

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

<p>DEPARTMENT OF THE TREASURY UNITED STATES CUSTOMS SERVICE EL PASO, TEXAS</p> <p style="text-align: center;">Respondent</p> <p style="text-align: center;">and</p> <p>NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 143</p> <p style="text-align: center;">Charging Party</p> <p>AND</p> <p>DEPARTMENT OF THE TREASURY UNITED STATES CUSTOMS SERVICE NEW ORLEANS, LOUISIANA</p> <p style="text-align: center;">Respondent</p> <p style="text-align: center;">and</p> <p>NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 168</p> <p style="text-align: center;">Charging Party</p>	<p style="text-align: right;">Case Nos. DA-CA-60047 DA-CA-60048</p>

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§

2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25,
and 2429.27.

Any such exceptions must be filed on or before DECEMBER 1, 1997, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: October 31, 1997
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: October 31, 1997

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE
EL PASO, TEXAS

Respondent

and

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 143

Charging Party

AND
CA-60047

Case Nos. DA-

CA-60048

DA-

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE
NEW ORLEANS, LOUISIANA

and

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 168

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent

to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

<p>DEPARTMENT OF THE TREASURY UNITED STATES CUSTOMS SERVICE EL PASO, TEXAS</p> <p style="text-align: center;">Respondent</p> <p style="text-align: center;">and</p> <p>NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 143</p> <p style="text-align: center;">Charging Party</p> <p>AND</p> <p>DEPARTMENT OF THE TREASURY UNITED STATES CUSTOMS SERVICE NEW ORLEANS, LOUISIANA</p> <p style="text-align: center;">Respondent</p> <p style="text-align: center;">and</p> <p>NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 168</p> <p style="text-align: center;">Charging Party</p>	<p>Case Nos. DA-CA-60047 DA-CA-60048</p>

Currita Waddy, Esquire
Octave Weber, Esquire
For the Respondents

Walter E. Dresslar, Esquire
For the Charging Party

Charlotte A. Dye, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. 1, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq.; concerns whether Respondent, on September 20, 1995, at El Paso, and on, or about, October 12, 1995, at New Orleans, unilaterally implemented videotaping of Internal Affairs interviews of employees without affording, ". . . an opportunity to negotiate to the extent required by the Statute." (G.C. Exh. 1(e), Pars. 18 and 20).

This case was initiated by a charge filed in Case No. DA-CA-60047 on October 30, 1995 (G.C. Exh. 1(a)); and by a charge filed in Case No. DA-CA-60048 also on October 30, 1995 (G.C. Exh. 1(c)). The Consolidated Complaint and Notice of Hearing issued on May 31, 1996, and set the hearing for August 13, 1996, at a place to be determined in El Paso, Texas (G.C. Exh. 1(e)). By notice dated August 6, 1996, the place of hearing in El Paso was fixed (G.C. Exh. 1(g)); but the hearing was canceled on August 12, 1996. By order dated May 29, 1997, the hearing, by agreement of the parties, was rescheduled for August 21, 1997, in New Orleans, Louisiana, pursuant to which a hearing was duly held on August 21, 1997, in New Orleans, Louisiana, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which Respondent exercised. At the conclusion of the hearing, September 22, 1997, was fixed as the date for mailing post-hearing briefs, which time subsequently was extended, on timely motion of the Charging Party, to which the other parties did not object, for good cause shown, to October 22, 1997, and General Counsel and Respondent each timely mailed a brief, received on, or before, October 23, 1997, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

FINDINGS

1. The National Treasury Employees Union (NTEU) is the exclusive representative of a nationwide unit of employees of the United States Customs Service (Respondent) and

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For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116 (a) (5) will be referred to, simply, as, "\$ 16(a) (5)."

National Treasury Employees Union, Chapters 143 and 168 (hereinafter, collectively, referred to as the "Union" and individually, referred to as "Chapter 143" and "Chapter 168") are agents of NTEU for the representation of unit employees, respectively, at El Paso, Texas, and at New Orleans, Louisiana.

2. The June 30, 1980, National Agreement of NTEU and Respondent (G.C. Exh. 8), in Article 3, Section 12, subsection F., provided as follows:

"F. Where a representative of the Office of Management Integrity tape-records an employee interview, or causes a stenographic record to be made of such an interview, the employee shall receive a verbatim transcript of the interview." (G.C. Exh. 8, Article 3, Sec. 12 F.)

3. The December 14, 1983, National Agreement (G.C. Exh. 9) reflected the change of name from "Office of Management Integrity" to, "Office of Internal Affairs"; but, except for the change of name, Article 3, Section 12, subsection F. remained substantially the same and then provided as follows:

"F. Where a representative of the Office of Internal Affairs tape-records an employee interview, or causes a stenographic record to be made of such an interview, the employee shall receive a verbatim transcript of the interview, upon request, if transcribed. Nothing in this Subsection shall expand or diminish the rights an employee possesses under the Privacy Act." (G.C. Exh. 9, Article 3, Sec. 12 F.)

4. The August 24, 1987, National Agreement (G.C. Exh. 10), carried over Article 3, Section 12, subsection F. verbatim.

5. The May 19, 1991, National Agreement (G.C. Exh. 6) restructured and modified, slightly, the foregoing provision. A separate Article (41) was established for Office of Internal Affairs Interviews and Section 7 of Article 41 provided as follows:

"Section 7. When the Employer tape-records or causes a stenographic record to be made of such an employee interview under this Article, the employee may receive a copy of the tape-recording and/or the transcript if necessary to review the contents of the interview, unless pursuant to law,

disclosure may be denied to protect the integrity of the investigation. With the concurrence of the investigating agent, the employee may choose to tape record the interview. Nothing in this Section shall expand or diminish the rights an employee possesses under the Privacy Act." (G.C. Exh. 6, Article 41, Section 7).

