OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
U.S. BORDER PATROL STATION
EL PASO, TEXAS
Respondent

and Case No. 6-CA-10910-1&2

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, AFL-CIO, NATIONAL

BORDER PATROL COUNCIL, LOCAL 1929

EL PASO, TEXAS
Charging Party

Robert S. Hough, Esq. For the Respondent
Raymundo D. Sanchez For the Charging Party
Joseph T. Merli, Esq. For the General Counsel
Before: SALVATORE J. ARRIGO Administrative Law Judge

DECISION

Statement of the Case

This matter arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. & 7101, etseq. (herein the Statute).

Upon unfair labor practice charges having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Dallas Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by changing various conditions of employment prior to completion of negotiations with the Union over the impact and implementation of the changes and while the matter at issue was pending before the Federal Service Impasses Panel (FSIP).[1]

A hearing on the Complaint was conducted in El Paso, Texas at which all parties were afforded full opportunity to adduce evidence, examine and cross-examine witnesses and argue orally. A brief was filed by

Respondent and has been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the Union has been the exclusive collective bargaining representative of approximately 300 Border Patrol agents employed by Respondent at its El Paso Station. In the beginning of 1991 Station employees operated on three major shifts; midnights, days, and evenings, with some staggered shifts. Agents were grouped into 24 to 30 units, each under a supervisor. Units were assigned to a specific activity such as the airport, the freight yards, the city patrol, or line watching. Every four months Respondent posted a schedule of shift requirements and agents would designate which shift, unit, and activity they desired. Agents were selected by management according to seniority. Some agents repeatedly bid on and received the same shift, unit, and activity assignment. However, an agreement between the Union and management prevented an agent from remaining in the same job for more than eight consecutive months. Thus, an agent might be in the same job for eight months, go to another job for four months, then return to the original job for eight more months if the agent had enough seniority to win the bid.

Chronology of Events

On February 27, 1991 Respondent sent the Union the following letter:

> In accordance with Article 3, Section G of the Negotiated Agreement, you are hereby notified that commencing on April 1, 1991 the practice by Border Patrol Agents to bid for units, shifts and activity assignments based on seniority will be changed at El Paso Border Patrol Station.

Through the utilization of a personnel roster, non-detailed agents will be assigned by the Patrol Agent in Charge to units, shifts, and activity assignments in such a manner that each work unit will have as equal a representation and distribution of experienced agents as possible consistent with operational needs of the Station and the Service. Duration of the unit assignment will be for a one year period (or portion thereof in cases of agents on detail) under the technical and operational supervision of an established supervisory chain of command. Duration of shift rotation and corresponding activity will be four pay periods.

Agents returning from detail will be assigned by the Patrol Agent in Charge to a unit consistent with existing operational needs as stated in the preceding paragraph.

The attached informational diagram is provided as an explanation of the operational mechanics involved in the change. The inner circle rotates within the outer circle one space in a clockwise direction every four pay periods. The resulting position identifies the shift and activity of each work unit.

Management maintains its right with respect to 5 USC

7106 to instigate additional changes as deemed prudent and necessary consistent with the needs and mission of the Service.

Questions concerning this matter by be directed to my office.

The Union replied on March 4, 1991 stating it wished "to negotiate over this change of past practice."

The parties met for their first negotiation session on March 18 at which the Union presented its bargaining proposals. In addition to proposals on details, the Union's proposals were as follows:

ARTICLE ONE

UNITS:

1. Agents shall be allowed to select the unit in which they wish to be in.

2. Agents shall pick the unit they wish to be in, based on grade and seniority (I&NS time).

3. Agents shall remain in their selected units, for a period of one (1) year, to begin April 1st and end on March 31st of the following year.

4. Where mutually agreeable to Agents affected, Agents may trade units in the event of a conflict,

in the unit.

5. Agents shall pick days off duty, based on seniority in that unit, where mutually agreeable to Agents affected, Agents may trade days off duty.

