OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERANS AFFAIRSMEDICAL CENTER, DALLAS, TEXAS Respondent

and

Case No. DA-CA-50531

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2437, AFL-CIO Charging Party

Gregory A. Burke andCatherine Rich, Esquires For the Respondent Dan Miles For the Charging Party
Michelle Ledina andSusan Jelen, Esquires For the General Counsel
Before: ELI NASH, JR. Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.* (the Statute).

Based upon an unfair labor practice charge filed by the Charging Party, American Federation of Government Employees, Local 2437, AFL-CIO (the Union), a Complaint and Notice of Hearing was issued by the Regional Director for the Dallas Region of the Federal Labor Relations Authority. The complaint alleges that the Department of Veterans Affairs Medical Center, Dallas, Texas (the Respondent) violated section 7116(a)(1) and (5) of the Statute by installing covert surveillance cameras in the Canteen while deliberately concealing such action from the Union and without providing the Union notice and an opportunity to negotiate the impact and implementation of the change.(1) Respondent admits that the VCS installed covert surveillance cameras in the Canteen in December 1994 without notice to or bargaining with the Union, but contends that such action did not constitute a change in conditions of employment or engender an obligation to bargain over impact and implementation for several reasons which will be discussed below.

A hearing was held in Dallas, Texas, on February 27, 1996, at which all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.(2) Upon Respondent's motion, the deadline for filing briefs was extended from March 26 to April 26, 1996. Counsel for the General Counsel and the Respondent filed timely briefs which were received on May 1, 1996, and have been carefully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

A. Background.

1. The applicable bargaining history.

The American Federation of Government Employees, AFL-CIO (AFGE), is the certified exclusive representative for a

nationwide consolidated unit of employees appropriate for collective bargaining, and the Union is an agent of AFGE for the purpose of representing unit employees located at Respondent's facilities (including VCS employees at the Canteen) in Dallas, Texas. The parties are subject to the terms of a master agreement originally negotiated in 1982 between the Veterans Administration (now the Department of Veterans Affairs) and AFGE.[3] Article 12, Section 6 of the master agreement provides:

Article 12

INVESTIGATIONS, DISCIPLINE AND ADVERSE ACTION

* * * * * * *

Section 6 - Investigations

A. Before being questioned in a formal investigation, the employee will be informed as to why he/she is being questioned.

B. At the time the employee who is the subject of a formal investigation is being questioned, he/she will be informed of the nature of the allegations.

C. While being questioned or being required to provide a written or sworn statement, the employee

will have the right to be represented by the Union. If an employee is the subject of an investigation, the employee will be informed of his/her right to be represented prior to being questioned or required to provide a written or sworn statement. Except in very rare and unusual circumstances, if the employee desires a representative, the investigator will wait a reasonable period of time before proceeding.

A copy of the statement of the employee will be given to the employee and/or the employee's designated representative upon request.

D. Supervisors, employees and union represent

atives will not, except as specifically authorized, disclose any information about an investigation.

Another provision of the master agreement, Article 5, Section 2, permits local supplemental agreements to be negotiated as long as they are not inconsistent with the terms of the master agreement.

On or about June 1, 1992, the parties to the master agreement negotiated a Memorandum of Understanding (MOU) concerning the nationwide installation and use of the so-called Standard Security Surveillance TV (SSTV) System. SSTV refers to *overt* surveillance cameras that are installed permanently at various retail facilities to monitor employees and customers; that are clearly visible to them; and that are called to their attention by posted signs. By contrast, *covert* surveillance cameras--which are intended to be undetectable and

are installed for temporary use solely during *criminal investigations*--has never been the subject of bargaining at either the national or local level.(4)

2. Prior use of covert surveillance cameras.

Covert surveillance cameras have been used on a number of occasions by VA/VCS in the course of criminal investigations.