6. When the words, "tape-records" were incorporated into Article 3, Section 12 F. of the 1980 National Agreement, there is no disagreement that the words meant audio tape records because that is what Respondent used. Indeed, Respondent possessed no video recording equipment until 1990 (Tr. 103) and the first use of video for recording an Internal Affairs bargaining unit employee

interview shown on the record² was the October 26, 1993, interview of Mr. Walter Howell, a Senior Inspector and President of the Brownsville, Texas, Chapter (Tr. 20); and Mr. Walter E. Dresslar, Assistant Counsel and National Field

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Respondent filed a Motion To Dismiss on July 16, 1997 (G.C. Exh. 1(i)), asserting that the charges filed in this case were untimely and barred by § 18(a)(4)(A) of the Statute. Purported to be attached was a list of "Video Taping by Internal Affairs" which showed that a Ms. Charlotte Charles, represented by Union Representative Fred Madison, had been videotaped on March 11, 1992, at Houston, Texas; that two videotaped interviews at Brownsville had preceded Mr. Howell's (Ms. Christine Johnson 8/31/93 and Mr. Raul Garza 10/19/93); that two videotaped interviews were conducted in 1994 at Brownsville (Mr. Reynaldo Tejada 1/28/94 and Mr. Carlos Vasquez 5/19/94); one videotaped interview at Del Rio (Mr. Victor Jimenez 5/4/95); two at Laredo (Mr. Robert Jensen 6/29/95 and, again, 7/10/95); and one at El Paso (Ms. Estella Aquiliar 8/18/95); and at each of the foregoing interviews the employee had been represented by a Union Representative. While this list was, indeed, filed, as General Counsel notes in his Opposition, it was submitted as an attachment to, "Agency's Response to Settlement Status and Unresolved Issues", dated July 8, 1997, and received by this Office on July 14, 1997. Respondent's Motion To Dismiss was dated July 16, 1997, and was received in this Office on July 21, 1997, without any attachment.

NTEU filed a Response to Respondent's Motion To Dismiss on July 23, 1997 (G.C. Exh. 1(j)); General Counsel filed an Opposition to the Motion To Dismiss on July 24, 1997 (G.C. Exh. 1(k)); the Acting Regional Director referred the Motion To Dismiss to the Chief Administrative Law Judge by Order dated July 24, 1997 (G.C. Exh. 1(l)); and the Motion To Dismiss was denied by Order dated August 8, 1997 (G.C. Exh. 1(m)).

Because the "list" referred to above was not attached to the Motion To Dismiss, the "list" is not part of General Counsel Exhibit 1(i); the "list" was not offered as an exhibit and, therefore, is not part of the record. Nevertheless, because General Counsel makes specific reference to the "list" in his Opposition (G.C. Exh. 1(k)) and because the "list" was filed and is part of the case file, I specifically take notice of the list as more fully set forth above. I am aware that Mr. Doyle Wayne Walker, Senior Special Agent, Internal Affairs, McAllen, Texas (Tr. 120), testified that the McAllen office received video equipment either in late 1991 or early 1992 and began using

Representative of NTEU, who was called by Mr. Howell about Internal Affairs' attempt to compel him to disclose what an employee had told him in confidence in his representational capacity (Tr. 33-34), prepared and filed an Unfair Labor Practice Charge in November, 1993 (Res. Exh. 1); but Mr. Dresslar testified that he was not told that the interview of Mr. Howell had been videotaped (Tr. 20, 22) and that he, Dresslar, did not learn that interviews were being videotaped until September or October, 1995 (Tr. 29-30).

7. Not only did Respondent in 1980 not have any tape recording capability except voice recording, but the whole structure of Article 3, Section 12 F. reflects recordation of what was said. Thus subsection F. provided that, "Where a representative . . . tape-records an employee interview, or causes a stenographic record [e.g., Gregg or Pitman shorthand or stenotype] to be made . . . the employee shall receive a verbatim transcript of the interview." (G.C. Exh. 8, Article 8, Sec. 12 F.) (Emphasis supplied). The 1983 Agreement reflected the change of name, from "Office of Management Integrity" to "Office of Internal Affairs" and limited employee receipt of a transcript to those instances that Respondent "transcribed" the tape recording or stenographic record and added the concluding sentence that, "Nothing in this Subsection shall expand or diminish the rights an employee possesses under the Privacy Act." (G.C. Exh. 9, Article 3, Sec. 12 F.).

The 1987 Agreement (G.C. Exh. 10) carried over the 1983 provision without change.

The 1991 Agreement completely restructured what had been Article 3, created a separate Article 41 for, "Office of Internal Affairs Interviews" (G.C. Exh. 6); and Section 7, for the first time provided that: (a) ". . . the employee may receive a copy of the tape-recording and/or the transcript . . ."; and (b) permitted the employee to tape record the interview, "With the concurrence of the investigating agent . . ." (G.C. Exh. 6, Article 41, Sec. 7). However, additional limitations were imposed on the availability of either the tape recording or the transcript, namely: "if necessary to review the contents of the interview" and "disclosure may be denied to protect the integrity of the investigation" (id.). However, the limitation on availability, "if transcribed", inserted in the 1983 Agreement and carried over to the 1987 Agreement, was eliminated.