ARTICLE TWO

SHIFTS:

1. Agents shall be allowed to select the shift they wish to work on.

2. Agents shall select the shift they wish to work on, based on grade and seniority (I&NS time).

3. Agents shall remain in their selected shifts for a period of one (1) year, to begin April 1st and end on March 31st of the following year.

4. Where mutually agreeable to Agents affected, Agents may trade shifts out of the normal rotation, if a need due to personal hardship arises.

ARTICLE THREE

ACTIVITY:

1. Agents will rotate through the following

Activities:

A. Line Watch

B. Freight Yards

C. Airport

D. SIBAD

E. BORCAP

F. City Patrol

2. Agents will rotate through the above listed Activities, every four (4) months.

3. Where mutually agreeable to Agents affected, Agents may trade Activities.

No progress was made on March 18 and the parties met again on April 2, 1991. At this meeting Respondent submitted its proposals to the Union which were essentially a restatement of Respondent's announced change. Respondent commented that it was going to implement the change on April 21 regardless of what happened at the negotiations.The parties did not discuss the proposals further.

At the next negotiation session of April 3 the Union again submitted bargaining proposals, which were essentially the same as its previous proposals.

Sometime thereafter the Union requested the assistance of the Federal Mediation and Conciliation Service and meanwhile cautioned Respondent not to implement any change until negotiations were completed, including third party intervention.

The parties met for their last negotiation session on April 16, 1991. At this meeting, attended by a Federal Mediator, the Union submitted the following proposals on unit assignments, shifts, and activities:

Article One

Unit Assignments

1. The Service shall determine the number of positions available in each work unit, and the breakdown of such positions in each work unit, i.e., how many senior journeyman positions, how many journeyman positions, how many intermediate positions, and how many trainee positions are required for each work unit.

2. Agents shall be allowed to bid for assignment to a specific work unit. Agents shall initially submit a list of two (2) work units, in order of preference.

3. Assignment preferences shall be granted based upon total I&NS seniority, consistent with section one of this Article. In cases where an Agent's first choice is denied, the second choice will be assigned.

4. The duration of work unit assignments shall be approximately one year, and shall correspond to the Performance Appraisal period.

5. Agent's may trade work unit assignments where mutually agreeable to the affected employees,

consistent with the needs of the Service.

Article Two

Shifts

1. Shifts shall rotate very four Pay Periods, and shall rotate in a forward direction. In other words, a unit shall rotate from days to evenings to midnights to days, etc. Assignment of shifts shall continue to be by seniority bidding.

2. Consistent with article 281 of the Master Collective Bargaining Agreement, agents may trade shift assignments with other agents where mutually agreeable to the affected employees, consistent with the needs of the Service.

Article Three

Activities

1. The Service has determined that agents shall normally rotate through the following activities on a regular basis, not necessarily in the order listed.

   A. Linewatch

   B. Freight Yards

   C. Airport

   D. SIBAD

E. BORCAP

F. City Patrol

2. The duration of each activity assignment shall be four Pay Periods.

3. Where mutually agreeable to the affected employees, trading of activities will be allowed, consistent with the needs of the Service.

Upon receiving the Union's proposals Respondent claimed the proposals were nonnegotiable and announced that the change as previously set forth would be implemented on April 21. On April 19 the Union sent a request for assistance to the FSIP with a summary of the parties' positions, providing a copy of these documents to Respondent. The Union also sent a letter to Respondent on this same day advising against implementing the change "until all third party negotiations are completed." On April 21, 1991 the changes proposed by Respondent were implemented.

On August 30, 1991 the FSIP notified the parties that it was declining to assert jurisdiction in the matter because it was unclear that an impasse existed within the meaning of the regulations. The Panel's declination further informed the parties:

> In this regard, our investigation reveals that the Employer alleges it has fulfilled its obligation to bargain with respect to the Union's proposals concerning the use of seniority for the selection of employees for shift and work assignments. The Union contends that those claims are without merit. Such questions concerning the obligation to bargain must be resolved in an appropriate forum before a determination can be

made as to whether the parties have, in fact, reached a negotiation impasse. We note that the Union has filed an unfair labor practice charge with the Federal Labor Relations Authority relating to this matter.