Bonita Loman, the Director of VCS's Central Region (which includes the Respondent's facilities in Dallas), testified concerning the number and locations of such investigations occurring between 1992 and 1995. Of the 39 investigations listed (Resp. Ex. 5), 29 occurred at facilities where AFGE was the exclusive representative.(5) On none of these occasions was AFGE or any other labor organization notified in advance that a covert camera surveillance was about to take place. According to a number of witnesses, prior disclosure of such covert surveillance activity to anyone without an absolute need to know could compromise the integrity of the criminal investigation by alerting potential suspects prematurely and also would create safety risks for the covert investigator who is required to install and maintain the hidden cameras alone at night where discovery could prove fatal.(6)

The practice followed in cases where covert camera surveillance results in the detection of unlawful activity was described by several witnesses in connection with an incident which occurred at the Respondent's facilities in March 1994. In that situation, two unit employees were videotaped stealing money from the cash register of the "chicken shop," a retail store at the Respondent's facility, by the use of a covert camera located in the ceiling of the shop. The following morning, Norman Seibert, at that time the Respondent's Chief of Security, Gary Shelton, the Respondent's Assistant Chief of Human Resources, and George Pryor, who was then the District Manager for VCS, held a meeting with Union president Andrew Brumsey and another Union official, Dan Miles. At that meeting, the incriminating videotape of the two employees stealing money from the store's cash register was played for Brumsey and Miles, who were informed that "covert" or "hidden" cameras had been used in the surveillance of the chicken shop.(7) The two employees were then brought into the meeting (one at a time), and, in the presence of their Union representatives, were shown the videotape and afforded the option of resigning or being discharged and prosecuted. Both employees chose to resign on March 7, 1994. At no time during or after these events did the Union object to the use of covert surveillance cameras as part of the criminal investi-gation or request to bargain over their installation and use.

B. The covert surveillance in December 1994-March 1995.

The facts giving rise to the instant complaint arose in the latter part of 1994. As explained by Bonita Loman, the retail store run by VCS at the Respondent's facility was experiencing large and growing losses far in excess of what was deemed acceptable for such an operation. Thus, while the acceptable loss rate is 1.5%, the loss at the Dallas store had risen to over $77,000, a rate of 6.8%, at the point when Loman decided to request outside assistance. It was only after all her other efforts to control the store's losses were unsuccessful that she called Duane Walsh, the Associate Director of Human Resources, Administration and Security for VCS, and requested the installation of covert surveillance cameras at several locations in the store. Loman's conclusion in making the request was that only theft could account for such large losses.

As a result of Loman's call to Walsh, an inspector for police operations at VA headquarters named David Burke was assigned the task of traveling to Dallas in order to determine whether criminal conduct was occurring and, if so, to notify the U.S. Attorney. Burke began his covert investigation on December 6, 1994, by conducting surveillance in a number of

areas. He provided information to the U.S. Attorney on January 29, 1995, and was told to broaden his investigation. Surveillance resumed on February 12 and continued through March 20, 1995. Burke, working

alone and at night, installed three covert surveillance cameras at various common areas of the Respondent's retail establishments, and surreptitiously entered these facilities every other night to retrieve the videotapes and re-position the cameras.(8) At the conclusion of his criminal investigation prior to May 31, 1995, Burke removed the covert cameras and took them away. Burke's investigation ultimately resulted in the felony convictions of 5 VCS employees and the misdemeanor convictions of another 15-20 VCS employees.(9)

According to the undisputed testimony of Union president Brumsey, he first learned of the covert criminal investigation on May 25, 1995, when employees at Respondent's facility called him and reported that a number of VCS unit employees had been taken into custody by the VA security police. Brumsey sent the Union's chief steward to investigate, and also went to the VA police station to see the employees who had been detained but was denied access due to the criminal nature of the investigation.

The following day, Brumsey sent a letter to Alan Harper, the Respondent's Medical Center Director, acknowledging receipt of "evidence files and video tapes in regards to proposed actions in the Canteen Service," and requesting any additional evidence in the Respondent's possession which would be used concerning the above matter. Harper responded to this request by memo dated May 30, 1995, in which he indicated that, apart from the evidence file concerning each of the affected VCS employees, the video tapes and the evidence log, all of which had previously been furnished to the Union, "[a]t this time you [Brumsey] have everything that we have."(10)

On May 31, the Union made "an official Demand to Bargain on the installing of Surveillance equipment and Electronic Cameras which has (sic) been used here at the Dallas VA Medical Center per Canteen Service." The Union further demanded that the surveillance cameras be removed immediately, and in the Union's presence, because the Union viewed the cameras as having been installed illegally without bargaining over the impact and implementation of a change in conditions of employment. By letter dated June 2, 1995, Respondent replied to the Union's bargaining request by referring to and attaching a copy of the 1992 MOU between the parties at the national level concerning the impact and implementation of management's decision to install and use SSTV (overt) cameras nationwide;(11) acknowledging its continuing obligation to bargain over the impact and implementation of future changes in the SSTV system; and referring the Union to the VCS canteen chief for future bargaining over local security systems

maintained by the VCS.(12) On June 7, 1995, the Union filed an unfair labor practice charge without any further communication with the Respondent.