8. Mr. Charles Giunta, now Port Director at Rochester, New York, a position he assumed in April, 1996. (Tr. 35-36). Prior to April, 1996, he had been a Senior

Inspector at El Paso, Texas, and had been President of the El Paso, Chapter from 1984 until 1996 (Tr. 36). Mr. Giunta, beginning on September 20, 1995, represented Mr. J.A. Gonzales at a series of Internal Affairs interviews (Tr. 36, 37) and, "During one of the interviews, I noticed the absence of microphones that were usually placed on the desk . . . I asked the agent if the interview was going to be recorded, and he told me that he was not only audio recording it, but they were video recording it. Q. Did you see any noticeable video equipment in the room? A. No. I did not. They have a two-way mirror on the back wall, and I assume that the camera was behind that two-way mirror." (Tr. 37).

Mr. Giunta stated that he was never given notice that Internal Affairs was going to begin videotaping Internal Affairs interviews (Tr. 38) and he was not told before the Gonzales interview that it was going to be videotaped (Tr. 37). Indeed, when he was told that the Gonzales interview was being videotaped, he also was informed that the interview of Ms. Stella Aguilar, whom he had represented at an interview in August³, had also been videotaped (Tr. 38).

Sometime after the Gonzales interview, Mr. Dresslar said it was September or October, 1995 (Tr. 29), Mr. Giunta called Mr. Dresslar and told him that Internal Affairs had videotaped an employee interview at El Paso (Tr. 29-30, 39-40) and Mr. Dresslar directed Mr. Giunta to make a request to negotiate locally, which Mr. Giunta did by letter dated November 1, 1995, addressed to the Office of Internal Affairs, El Paso (G.C. Exh. 3).

Shortly after his conversation with Mr. Giunta, Mr. Dresslar learned that an employee interview had also been videotaped in New Orleans, Louisiana, which is in a different Customs Region, and he called Mr. Giunta and told him that because videotaping was being done in two Regions, ". . . we better put in a demand nationally to bargain." (Tr. 30), which Mr. Giunta did by letter dated November 16, 1995 (G.C. Exh. 4; Tr. 40). By letter dated December 19, 1995, Mr. Robert M. Smith, Respondent's Personnel Director, advised Mr. Giunta that the videotaping of Internal Affairs interviews was being addressed at the national level (G.C. Exh. 5).

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Mr. Giunta believed it was August 22, 1994; but Respondent's "list", correctly, I believe, shows that the interview took place on August 18, 1995, about a month before the Gonzales interview (see n.2, supra).

9. On October 12, 1995, Mrs. Geraldine M. Seymour (nee Wilson), Operational Analysis Specialist at New Orleans (Tr. 54-55) and a Union steward, represented Mr. Charles Christian in an Internal Affairs interview (Tr. 56). Mrs. Seymour stated that when she and Mr. Christian arrived at the interview room they found the room set up in a very different way than in the past: there was no table; there was one chair in the center of the room, facing the corner, which was about 10 feet away, and mounted on the wall in the corner was a camera (Tr. 56, 58); there was another chair, about five feet away, against the wall. Mr. Christian tried to move his chair but Mr. Guy Fortunato, the Internal Affairs agent, told him not to move the chair and Mr. Fortunato positioned the chair back where it had been and told Mr. Christian to sit there and Mrs. Seymour was told to sit in the chair against the wall (Tr. 57). Mrs. Seymour stated that Mr. Fortunato stated that this was the new procedure for Internal Affairs to interview employees (Tr. 58); that Agent Nancy Valencic was in the interview room handling the audio recording (Tr. 59); that a third Agent, Mr. Terry Hoxworth, was in an adjacent room with the video equipment (Tr. 60); and that he said the reason for videotaping was to detect whether the employee was lying or not by what was captured by his body language on the videotape (Tr. 61).

Mrs. Seymour was very unhappy with the procedure and immediately after the interview called Mr. Argent J. "Butch" Acosta, President of Chapter 168, New Orleans, and told him what had occurred (Tr. 62, 70-71). Mr. Acosta did not know about videotaping (Tr. 62, 71) and said he would speak to the CMC Director, Mr. J. Robert Grimes (Tr. 62). Mr. Acosta did contact Mr. Grimes and Mr. Acosta said Mr. Grimes seemed to be very upset over the videotaping; seemed to indicate he didn't think it was right (Tr. 72); said that he, Grimes, had not been notified (Tr. 72); and said that he, Grimes, would look into it (Tr. 72).

Following his discussion with Mr. Acosta, Mr. Grimes called Mrs. Seymour to his office to discuss the interview and she told him what she had told Mr. Acosta (Tr. 63). After this meeting, Mr. Grimes came to Mrs. Seymour's office and she said that he told her he had looked at the interview room and agreed that the setup of the room was quite intimidating (Tr. 63-64). Mr. Grimes told Mrs. Seymour he had spoken with the Director of Internal Affairs (Tr. 64).

10. Mr. Acosta was a member of NTEU's bargaining team in 1979 when the 1980 Agreement (G.C. Exh. 8) was negotiated (Tr. 74) and testified, both credibly and without contradiction, that it was understood that the term "tape-

recording", used in Article 3, Section 12, subsection F. meant, ". . . an audiotape recording. That was in 1979. It was pretty high tech for this Agency." (Tr. 75).