This determination to decline to assert jurisdiction is made without prejudice to the right of either party to file another request for assistance at such time as the aforementioned threshold questions have been resolved and an impasse has been reached on the substantive issues.

Relevant Provision of the Collective Bargaining Agreement

ARTICLE 28- Tours of Duty (Border Patrol Council)

A. The parties to this agreement recognize that the Agency must, to carry out its mission, vary tours of duty.

In the interest of good employee morale, it is agreed that changes in an employee's scheduled hours of duty shall be kept to the minimum necessary to accomplish the mission of the Agency.

B. Assignment to tours of duty shall be posted five days in advance in the appropriate work area

covering at least a two week period.

C. Except in an emergency, the Agency agrees to schedule eight (8) hours between changes in shifts, and when practical will schedule more time between shifts.

D. Any employee may retain a carbon copy of his DJ-296 and/or Form I-50 if he so desires.

E. The Agency agrees that maximum effort will be made to assign consecutive days off duty.

F. The administrative workweek shall be seven consecutive days, Sunday through Saturday.

G. Breaks in working hours of more than one hour shall not normally be scheduled in any basic workday.

H. When practical, an employee shall be given 24 hours advance notice of individual shift changes. Exceptions to this provision may be made where there is mutual agreement between the employees and supervisors involved. Individuals involved in a change of tour should be notified of the reasons for the change.

I. Where mutually agreeable to all employees affected, employees may trade shifts out of the

normal rotation consistent with the needs of the Service.

Discussion and Conclusions

Positions of the Parties

The General Counsel alleges Respondent was required to bargain with the Union over the impact and implementation of changing the manner in which agents obtained unit, shift, and activity assignments and its conduct, essentially declaring the Union's proposals nonnegotiable and implementing the change while the matter was before the FSIP, violated the statute. As a remedy, the General Counsel seeks the posting of an appropriate notice and a return to the status quo ante.

Respondent takes the position that: the change related to management's right to determine its internal security practice and therefore the entire matter was not negotiable; it has not been established that the impact of the change was more than de minimis; and the terms of the parties' collective bargaining agreement permitted Respondent to act in this matter without raising the obligation to bargain.

The Nonnegotiability Issue

I find and conclude Respondent's declaration of nonnegotiability of the Union's proposals at the April 16, 1993 negotiating session prevent negotiations from proceeding further. I further find and conclude Respondent was timely notified and made aware of the Union's April 18 request for FSIP intervention when it implemented the changes herein on April 21.

In Department of Veterans Affairs, Veterans Adminis-tration Medical Center, Decatur, Georgia, 46 FLRA 339 (1992) (VA Decatur), the Authority held, at 345-346:

> Once a party timely invokes the services of the Panel, the status quo must be maintained to the extent consistent with the necessary functioning of the agency,

in order to allow the Panel to take whatever action it deems appropriate. A failure to maintain the status quo while a negotiation dispute is pending before the Panel constitutes a violation of section 7116(a)(1), (5), and (6) of the Statute. For example, Department of Health and Human Services, Health Care Financing Administration, 39 FLRA 120, 131-32 (1991) enforced sub nom. Department of Health and Human Services, Health Care Financing Administration v. FLRA, No. 91-1068 (4th Cir. Dec. 26, 1991).

The purpose of the requirement that the parties maintain the status quo "is to facilitate the Panel's consideration of negotiations impasses and allow the Panel to take whatever action it deems appropriate to resolve the dispute." SSA,35 FLRA at 950. An agency's obligation to maintain the status quo while matters are before the Panel is not affected by the nature of the action the Panel eventually takes. In particular, an agency is obligated to maintain the status quo even if the Panel ultimately declines jurisdiction over the union's request for assistance. See U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., 44 FLRA 1065, 1072-73 (1992), petition for review filed sub nom. U.S. Department of Justice, Immigration and Naturalization Service v. FLRA, No. 92-

4652 (5th Cir. June 24, 1992).[2]

> The foregoing cases, among others, confirm that permitting an agency to implement a change in conditions of employment while a union's request for assistance is pending before the Panel would undermine the Panel's role in resolving impasses and is inconsistent with the purposes of the Statute. We find no reason to conclude differently in this case. In this regard, we note that the Union filed its request for assistance after the parties had engaged in bargaining over the institution of paid parking. Indeed, it appears that any failure of the parties to engage in more extensive bargaining can properly be attributed to the Agency's assertion that parking rates were nonnegotiable. . . .