Discussion and Conclusions of Law

As indicated above, the complaint in this case alleges that the Respondent violated section 7116(a)(1) and (5) of the Statute by installing covert surveillance cameras in the Canteen as of December 1994 without providing the Union prior notice and an opportunity to negotiate the impact and implementation of the change. Respondent asserts that it had no duty to bargain, and therefore no violation was committed, because the use of covert surveillance cameras did not constitute a change in conditions of employment; was covered by the parties' collective bargaining agreement; and was a nonnegotiable internal security practice.

A. Respondent did not change conditions of employment.

The Authority has previously held that an agency has the duty to provide an exclusive representative with prior notice and an opportunity to bargain over the impact and implementa-tion of management's decision to install covert surveillance cameras as part of its internal security practices. *Depart-ment of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 221-22 (1995) (*VA Nashville*). However, this case is distinguishable from *VA Nashville* in several significant respects. First, in *VA Nashville* the agency's answer conceded that its implementa-tion of a covert camera surveillance program constituted a

change in the unit employees' established conditions of employment. In this case, by contrast, the Respondent's answer specifically pleaded the absence of a change in conditions of employment as an affirmative defense.

Moreover, the undisputed evidence herein established that the Respondent's deployment of covert surveillance cameras as part of its criminal investigation did not change established conditions of employment. Thus, the record indicates that VA has used covert surveillance cameras on many occasions during

criminal investigations at facilities where AFGE has been the exclusive representative of the employees involved; that no prior notice of such covert camera surveillance ever has been given to the exclusive representative; that the Union has been notified *only after the fact* when the investigation revealed misconduct on the part of unit employees; that the Union has been given a copy of all relevant evidence collected and access to the pertinent videotapes; and that the Union has been allowed to represent the affected unit employees in any subsequent discussions or proceedings involving them. This is what occurred in March 1994 at the conclusion of a covert camera surveillance which detected two unit employees stealing money from the store's cash register. The Union was specifically notified of the covert camera surveillance, was given access to all pertinent evidence, and was present when the affected unit employees were confronted with the incriminating evidence and given the option of resignation or discharge and prosecution. This is also what occurred in the instant case. The Union was informed of the covert surveillance after its conclusion, provided copies of all relevant evidence accumulated against every unit employee, and permitted to represent unit employees in later proceedings.

To be sure, there was a noticeable change in the conditions of employment of those employees caught stealing as a result of the covert camera surveillance. They no longer were employed. However, that is not the change in conditions of employment alleged in the complaint. That change was said to be the use of covert cameras as part of the criminal investigation which began on December 6, 1994, without prior notice to the Union and without the opportunity for impact and implementation bargaining before the cameras were deployed. I find that there was no change of conditions of employment in that respect.

B. The existence of a current criminal investigation

precluded prior notice and bargaining in this case.

This case is also distinguishable from *VA Nashville* in that an immediate covert criminal investigation was deemed necessary by the Respondent in order to curtail the massive losses of property occurring at its Dallas facility. In *VA Nashville,* by contrast, there was no immediate need for the agency to use covert surveillance cameras for the first time. Rather, the agency notified the union that it had decided to purchase and install such devices for use as needed as part of its internal security plan. The agency's notice to the union in *VA Nashville* of its decision to use such cameras therefore had no potential to compromise an imminent criminal investi-gation. Under these circumstances, the Authority concluded that the agency had an obligation to bargain over the impact and implementation of its decision to install and use covert

surveillance cameras, and that its rejection of the union's request to bargain over impact and implementation violated section 7116(a)(1) and (5) of the Statute.

I conclude that advance notice to the Union in this case, and the ensuing negotiations over impact and implementation, would have excessively interfered with the Respondent's internal security practices by compromising the effectiveness of its criminal investigation. The record is replete with evidence of the need for secrecy while a covert criminal surveillance operation is in progress, and the damage that can be caused by its premature disclosure on the integrity of the investigation and the safety of the investigator.