Mr. Acosta stated that he didn't think Respondent had the capability to do videotaping in 1980 (Tr. 75). Mr. Acosta also was a member of the NTEU bargaining team for every Agreement through the 1997 Agreement (Tr. 76, 77, 79, 81, 82). Mr. Acosta said that all tape recordings were on audio cassette recorders (Tr. 75, 77, 78) but he didn't recall any time that the term, "tape-records" was discussed (Tr. 78) until the negotiations for the 1991 Agreement, which began in 1990 (Tr. 79), but in those negotiations, the phrases, "tape-recording," and "tape record" in Article 41, Section 7, and their meaning was discussed (Tr. 80). He explained that the discussion came about because NTEU sought to expand the Article, inter alia, because, ". . . transcripts from previous tape recordings at least appeared to be missing facts that parties at those interviews thought had been placed into record. We wanted to have a way that we could also record the conversations and thereby insure that the written document that ensued was correct, basically, verbatim." (Tr. 80). Mr. Acosta explained that under the prior Agreements the employee received only the transcript, that under the 1991 Agreement, the employee received a copy of the tape as well as the transcript and, in addition, the right, personally, to record the interview (Tr. 80-81). Mr. Acosta emphasized that videotaping was not brought up, ". . . This was entirely about the spoken word. This was entirely about recording the spoken word." (Tr. 81).

Mr. Acosta's testimony, concerning the discussions at the negotiations for the 1991 Agreement, was fully corroborated by the equally credible testimony of Mr. Larry Joseph Adkins, Assistant Counsel for NTEU and from 1988-1996 had been Assistant Counsel, or Assistant Director, for negotiations, (Tr. 87-88, 88-89) and by Mr. Giunta who, also, was a member of the NTEU bargaining team (Tr. 42-43). Mr. Adkins emphasized that the parties discussed audio recording, ". . . Because we had to, you know, talk about whether the employee would be able to bring in a cassette deck to tape record the interview and things of that nature." (Tr. 89-90). Mr. Adkins said he knew of no videotaping of interviews before 1991 and that the recording mechanism used was audio taping (Tr. 90). Mr. Giunta stated, in part, that, ". . . And it was discussed that the employee or the Union representative could bring a small cassette, mini-cassette tape recorder into the interview room, and it was also discussed that that would be the limitation so that we would not bring in audio technicians, cords, and large recording equipment, which would be

disruptive to the interview." (Tr. 42). Mr. Giunta said he knew of no videotaping of interviews and if an interview was taped, "It was taped using audio recording equipment." (Tr. 42).

11. Mr. Adkins stated that negotiations for the 1997 Agreement began in February, 1995 (Tr. 91), using, ". . . an interspaced negotiations process. . . ." (Tr. 91). He said that at the February, 1995, meeting, the parties identified issues they wanted to raise and one of NTEU's issues, ". . . was whether employees would be able to make their own tape recordings of the Internal Affairs interviews. Because in the previous contracts, it could be done only with the consent of the agent. So the issue was should the employee be able to make a recording of it." (Tr. 91). There was no mention of videotaping in February or at the next session in July, 1995 (Tr. 91); however, in July, Article 41 was restructured and the Article was changed from, "Office of Internal Affairs Interviews" (G.C. Exh. 6) to, "Employer Investigative Interviews" (G.C. Exh. 7) to reflect the fact that other entities, e.g., Office of Inspector General, were also conducting investigative interviews (Tr. 91); but no agreement had been reached to give the employee the right to tape the interview (Tr. 92).

At the next bargaining session in October, 1995, ". . . the issue of videotaping was raised at that session by Charles Giunta and Butch Acosta, both of whom told the national bargaining team that Internal Affairs had been -- had started a new practice of videotaping in their locations." (Tr. 92; see, also, Tr. 47, 82, 83). Mr. Adkins said that the members of the national bargaining team (ten NTEU and ten Management negotiators - Tr. 51) were not aware of videotaping of interviews until Messrs. Giunta and Acosta reported it at the October, 1995, meeting (Tr. 93; see, also Tr. 48, 83).

The videotaping issue was accepted by the national bargaining team for negotiation in October, 1995 (Tr. 93), prior to the demands to bargain filed by Mr. Giunta on November 1 (G.C. Exh. 3) and 16 (G.C. Exh. 4). The parties did bargain concerning the videotaping of interviews and reached agreement on a new Article 41, including Section 8, which specifically addressed, for the first time, videotaping. Section 8 provided as follows:

"Section 8. When the Employer *makes an audio or videotape recording* or causes a stenographic record to be made of an employee interview under this Article, the employee may receive a copy of the tape-recording and the transcript, if

necessary, to review the contents of the interview, unless pursuant to law, disclosure may be denied to protect the integrity of the investigation. *The employee may elect to tape-record the interview unless, pursuant to law, disclosure of the contents of the interview may be denied to protect the integrity of the investigation. If denied, the Employer must provide citation to the legal authority relied on to deny the request.* Nothing in this Section shall expand or diminish the rights an employee possesses under the Privacy Act." (G.C. Exh. 7, Article 41, Sec. 8) (Emphasis in original).

A related provision, Section 14, provided as follows:

"Section 14. The Union will receive reasonable advance notice when an employee who is the subject of an investigation is to be interviewed by the *Employer and whether the interview will be tape-recorded.*" (id., Sec. 14) (Emphasis in original).