The situation herein is clearly controlled by the Authority's decision in VA Decatur. Accordingly, I reject Respondent's various arguments relating to the claimed nonnegotiability of the subject matter at issue. Thus Respondent was required to refrain from implementing the change during the time the matter was before the FSIP and its unilateral action taken while the matter was before the FSIP for "whatever action it deem(ed) appropriate" was not privileged.

The De Minimis Argument

I also reject Respondent's contention that the effectsof the change herein have not been shown to be more thande minimis. It is well established that if the impact of a change is de minimis, the change does not give rise to a duty to bargain. It is also well established the Authority has stated that in determining whether a change is more than deminimis:

> T]he pertinent facts and circumstance presented in each case will be carefully examined. In examining the record, we will place principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involved.

Department of Health and Human Services, Social Security Administration, 24 FLRA 403, 407-408 (1986).

In the case herein the record reveals that Respondent's changes implemented on April 21, 1993 affected the duration of time agents could spend on a particular shift or a particular duty assignment. The uncontroverted testimony of employee witnesses establishes that the changes resulted in some employees losing night shift differential payments when they could no longer continue working night shifts on a regular basis which they chose for financial reasons; some employees incurred added child care payments when they could no longer continue to maximize work on a particular shift; and some employees incurred adverse personal, physical or emotional reactions such as sleeping problems on the job or late arrival to the job which resulted in discipline and increased use of sick leave and annual leave. Examining all the facts and circumstances herein using the standards set by the Authority, I conclude the reasonably foreseeable effect of the changes in conditions of employment implemented by Respondent onApril 21, 1993 above was more than de minimis. See Veterans Administration Medical Center, Phoenix, Arizona, 47 FLRA 419 (1993); U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service Northeast Region, Boston, Massachusetts, 38 FLRA 770, 783, 819-821 (1990); and Department of the Air Force, Scott Air Force Base, Illinois, 33 FLRA 532 (1988).(3)

Application of the Collective Bargaining Agreement

Respondents final argument is that the terms of the parties' collective bargaining agreement essentially covers the matter and permits it to effectuate the change herein and vary tours of duty, referring to Article 28, section A of the agreement. Respondent also states it had "no duty to bargain over the impact that may occur when an agent is required

to work rotating shifts, since it has been addressed by the terms of the collective bargaining agreement."

In U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993) (SSA), the Authority modified its approach when considering whether matters in dispute are "covered by" or "contained in" an agreement so as to obviate any requirement for further bargaining on the subject. In that case the Authority rejected its prior holding in Internal Revenue Service, 29 FLRA 162 (1987) and, at 1018-1019, set forth the "framework" it would use to determine whether a contract provision covers a matter in dispute, as follows:

> . . . Initially, we will determine whether the matter is expressly contained in the collective bargaining agreement. In this examination, we will not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute. (Citation omitted).
>
> If the provision does not expressly encompass the matter, we will next determine whether the subject is "inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract." (Citations omitted). In this regard, we will determine whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision. If so, we will conclude that the subject matter is covered by the contract

provision. . . .