On a number of prior occasions, the Authority has recognized management's right to conduct such investigations without prior disclosure. *See National Federation of Federal Employees, Local 28 and Defense Commissary Agency*, 47 FLRA 873, 880-83 (1993) (requiring agency to notify union in advance of impending random inspections of personal hand-carried items as employees were leaving commissary would negate deterrent effect of inspections and excessively interfere with agency's internal security practice); *National Association of Government Employees, Locals R14-22 and R14-89 and U.S. Department of the Army, Headquarters, U.S. Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas*, 45 FLRA 949, 962-63 (1992) (proposals requiring prior notice to union of when and where agency has decided to conduct gate inspections of employees leaving military base risked premature disclosure to employees and excessively interfered with management's right to determine its internal security practices); *National Federation of Federal Employees, Local 2058 and U.S. Department of the Army, Aberdeen Proving Ground Support Activity, Aberdeen Proving Ground, Maryland*, 38 FLRA 1389, 1403 (1991) (requiring agency to announce partner and patrol assignments in advance directly interfered with management's right to determine internal security practices designed to reduce risk of theft of agency property by employees); *Department of the Treasury, Internal Revenue Service, Jacksonville District and Department of the Treasury, Internal Revenue Service, Southeast Regional Office of Inspection*, 23 FLRA 876, 880 (1986) (Congress could not have intended to prohibit agencies from engaging in unannounced surveillance of allegedly dishonest employees as an investigative technique without first informing employee of what was being done and providing an opportunity to request representation).

Accordingly, I conclude that the Respondent did not violate section 7116(a)(1) and (5) of the Statute as alleged

in the complaint by conducting the covert camera surveillance in this case without giving the Union prior notice and an opportunity to bargain over impact and implementation, even if (contrary to my earlier finding) such covert surveillance were a change in conditions of employment.

C. Respondent cannot be held to have violated its

duty to bargain over impact and implementation

of covert surveillance cameras after completion

of the investigation.

Once the covert camera surveillance was completed and the Union was notified of the results, the Respondent would have had a duty to bargain upon request concerning the impact and implementation of its decision to use such equipment during the course of criminal investigations,[(13)] *VA Nashville*, *supra*, unless the Union in some manner gave up its right to bargain or the matter in question was *de minimis*. *See Social Security Administration, Area IX of Region IX*, 51 FLRA 357, 369 (1995). The Union's acquiescence in the use of covert surveillance cameras by the agency during previous criminal investigations would not have precluded negotiations here. Otherwise, conditions of employment established by past practice would never be subject to change through collective bargaining. In this case, for example, the large number of unit employees implicated in the covert camera surveillance might have persuaded the Union to request impact and implementation bargaining even though it had never done so before.

Similarly, I find that the Union would not have been precluded from bargaining by virtue of the terms of the parties' agreement which was negotiated in 1982 and is still in effect. Thus, applying the test set forth by the Authority in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004, 1018-1019 (1993), I find that the matter of covert camera surveillance was not covered by Article 12, Section 6 of the parties' agreement as the Respondent contends. That provision relates

solely to the rights of individual unit employees when questioned by management during an investigation, and does not address camera surveillance in any manner. To underscore that there was no intent to cover camera surveillance matters in Article 12, Section 6, the parties to that agreement chose to

negotiate a Memorandum of Understanding in 1992 when the agency decided to use *overt* surveillance cameras nationwide. If such matters were already covered by Article 12, Section 6 of the parties' 1982 agreement, there would have been no need for the 1992 MOU.(14)

Having concluded that the Union was within its rights to request impact and implementation bargaining on May 31, 1995,

concerning the use of covert surveillance cameras, I further conclude that the Respondent cannot be found to have violated the duty to bargain by its conduct in reply to that request. First, the complaint as set forth above alleges *solely* that the Respondent violated its duty to bargain by installing covert cameras in the Canteen as of December 6, 1994, without providing the Union prior notice and an opportunity to bargain the impact and implementation of the change. There is no allegation that the Respondent violated its duty to bargain when the Union sought to negotiate on May 31, 1995, well after the covert surveillance had ended, and such issue was not litigated at the hearing. Under these circumstances, I find that the latter question is not properly before me to decide. However, even if the complaint were broadly interpreted to include such an allegation and the parties could be said to have litigated the issue, I would still conclude that no violation was committed for the reasons set forth below.