Mr. Adkins stated, in part, that ". . . we did distinguish and add the words 'audio- or video recording.' . . . because the previous contracts had not covered videotaping." (Tr. 95). Mr. Adkins further stated that the portion of Section 8 that stated, "the employee may receive a copy of the tape-recording and the transcript" covered both audio and videotape recording and they would receive a copy of both (Tr. 95-96). Mr. Giunta stated in part, ". . . it was decided that we would clarify the language to include videotaping and audiotaping. . . . Because there was a confusion on what was meant by the words, 'tape recording.' . . . Prior to us bringing this to the negotiating team, everybody in the past had used the words 'tape recording' to mean audio recording, which was always done during the interviews. It was never video equipment." (Tr. 47-48). Mr. Acosta stated, in part, as follows: ". . . the reason ultimately that we changed the language was because we felt like the previous language meant audio recording. Always had meant audio recording." (Tr. 83-84).

12. Section 8 of Article 41 was disapproved (Tr. 44-45, 96).

CONCLUSIONS

Respondent concedes that it unilaterally implemented videotaping of employee interviews and, unless videotaping was "covered by" the National Agreement or the charges were

untimely and barred by § 18(a)(4)(A) of the Statute, Respondent violated §§ 16(a)(5) and (1) by implementing videotaping of employee interviews at El Paso, Texas, and at New Orleans, Louisiana, without giving the Union notice and an opportunity to negotiate before implementing videotaping. For reasons set forth hereinafter, I find that the charges were timely; that videotaping was not "covered by" the 1991 National Agreement; and that Respondent violated §§ 16(a)(5) and (1) of the Statute, notwithstanding that Respondent did, after implementation of videotaping, at the request of the Union, bargain in good faith on the matter of videotaping.

1. Charges were timely.

Since 1980, NTEU and Respondent have been parties to National Agreements. Respondent asserts that it acquired videotaping equipment in 1990; that it began videotaping unit employee interviews at least as early as 1992 [Ms. Charlotte Charles at Houston, Texas, 3/11/92, n.2, supra]; that in 1993 it videotaped three employee interviews at Brownsville, Texas, Laredo District [n.2, supra], including Mr. Walter Howell, on October 26, 1993, who was President of the Brownsville Chapter; that NTEU filed an Unfair Labor Practice charge about the Howell interview (Agency Exh. 1); that in 1994 it video-taped two more employee interviews at Brownsville, Texas [n.2, supra]. Accordingly, if videotaping were not "covered by" Article 41, Section 7 of the Agreement, as Respondent also asserts, which assertion is discussed hereinafter, Respondent contends that the unilateral change of conditions occurred in 1992, 1993 and 1994 and because the charges herein were not filed until October 30, 1995, they are barred by § 18(a)(4)(A) of the Statute. The record shows that Mr. Howell called Mr. Walter E. Dresslar, NTEU Assistant Counsel and National Field Representative, about the interview (Tr. 20); that Mr. Dresslar prepared the ULP charge, DA-CA-40087, concerning the Howell interview which he signed on behalf of Mr. Robert M. Tobias, National President of NTEU (Tr. 19); and that Mr. Dresslar who has direct responsibility for the Southwest Region which includes Texas, and the South Central Region, which includes Louisiana (Tr. 15), knew that the interview had been videotaped is shown by the fact that in an information request in the Tooley-Johnson grievance he requested the videotape recordings of the August 31, 1993, interview of Christine Tooley-Johnson and the October 26, 1993, interview of Mr. Howell (Agency Exh. 2). Moreover, the numerous videotaping incidents in Texas in 1992, 1993 and 1994 create a presumption that Mr. Dresslar was informed of the videotaping.

Mr. Dresslar certainly could have known of the videotaping at Brownsville and at Houston; but he credibly testified that he did not (Tr. 18, 29); that Mr. Howell never told him that the interview had been videotaped (Tr. 20, 22), but, rather called him because the Internal Affairs Agent had sought to compel Mr. Howell to disclose information he had gained as a designated representative (Tr. 21). The ULP Mr. Dresslar prepared and filed (Agency Exh. 1) reflects only the asserted coercion and interference by, ". . . ordering Walter Howell, a designated representative of the National Treasury Employees Union, to disclose, under threat of disciplinary action, the content or substance of statements made by a bargaining unit employee and Mr. Howell in the course of private representational discussions. . . ." (id.). The information request, inter alia, for the videotape recordings of the Johnson and Howell interviews, was not made until June 7, 1996 (Agency Exh. 2; Tr. 26) and Mr. Dresslar testified that he did not learn of the videotaping until, ". . . Charles Giunta, the chapter president of NTEU 143 in El Paso, Texas, gave me a telephone call -- it must have been September, October of 1995 -- telling me that he went to an interview and . . . he learned during the course of that interview that the interview had been videotaped by Internal Affairs. And I learned at that time. . . ." (Tr. 29-30). The surprise exhibited by CMC Director Grimes when told of the New Orleans videotaping and the surprise on the part of all members, management and NTEU, of the national bargaining team in October 1995, when Messrs. Giunta and Acosta told them that Customs had videotaped employee interviews at El Paso and New Orleans, supports Mr. Dresslar's assertion that NTEU at the national level was not aware of the videotaping of employee interviews until September or October, 1995. The charges herein having been filed on October 30, 1995, were timely.

