as an issue at the commencement of bargaining, Mr. Bryce chose to pull the issue off the table, as he did not want the negotiations to become bogged down on this one issue. Mr. Bryce explained, "Including it in the big table discussions for the entire contract -- It was going to block those negotiations. If we were going to end up there anyway, let's do it away from the table. It was a strategy that I decided." (NT-159) The issue was not bargained during the negotiations that led to the successor MOA and supplements.

Then, by letter dated September 15, 2011, Mr. Bryce wrote Mr. Aleknavich for the purpose of meeting and discussing the November 1, 2011, change that the Company was implementing to the Nuclear Weapons Policy. His letter reads, in pertinent part, as follows:

> I wrote you on May 16, 2011, informing you of the Company's intent to change the sanctions on employees who attempt, inadvertently or otherwise, to introduce a weapon into our nuclear facility to one of termination of employment. The provided communication stated this change would be effective November 1, 2011.
>
> It is imperative that the Company and the Union meet *to discuss* the proposed policy change as soon as possible. Please advise available dates that will facilitate a November 1, 2011 implementation.

(Exhibit J-5, emphasis)

The parties then met on two occasions, although neither was specifically for the purpose of bargaining over the issue at hand. The Company remained firm in its intent to implement a zero tolerance policy. The Union remained firm in its opposition to changing the penalty for inadvertent introduction of a firearm into a nuclear facility to discharge, although it was willing to explore other alternatives.

By letter dated October 25, 2011, Brendan Callaghan, the Company Director of Corporate Safety and Labor Relations, wrote Mr. Aleknavich to "conclude" the discussions "... regarding the administrative change to the policy governing the attempted introduction of firearms, explosives, or incendiary devices into any of our nuclear facilities." He stated, in pertinent part, as follows:

> The Company has earnestly considered the points raised by the Union but maintains that the interests of our employees, the Company, and the general public are best served by the proposed update to the policy. As stated in the May 16, 2011 letter from Mike Bryce, the Company will terminate the employment of any employee who attempts to introduce firearms, explosives, or incendiary devices into any of our nuclear facilities. The policy change will take effect on November 1, 2011.

(Exhibit J-7)

The record demonstrates that there was no true bargaining over the change to the nuclear weapon policy. As the Union pointed out, rather than negotiate over the zero tolerance policy during the contract negotiations for the new MOA and supplements, the Company chose to remove the issue from the bargaining table. After the MOA and supplements were negotiated, the Company then engaged in piecemeal bargaining. The only issue was the nuclear weapons policy and there was no opportunity for the Union to trade its agreement for something else of benefit to its members. The Union's only option was to discuss how the Company's decision to implement the zero tolerance policy would impact the bargaining unit. The Union was presented with a situation of no choice. The Company would only accept the Union's agreement to its unilateral decision to implement the zero tolerance policy. Because the Union was not willing to do so, the Company asserted impasse, and implemented the policy.

As was amply demonstrated by the Union in its brief, engaging in piecemeal bargaining violates the NLRA. The NLRB has held that "an employer may not engage in piecemeal bargaining where the employer bargains to impasse and then implements

changes in a particular matter without first bargaining to an overall impasse for the agreement as a whole." *Mail Contractors of America, Inc.*, 346 NLRB 164 175 (2005). This is exactly what the Company did. It removed the zero tolerance policy from the bargaining table during the negotiations for the agreement as a whole and then later maintained that it bargained the issue to impasse, thereby allowing the Company to implement the policy. The NLRB also held that "[b]y separating out a mandatory subject of bargaining from overall contract negotiations, an employer violates the duty to bargain in good faith." *E.I. DuPont & Co.*, 304 NLRB 792, n. 1 (1992); see also *Trumballl Memorial Hospital*, 288 NLRB 1429, 1446-49 (1988). Again, this is what the Company did.

As cited by the Union, in *Duffy Tool & Stamping LLC v. NLRB*, 233 F.3d 995 (7th Cir. 2000), Judge Richard Posner outlined the reasons why such piecemeal bargaining would undermine labor peace and frustrate the bargaining process:

> It would empty the duty of bargaining of meaning and this in two respects: (1) by removing issues from the bargaining agenda early in the bargaining process, it would make it less likely for the parties to find common ground; (2) by enabling the employer to paint the union as impotent, it would enable him to hold out for a deal so unfavorable to the union as to preclude agreement. A negotiation is more likely to be successful when there are several issues to be resolved (integrative bargaining) rather than just one because it is easier in the former to strike a deal that will make both parties feel they are getting more from peace than from war ... If by deadlocking on a particular issue, the employer is free to implement his proposals with respect to that issue, he signals to the workers that the union is a paper tiger.

(233 F. 3d at 998)

Similarly, in *Visiting Nurse Svcs. of Western Mass. V. NLRB*, 177 F.3d 52 (1st Cir. 1999) the Board explained the effect of authorizing piecemeal bargaining:

> ... would be to permit the employer to remove, one by one, issues from the table and impair the ability to reach an overall agreement through compromise on particular items. In addition, it would undermine the role of the Union's collective bargaining representative, effectively communicating that the Union lacked the power to keep issues at the tables.