When the Union requested bargaining by letter dated May 31, 1995, the Respondent promptly replied by letter dated June 2, 1995, through the usual communication channels. I have found that the Union received the Respondent's reply in due course, just as the Union had received immediate replies to all of its requests for information concerning the covert surveillance and the location of all cameras. While I have found that the Union's bargaining request should have been understood by the Respondent as pertaining to the recent use of covert surveillance cameras rather than to the use of overt surveillance cameras concerning which the parties at the national level had negotiated an agreement in 1992, the Union easily could have clarified the bargaining request for the Respondent by making specific reference to the use of covert surveillance cameras. Instead, the Union filed an unfair labor practice charge dated June 5, 1995, alleging that the Respondent violated the Statute by installing surveillance equipment to photograph unit employees without notice and

bargaining. Moreover, there is no record evidence that the Union thereafter sought to clarify its bargaining request to the Respondent. Had it done so, the Respondent would have had to negotiate consistent with the Authority's decision in *VA Nashville* (which had been issued on March 2, 1995) or attempt to justify its refusal on grounds which could be tested in subsequent proceedings. Accordingly, if the complaint alleged such a violation, I conclude that the Respondent did not violate section 7116(a)(1) and (5) of the Statute by failing to negotiate in good faith concerning the Union's request dated May 31, 1995.

Having concluded that the Respondent did not violate the Statute as alleged in the complaint, I recommend that the Authority adopt the following Order.

ORDER

The complaint in Case No. DA-CA-50531 is dismissed.

Issued, Washington, DC, June 25, 1996.

ELI NASH, JR.

Administrative Law Judge

1. By order dated December 22, 1995, the Acting Regional Director added the Veterans Canteen Service (VCS) as a Respondent in this case. Such action was taken in response to a motion by the named Respondent to have the VCS substituted as Respondent and the General Counsel's opposition thereto. At the hearing and again in its post-hearing brief, the named Respondent renewed its motion before the undersigned to sub-stitute VCS. The motion was denied at the hearing and is once again denied. As the Authority previously held in *Department of Veterans Affairs, Dwight D. Eisenhower Medical Center, Leavenworth, Kansas*, 44 FLRA 1362, 1370-71 (1992) and *Veterans Administration Medical Center, Leavenworth, Kansas*, 40 FLRA 592, 610 (1991) when presented with the same arguments raised here, the Medical Center is responsible for the actions of the Canteen Service under the theory of *respondeat superior*. Since it is conceded that this case is not distinguishable in any respect from the cases cited above, I conclude that the result here should be the same as in those cases.

2. An earlier scheduled hearing was indefinitely postponed and subsequently rescheduled at the Respondent's request due to a lack of Congressional appropriations.

3. I reject the General Counsel's contention that the master agreement had expired at the time that the events in this case took place. Thus, under Article 35, Section 2 of the parties' agreement covering the nonprofessional employees involved herein, the initial 3-year term (which began on August 13, 1982) "shall be automatically renewed for one year periods, unless either party gives written notice to the other party of its intention to amend or modify this Agreement not more than 105 calendar days nor less than 60 calendar days prior to the expiration date of this Agreement." Neither party ever exercised that option during the contractual window period. Accordingly, by its terms, the original agreement automa-tically renewed itself again on August 13, 1994, and was in full force and effect at all relevant times herein. The General Counsel's reliance on *United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas*, 51 FLRA 768 (1996), is misplaced. In that case, it was undisputed that the parties' agreement had expired by its terms in 1979, although the provisions of that agreement were being followed thereafter. 51 FLRA at 784.

4. Respondent introduced into evidence a large number of documents purporting to be notes of the 1982 negotiations leading to the master agreement, and contended that the notes reflect an intention by AFGE to avoid involvement in limiting management's use of covert surveillance techniques. I find those notes unhelpful and inconclusive. Thus, there was no testimony from anyone who participated in the 1982 negotia-tions concerning the intent of the parties or even what the various comments meant or whose comments they were. Under these circumstances, I accord no probative weight to such notes.