Moreover, even if the Brownsville Chapter's acquiescence⁴ were considered tantamount to a local agreement on video-taping, Mr. Dresslar testified, without contradiction, that,

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Respondent did not pursue the Houston interview of 3/11/92. It is shown on Respondent's list, n.2, supra, and I have taken note of it. The record contains no evidence or testimony as to whether the employee and/or his representative was aware of the videotaping; it was a single episode, not shown to have been repeated and, accordingly, is not further considered. However, even if Houston were equated to Brownsville, my conclusion concerning Brownsville would apply equally to Houston.

". . . If any port negotiated their own agreement or local chapter negotiated their own agreement, it would have no effect on any other chapter at all or the region in general." (Tr. 19).

Accordingly, when Respondent unilaterally changed the conditions of employment in September and October, 1995, at El Paso, Texas, and at New Orleans, Louisiana, by videotaping employee interviews, it violated §§ 16(a)(5) and (1) if the change were not "covered by" the National Agreement, and, of course, the charges herein were timely.

2. Videotaping not, "covered-by" the 1991 Agreement.

Section 7 of Article 41 of the 1991 National Agreement is set forth in Paragraph 5 of the Findings, infra, and does, indeed, use the phrases: "tape-records", "tape-recording" and "tape record"; but nowhere does the word "video" appear. Respondent asserts that "tape-records", etc., means magnetic tape; that videotape is a magnetic tape; therefore, "tape records" includes videotape records and, because the Agreement covered videotape recording, there was no change and no obligation to give the Union notice and/or to bargain before implementing videotaping of employee interviews. Respondent's syllogism is reminiscent of Humpty Dumpty's statement,

"When I use a word, 'Humpty Dumpty said, in a rather scornful tone,' it means just what I choose it to mean - neither more nor less." Alice's Adventures in Wonderland, Lewis Carroll.

The Authority has set forth the considerations it applies in assessing whether a matter is "covered by" an existing agreement. Thus, in Department of Veterans Affairs Medical Center, Denver, Colorado, 52 FLRA 16 (1996), the Authority stated, in part, as follows:

"In SSA [U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993)], the Authority established a three prong approach for determining whether it should sustain a respondent's assertion that it has no duty to bargain based on the terms of an existing negotiated agreement. The Authority stated that, under the first prong, it looks to the express language of the provision of the agreement to determine whether it reasonably encompasses the subject in dispute. 47 FLRA at 1018. In this connection, an exact congruence of the language is

not required. Id. The Authority stated that, under the second prong, it determines whether the subject in dispute is "inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract." Id. (quoting C & S Industries, Inc., 158 NLRB 454, 459 (1966)) (citation omitted). In other words, the Authority determines whether the subject in dispute is 'so commonly considered to be an aspect of' a subject set forth in a provision of a contract that negotiations over that subject are presumed foreclosed. Id. The Authority stated that the third prong applies in cases where it is difficult to determine whether the subject matter sought to be bargained is an aspect of matters already negotiated. In such cases, the Authority will give controlling weight to the parties' intent. Id.; Navy Resale Activity, Naval Station, Charleston, South Carolina, 49 FLRA 994, 1002 (1994). In making these determinations, the Authority will, 'examine all record evidence[,] including the parties' bargaining history and prior agreements, to determine whether 'the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances.' SSA, 47 FLRA at 1019." (52 FLRA at 23). See, also, U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., 51 FLRA 1274, 1277 (1996).

The express language of Section 7 of Article 41 does not mention "video". The term, "tape-records" appeared in the parties' first National Agreement of June 30, 1980 (G.C. Exh. 8, Article 3, Section 12 F.), and was coupled with stenographic record. Thus Section F. provided that, "Where a representative . . . tape-records . . . or causes a stenographic record to be made . . . the employee shall receive a verbatim transcript . . .", all of which emphasized that the recordation covered was what was said. In 1979, when the Agreement was negotiated, Respondent possessed no video recording equipment - indeed, Respondent stated it did not acquire video equipment until 1990 and the Record shows that Respondent did not videotape an employee interview until 1992. All tape recordings were on audio cassette recorders (Tr. 75, 77, 78). The language of the 1980 Agreement was carried over in the 1983 Agreement largely without change, except that: (a) the employee shall receive a verbatim transcript only "if transcribed"; and (b) a new concluding sentence was added, "Nothing in this Subsection shall expand or diminish the rights an employee possesses under the

Privacy Act." The 1987 Agreement carried over the language of the 1983 Agreement verbatim. In the 1991 Agreement, the Internal Affairs provision was restructured and a separate Article, 41, was established for Office of Internal Affairs Interviews and the prior language, slightly modified, became Section 7 of Article 41. Mr. Acosta who was a member of NTEU's bargaining team from the first National Agreement (1980) through the 1997 Agreement, testified, both credibly and without contradiction, that it always was understood by all parties that "tape-recording" meant audio recording but that he didn't recall any time that the term, "tape-records" was discussed until the negotiation of the 1991 Agreement when the meaning of "tape-recording" and "tape record" was discussed at length as the result of NTEU's demand that the employee, or his representative, have the right to record the interview (Tr. 80-81). He said video-taping was not mentioned, that, ". . . This was entirely about the spoken word. This was entirely about recording the spoken word." (Tr. 81). Mr. Acosta's testimony, concerning the discussions at the negotiations for the 1991 Agreement, was fully corroborated by the equally credible testimony of NTEU Assistant Counsel Adkins and of Mr. Giunta, also a member of NTEU's bargaining team. Thus, Mr. Adkins stated that they discussed audio recording, ". . . Because we had to . . . talk about whether the employee would be able to bring in a cassette deck to tape record the interview . . ." (Tr. 89-90); and Mr. Giunta stated, ". . . And it was discussed that the employee or the Union representative could bring a small cassette, mini-cassette tape recorder into the interview room, and it was also discussed that that would be the limitation so that we would not bring in audio technicians, cords, and large recording equipment" (Tr. 42).