By engaging in piecemeal bargaining, the Company has violated the NLRA.

Further, the Company effectively presented its proposal as a "done deal". This does not represent good faith bargaining. There was no give-and-take, no compromise, no bargaining. As noted by the Union, in *Winn- Dixie Stores, Inc.*, 243 NLRB 972, 974-975 (1979), the Board recognized that:

> Bargaining presupposes negotiations-with attendant give and take-between parties carried on in good faith with the intention of reaching agreement through compromise. . . . "the duty to bargain - to meet and treat - was imposed in the hope that negotiations would lead to the kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement." Clearly this duty requires more than going through the motions of proffering a specific bargaining proposal as to one item while other are undecided and merely giving the bargaining agent an opportunity to respond. Such tactics amount to little more than a ritual or pro forma approach to bargaining and hardly constitute the "kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement."

The Company cited *TruServ Corp. V. NLRB*, 254 F.3d 1105, at 1115 (D.C. Circuit 2001), in which the Board discussed the concept of an impasse and the factors that the Board considers in finding an impasses, as follows:

> A bargaining impasse . . . which justifies an employer's unilateral implementation of new terms and conditions of employment . . . occurs when "good faith negotiations have exhausted the prospects of concluding an agreement," leading both parties to believe that they are at the "end of their rope." For an impasse to be found, the parties must "have reached 'that point of time in negotiations when [they] are warranted in assuming that further bargaining would be futile.'" Whether the parties have reached that point is a case-specific inquiry; '[t]here is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations." Among the factors that the Board considers in evaluating the existence of an impasse are "(a) the bargaining history, (b) the good faith of the parties in negotiations, (c) the length of the negotiation, (d) the importance of the issue or issues as to which there is disagreement, [and] (e) the contemporaneous understanding of the parties as to the state of negotiations." After weighing these factors, the Board will find an impasse if there is "no realistic possibility that continuation of discussions . . . would have been fruitful."

While the Company did an exhaustive analysis of how all of the factors were met in this matter, as has been explained above, the parties cannot be found to have reached an impasse because there was no true bargaining and there was lack of good faith on the part of the Company. It cannot say that because it would not give up the zero tolerance policy and the Union would not accept it, that an impasse was reached. That is not bargaining.

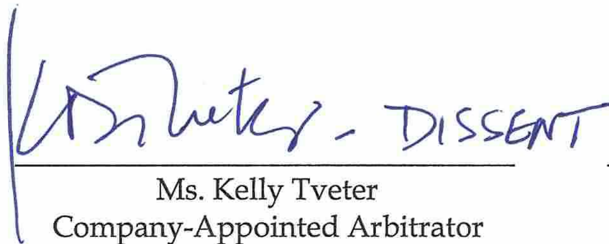
As was previously stated, the issue of discipline at the workplace, especially the extreme discipline of immediate discharge, is a mandatory subject of bargaining. The record does not reveal that there was any good faith bargaining over the imposition of the zero tolerance policy. The parties did not reach an impasse. Further, the record reveals that the Company engaged in piecemeal bargaining. As such, the Company has violated the collective bargaining agreement and the NLRA. The appropriate award has been entered below.

IBEW System Council U-4 and
Florida Power & Light Company
FMCS Case No. 12 0332-3
(Nuclear Weapons Policy)

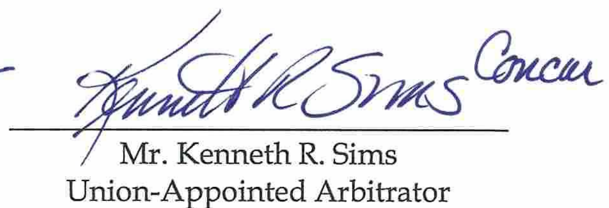
## Award

Based on the record as a whole and for the reasons discussed, the grievance is sustained. The Company is directed to rescind the zero tolerance weapon policy and reinstate the policy to which the parties agreed in 1999 in settling Grievance GO 97-0001.

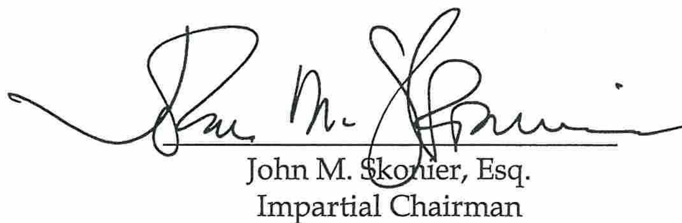
The Company is directed to post a notice, signed by the appropriate authorized Company agent, on all bulletin boards that are accessible by employees at its two Florida nuclear power plants for a period of not less than 60 days. Such notice should state, as would a notice from the NLRB, that the Company violated the NLRA, that it has rescinded its unlawful policy, that it will abide by the prior agreement, and that it will prospectively comply with its duty to bargain in good faith with the Union. The Company is also directed to send the notice to all members of the bargaining unit employed at those two plants.




Ms. Kelly Tveter
Company-Appointed Arbitrator




Mr. Kenneth R. Sims
Union-Appointed Arbitrator



John M. Skonier, Esq.
Impartial Chairman

September 12, 2013