We recognize that in some cases it will be difficult to determine whether the matter sought to be bargained is, in fact, an aspect of matters already negotiated. For example, if the parties have negotiated procedure and appropriate arrangements to be operative when management decides to detail employees . . . it may not be self-evident that the contract provisions were intended to apply if management institutes a wholly new detail program, or decides during the term of the contract to detail employees who previously had never been subject to being detailed. To determine whether such matters are covered by an agreement, we will examine whether, based on the circumstances of the case, the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances. In this examination, we will, where possible or pertinent, examine all record evidence. (Citation omitted.). If the subject matter in dispute is only tangentially related to the provisions of the agreement and, on examination, we conclude that it was not a subject that should have been contemplated as within the intended scope of the provision, we will not find that it is covered by that provision. In such circumstances, there will be an obligation to bargain.

The Authority subsequently applied the SSA test in various cases including U.S. Department of the Navy, Marine Corps Logistics Base, Barstow, California, 48 FLRA 102 (1993) and Social Security Administration, Douglas Branch Office, Douglas, Arizona, 48 FLRA 383 (1993).

In the case herein the parties' collective bargaining agreement contains a number of provisions in Article 28, supra, addressed to tours of duties.[4] Indeed, many of the provisions are specifically related to matters concerning the impact on employees of changes which section A acknowledges Respondent may be called upon to implement in carrying out its mission. Thus, changes are to be kept at a minimum (section A); assignments shall be posted five days in advance (section B); assignments will cover at least a two week period (section B); time between changes in shifts will be scheduled for a minimum of eight hours (section C); an employee will be given 24 hours advance notice of individual shift changes, except where the employee and supervisor mutually agree to alter this requirement (section H); individuals involved in a change of tour of duty are to be notified of the reason for the change (section H); and employees may trade shifts out of normal rotation where mutually agreeable to all affected employees if consistent with Agency needs. In view of the foregoing I conclude Article 28 "covers" the matter in dispute herein and the change at issue is inseparably bound up with and is an aspect of the subject of the provisions of Article 28. See SSA.

In these circumstances I conclude Respondent was not obligated to negotiate further on the subject with the Union and its refusal to continue negotiations did not violate the Statute. However, I have concluded that Respondent's implementation of the change herein while the matter was pending before the FSIP was, under Authority law, a violation of the Statute. In such circumstances I will recommend Respondent post a Notice addressing the implemen-tation of a change in conditions of employment while the matter was before the FSIP for consideration, but I will not require that Respondent return working conditions to the status quo ante and thereafter bargain on the matter since the subject is already covered under Article 28 of the parties' collective bargaining agreement.

Accordingly, in view of the entire foregoing I conclude Respondent violated section 7116(a)(1), (5), and (6) of the Statute and I therefore recommend the Authority issue the following:

ORDER

Pursuant to § 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and § 7118 of the Statute, it is hereby order that the

United States Immigration and Naturalization Service, U.S. Border Patrol Station El Paso, Texas, shall:

1. Cease and desist from:

(a) Failing and refusing to cooperate in impasse proceedings by implementing changes in shifts and assignments of agents while the parties' dispute over the matter is pending before the Federal Service Impasses Panel.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its El Paso Border Patrol Station facility copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chief Patrol Agent and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, November 30, 1995

SALVATORE J. ARRIGO

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to cooperate in impasse proceedings by implementing changes in shifts and assignments of agents while the parties' dispute over the matter is pending before the Federal Service Impasses Panel.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

_____

(Activity)

Dated : _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Dallas Regional Office, whose address is: 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906 and whose telephone number is: (214) 767-4996.

Dated: November 30, 1995

Washington, DC

1. The Complaint was amended at the hearing to allege that obligation to negotiate extended only to the impact and implementation of the change.

2. Subsequently the Authority's petition for review was denied, 995 F.2d 46 (5th Cir. 1993). However, I am constrained to follow Authority precedent where clear.

3. I find no merit to Respondent's argument that under Article 28, section I, employees could trade shifts outside of normal rotation and thereby "were able to minimize any impact from the change in manner of shift assignments." Under the terms of that provision such trades would have to be "mutually agreeable" and an employee is not entitled to work a particular shift as a matter of right, and the effect of this provision on the impact of the change accordingly would be minimal.

4. It would appear that the term "tours of duty" encompasses work assignments and shift assignments.