"Video" is not encompassed by the word "tape" or "tape recording" and is not inseparably bound up with and is not an aspect of the term covered by the contract. For example, Webster's Third New International Dictionary, Unabridged, 1971, defines, "tape-record", "tape recorder" and "tape recording" as follows:

"tape-record . . . vt [back-formation fr. *tape recording*] : to make a tape recording of <*tape-record* a speech>
"tape recorder *n* : a magnetic recorder using magnetic tape
"tape recording *n* : magnetic recording on magnetic tape; *also* : a recording made by this process"

By contrast, "video", "video recording" and "video tape recording" are defined as follows:

"video . . . *n* -s [*videre* to see + E -o (as in *audio*)] : TELEVISION

"video recording *n* **1** : a motion picture of a television production made by photographing the kinescope tube **2** : VIDEO TAPE RECORDING

"video tape recording *n* : a recording of a television production made by recording sound and video signals on magnetic tape"

Not only does "tape recording" not include video recording but videotape recording means the recording of sound and video signals on magnetic tape and introduces a new and different recording device namely an electronic camera. As noted, the consistent practice since 1979 had been audio tape recording on cassette recorders and the bargaining history shows that "tape-record", etc., in each National Agreement through the 1991 Agreement meant voice (audio) recording and nothing more. Negotiations for the 1997 Agreement had begun in February, 1995, and while Article 41 was one of the first Articles discussed, in part because Respondent wanted to restructure Article 41 to apply to all employer investigative interviews and not merely those conducted by Internal Affairs, and in part because NTEU wanted to remove the limitation of the 1991 Agreement that, "With the concurrence of the investi-gating agent", the employee may tape record the interview, videotape recording was not discussed and, the record shows, neither management nor NTEU negotiators were aware of videotaping until October, 1995, at which time the issue was accepted by the negotiators as a matter to be negotiated and the parties in the 1997 Agreement, Article 41, Section 8, reached agreement on a provision which, for the first time, addressed videotape recording. However, upon agency head review, § 14(c), Section 8 of Article 41 was disapproved. Nevertheless, the record shows that the parties in the 1997 Agreement added, "video recording", ". . . because the previous contracts had not covered videotaping" (Tr. 95).

Accordingly, I find that "videotaping" was not "covered by" the 1991 Agreement.

3. Video recording of interviews is not a matter of internal security within the meaning of § 6(a)(1) of the Statute.

The right of management to record what is said at employee interviews, by note taking, by shorthand or by voice recording, has long been assumed, United States Immigration and Naturalization Service, San Diego, California, 13 FLRA 591 (1984), enf'd 760 F.2d 278

[No. 84-7166] (9th Cir. 1985), has been recognized in agreements of the parties here since 1980, is not in issue and, while I accept that it has been treated as a management right under § 6(a)(1) of the Statute, I specifically do not make any decision as to whether it is, or is not, a reserved right of management. Assuming that recordation of the spoken word at employee interviews is a management right, it does not follow that video recording, also, is a management right. Surveillance by covert video camera is an investigative technique and a right reserved to management by § 6(a)(1) of the Statute, Department of Veterans Affairs Medical Center, Denver, Colorado, 52 FLRA 16 (1996); but, as noted in Department of Health and Human Services, Social Security Administration, Region VI, and Department of Health and Human Services, Social Security Administration, Galveston, Texas District, 10 FLRA 26 (1982),

". . . in the main, § 6(a), and specifically 'internal security practices' reflects the language of § 11(b) of Executive Order 11491, as amended. I have given careful consideration to the Council's decision in American Federation of Government Employees, AFL-CIO, Local 1592 and Army-Air Force Exchange Service, Hill Air Force Base, Utah, FLRC No. 77A-123, 6 FLRC 612 (1978) and in particular to the portion of the Council's decision concerning Union Proposal III, 6 FLRC at 617-621, wherein the Council stated, in part, as follows:

'No intent is evidenced in the Order, or in the various reports and recommendations which accompanied the Order and its subsequent amendments, that the phrase "internal security" practices is to be accorded any meaning other than the common meaning ascribed to it "Security" relates to defending, protecting, making safe or secure. Hence, as used in the Order . . . the term "security" practices include, inter alia, those policies, procedures and actions that are established and undertaken to defend, protect, make safe or secure (i.e., to render relatively less subject to danger, risk or apprehension) the property of an organization.'" (6 FLRC at 619). (10 FLRA at 39-40).

In the common meaning of "internal security", visual recording of employee interviews is not included and, notwithstanding Respondent's assertion that video recording

helps determine demeanor by showing body language (Tr. 128, 129), it is not an investigative technique as the covert surveillance video camera is. Because it is not a reserved right of management, the decision to use video cameras to record employee inter-views was negotiable and it is unnecessary to determine whether the impact of Respondent's unilateral implementation was more than de minimis.