5. Of the 39 covert camera surveillances, 23 uncovered unlawful activity resulting in disciplinary or criminal action and 16 investigations did not. In the 29 surveillances that involved employees represented by AFGE, 14 detected unlawful activity and 15 did not. Where a covert camera surveillance does not detect any improper conduct, nobody is informed that the surveillance was conducted, thereby insuring that no adverse inferences are drawn from the fact that an investigation occurred.

6. Among those who testified to this effect without contradiction were Norman Seibert, the Respondent's Chief of Security in 1994; David Burke, VA Headquarters' Inspector of Police Operations, who has conducted covert surveillance for 16 years; and Duane Walsh, the Associate Director of Human Resources, Administration and Security for VCS, who is responsible for security at VCS throughout the United States.

7. While there is some question whether the word "covert" or the word "hidden" was used when the Union was informed of and shown the videotape on March 3, 1994, I find that these terms were used interchangeably by management officials during the meeting; in fact mean the same thing; and should have been so understood by Brumsey and Miles. I further credit the testimony of Shelton, Seibert and Pryor that the Union was specifically informed of the use of covert surveillance cameras, and discredit Brumsey's testimony that Seibert never mentioned the use of either "covert" or "hidden" cameras at the meeting on March 3. Not only did I find the three management witnesses' testimony to be clear and corroborative on this point, but Shelton also prepared a memo of the March 3 meeting right after it ended which confirms that the Union was informed of the use of "covert" cameras in apprehending the two employees.

8. Thomas Baudine, who had just become the new canteen chief at the Respondent's facility and therefore was not a potential target of the covert investigation, assisted Burke in relocating the hidden cameras. He was one of the few individuals who had any knowledge of the investigation.

9. All of the affected employees received notices of proposed removal from the Respondent dated May 25, 1995, which specified that such action was based on the results of a "covert VA security investigation," and were thereafter either terminated or were advised that their temporary appointments would not be renewed.

10. On June 6, 1995, Brumsey asked Harper for additional information, specifically the number, type and location of surveillance equipment "presently in place" at the Dallas VA Medical Center. Harper replied on June 9 with a list of 26 cameras and their locations, identifying 3 of them as being located in the Canteen Office and monitored by VCS employees. The listed information was responsive to Brumsey's request even though it identified only the SSTV or *overt* cameras and made no mention of the covert cameras that had been used from December 1994 to March 20, 1995 as part of the criminal investigation, since the latter cameras had been removed at the conclusion of the criminal investigation (consistent with established policy and practice) and thus were not "presently in place" when the Union made its request. There is nothing in the record to indicate that the Union thereafter sought any information concerning the existence and location of covert cameras (if any) in operation at the Respondent's facilities.

11. Bonita Loman, who was responsible for the Respondent's reply, testified that she thought the Union wanted to bargain over the use of overt SSTV cameras because the covert cameras had been withdrawn already. I find this explanation disingenuous. Thus, the Union had just been informed on May 25--when the VCS employees were arrested and received notices of proposed removal--that covert cameras had been used in the criminal investigation; the Union had not been advised at the same time that the covert cameras were already removed; and the Union's bargaining request specified that it wanted to bargain over the use of surveillance cameras in the canteen which (in its view) had been illegally installed without prior bargaining over impact and implementation. Under these circumstances, the Respondent should have known that the Union wanted to bargain over the installation and use of covert surveillance cameras even though the request did not use the word "covert," and the Respondent's reply should have dealt with that request rather than addressing the duty to bargain concerning overt SSTV cameras.

12. Although Brumsey testified that he never received a reply to the Union's May 31 bargaining request, he later stated--when shown a copy of Respondent's June 2 letter--that the Union "might have gotten this letter" but he "didn't recall." I find that the Respondent sent its reply in the same manner as all of its other communications with the Union, and infer that the Union in fact received it.

13. I reject the Respondent's assertion that there is no duty to bargain if the investigation is criminal in nature. *Cf. Department of Defense, Defense Criminal Investigative Service, et al.*, 28 FLRA 1145, 1149 (1987), *aff'd,* 855 F.2d 93 (3d Cir. 1988) (employee's right to union representation during investigative interview applies to criminal as well as administrative matters).

14. In my judgment, it is a much closer question whether the 1992 MOU concerning *overt* surveillance cameras precluded further negotiations with respect to the use of *covert* cameras. Inasmuch as the Respondent did not claim that covert camera surveillance matters were covered by the MOU, it is unnecessary to address that question herein.