4. Change had more than a de minimis impact.

If, contrary to my conclusion, above, video recording of employee interviews were a reserved right of management, then Respondent's obligation to bargain would be limited to the right, pursuant to § 6(b)(2) and (3), to bargain on procedures and or appropriate arrangements (I&I bargaining) and the Authority has made clear that the obligation to bargain over impact and implementation turns on whether the change had more than a de minimis impact on employees' conditions of employ-ment. U.S. Department of Transportation, Federal Aviation Administration, Washington, D.C. and Michigan Airway Facilities Sector, Belleville, Michigan, 44 FLRA 482, 492-493 (1992); U.S. Department of Justice, Immigration and Natural-ization Service, Washington, D.C., 51 FLRA 1274, 1277 (1996).

Here, the record shows that at El Paso video taping of an interview could be done so unintrusively that even an experienced Chapter President was unaware; but at New Orleans it was done in such a manner that it was disruptive and intimidating. Whether videotaping changed the interview procedure, as it did, drastically, in New Orleans, use of a camera wrought substantial change in conditions of employment. Presence of a camera, whether on a tripod in the examination room, mounted at the ceiling of the examination room, or behind a two-way mirror in an adjacent room, is a distraction and is intimidating to some; it increases the number of people present for the interview; it creates a new and different record of the interview, namely a moving picture of the inter-view, which creates great concerns as to how the videotape would be used (Tr. 38-39). Generally, the presence of the video camera changes the seating arrangements and, because of the desire to have the employee being examined face the camera, makes it difficult for the employee's representative to effectively assist the employee during the examination; etc. The changes were substantial and more than de minimis.

Accordingly, Respondent was obligated to give the Union notice and an opportunity to bargain, whether about the decision to videotape or its impact and implementation, before changing conditions of employment at El Paso and at

New Orleans. Because Respondent unilaterally changed conditions of employment at El Paso and at New Orleans by videotaping bargaining unit employee interviews, it violated §§ 16(a)(5) and (1) of the Statute and it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41, of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41, and § 18, of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the United States Department of the Treasury, United States Customs Service, shall:

1. Cease and desist from:

(a) Changing conditions of employment of bargaining unit employees at El Paso, Texas, or at New Orleans, Louisiana, by videotaping employee interviews without giving the National Treasury Employees Union, the exclusive representative of its employees (hereinafter, "NTEU"), notice and opportunity to bargain to the extent required by the Statute.

(b) In any like or related manner, interfering with, restraining, or coercing its employees at New Orleans, Louisiana, or El Paso, Texas, 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) Upon request of NTEU, provide any employee at El Paso, Texas, and any employee at New Orleans, Louisiana, whose interview has been videotaped, a copy of the videotape if the employee has not previously been furnished a copy of the videotape.

(b) Upon request of NTEU, discuss the use of any videotape made of any employee interview at El Paso, Texas, or at New Orleans, Louisiana.

(c) Before videotaping any employee interview at El Paso, Texas, or at New Orleans, Louisiana, give NTEU notice and, upon request, bargain to the extent required by the Statute.

(d) Post at its facilities in El Paso, Texas, and in New Orleans, Louisiana, 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 Commissioner of Customs and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places at El Paso, Texas, and at New Orleans, Louisiana, 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.

(e) Pursuant to § 2423.41(e), of the Authority's Rules and Regulations, 5 C.F.R., § 2423.41(e), notify the Regional Director of the Dallas Region, Federal Labor Relations Authority, 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: October 31, 1997
Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of the Treasury, United States Customs Service, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES AT EL PASO, TEXAS AND AT NEW ORLEANS, LOUISIANA, THAT:

WE WILL NOT change conditions of employment of bargaining unit employees at El Paso, Texas, or at New Orleans, Louisiana, by videotaping employee interviews without giving the National Treasury Employees Union, the exclusive representative of our employees (hereinafter, "NTEU"), notice and opportunity to bargain to the extent required by the Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees at El Paso, Texas, or New Orleans, Louisiana, in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of NTEU, provide any employee at El Paso, Texas, and any employee at New Orleans, Louisiana, whose interview has been videotaped, a copy of the videotape if the employee has not previously been furnished a copy of the videotape.

WE WILL, upon request of NTEU, discuss the use of any videotape made of any employee interview at El Paso, Texas, or at New Orleans, Louisiana.

WE WILL, before videotaping any employee interview at El Paso, Texas, or at New Orleans, Louisiana, give NTEU notice and, upon request, bargain to the extent required by the Statute.

TREASURY
SERVICE

UNITED STATES DEPARTMENT OF THE
UNITED STATES CUSTOMS

Date:

By:

Commissioner of Customs
Washington, D.C.

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 Region, 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906, and whose telephone number is: (214) 767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case Nos. DA-CA-60047 and DA-CA-60048, were sent to the following parties in the manner indicated:

CERTIFIED MAIL, RETURN RECEIPT

CERTIFIED NOS.

Currita Waddy, Esquire
Octave Weber, Esquire
423 Canal Street, Room 216
New Orleans, LA 70130

P 600 695 490

Walter E. Dresslar, Esquire
National Treasury Employees Union
3036 South 1st Street, Room 200
Austin, TX 78704

P 600 695 491

Charlotte A. Dye, Esquire
Federal Labor Relations Authority
525 Griffin St., Suite 926, LB 107
Dallas, TX 75202-1906

P 600 695 492

REGULAR MAIL:

U.S. Customs Service
West Texas CMC
P.O. Box 9516
El Paso, TX 79985

Dated: October 31, 1997
Washington, DC