UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: January 31, 2003

TO: The Federal Labor Relations Authority

FROM: ELI NASH
Chief Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
WASHINGTON, D.C.

Respondent

AND

U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
U.S. BORDER PATROL, TUCSON SECTOR
TUCSON, ARIZONA

Respondent

and Case No. DE-CA-01-0416

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO (NATIONAL BORDER
PATROL COUNCIL), LOCAL 2544

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

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

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C. Respondent AND U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, U.S. BORDER PATROL, TUCSON SECTOR, TUCSON, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO (NATIONAL BORDER PATROL COUNCIL), LOCAL 2544 Charging Party	Case No. DE-CA-01-0416

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 **MARCH 3, 2003**, and addressed to:

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

ELI NASH
Chief Administrative Law Judge

Dated: January 31, 2003

Washington, DC

OALJ 03-17

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C. Respondent AND U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, U.S. BORDER PATROL, TUCSON SECTOR, TUCSON, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO (NATIONAL BORDER PATROL COUNCIL), LOCAL 2544 Charging Party	Case No. DE-CA-01-0416

Matthew L. Jarvinen, Esquire

For the General Counsel

Gerald McMahon, Esquire
For the Respondent

Edward Tuffly
For the Charging Party

Before: ELI NASH
Chief Administrative Law Judge

DECISION

Statement of the Case

On October 15, 2001, the Regional Director for the Denver Region of the Federal Labor Relations Authority (herein called the Authority), issued a Complaint and Notice of Hearing in the captioned matter. This proceeding was initiated by an unfair labor practice charge filed on

February 26, 2001 and amended on October 2, 2001 and January 16, 2002, respectively by the American Federation of Government Employees, National Border Patrol Council (herein called the Council or NBPC).[1] The Complaint alleged that the U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C. (herein called Respondent Washington) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (herein called the Statute) by implementing a change in the policy concerning payment for diagnostic medical tests for bargaining unit employees exposed to potentially infectious agents and/or bodily fluids without proving the Council or the local Union with prior notice or an opportunity to bargain; and further alleged that the U.S. Department of Justice, Immigration and Naturalization Service, U.S. Border Patrol, Tucson Sector, Tucson, Arizona (herein called Respondent Tucson) violated section 7116(a)(1) and (5) when on January 12, 2001, it implemented a change in the policy concerning payment for diagnostic medical tests for bargaining unit employees exposed to potentially infectious agents and/or bodily fluids and/or changed a past practice regarding such payment without providing Local 2544 (herein called the Union) with prior notice and an opportunity to bargain.

A hearing was held in the captioned matter in Tucson, Arizona. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Respondent and the General Counsel submitted post hearing briefs which have been fully considered.

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[1] The contention that the unfair labor practice charge herein is untimely within the meaning of section 7118(a)(4), is rejected. Section 7118(a)(4) ordinarily requires that a charge be filed within 6 months of the events giving rise to the unfair labor practice. *U.S. Penitentiary, Florence, Colorado*, 53 FLRA 1393, 1402 (1998). Where as here a charging party does not learn of the unfair labor practice due either to a respondent's failure to perform a duty owed or concealment of the unfair labor practice allows a Complaint to be issued if the charging party filed the unfair labor practice charge within 6 months of discovery of the alleged unfair labor practice. *Department of the Treasury, United States Customs Service, El Paso, Texas, et al.*, 55 FLRA 43, 45-46 (1998). Local 2544 filed its original charge against Respondent Washington on February 26, 2001, less than 6 months after learning of the Yentzer's March 1, 1999 memorandum and was, therefore, timely filed.

Findings of Fact

The Council represents all Border Patrol personnel of the Immigration and Naturalization Service (INS) assigned to Border Patrol Sectors, and Local 2544 is a constituent local of the Council for purposes of representing unit employees of the Respondent Tucson Sector. Both the Respondent Western Region and the Respondent Tucson Sector are subject to the jurisdiction of the Statute and governed by the terms and conditions of a collective bargaining agreement (CBA) between the INS and the NBPC. Ralph Hunt, Local 2544 Vice President and formerly Chief Steward, filed the original charge and served a copy by mail on Respondent Washington on or about February 21, 2001.

Union's Representation of Border Patrol Agent Linares Regarding Potential Exposure to Infections Disease

Union First Vice President Ralph Hunt described Border Patrol Agent Joe Linares approaching him with respect to management's nonpayment of a medical bill and described the background of Linares' situation. Linares was in the process of assisting an undocumented alien (UDA) by carrying the UDA out when the UDA went into cardiac arrest. When Linares performed cardiovascular resuscitation, the UDA vomited into Linares' mouth. The UDA subsequently died. When Linares reported the incident to his supervisors, they instructed him to get tested. It was only after Linares was denied reimbursement for the medical tests both by the Office of Workers Compensation Programs (OWCP) and the INS that he approached Hunt for Union assistance.

On November 25, 2000, Hunt sent an electronic "cc mail" message to David Aguilar, the Chief Patrol Agent for Respondent Tucson Sector, describing the circumstances underlying Linares' claim for reimbursement. Hunt's cc mail to Aguilar requested reimbursement, arguing that management needed to support its Agents in the field and also stating that the Union would file a grievance if management did not pay for Linares' medical tests. Aguilar addressed the issue at an early December 2000 labor-management relations meeting attended by several other high-level management and Union officials. Aguilar began by throwing down Hunt's cc mail message, stating that this was an example of a threatening letter and that labor-management relations were deteriorating. Hunt responded that there was no threat implied, but that he had assumed management was unaware of Linares' situation. Hunt stated his belief that when

management learned about it, they would pay for Linares' medical tests as had been done under the past practice. Charles Newcomer (then the Local 2544 President) then stated that the Union backed Hunt 100%. Ultimately, Chief Aguilar stated that management would look into it.

Hunt heard from management on January 12, 2001[2] when the Assistant Chief Patrol Agent Ronald Colburn gave Hunt a copy of a memorandum dated March 1, 1999 issued by David A. Yentzer, Respondent Washington's Designated Agency Safety and Health Official. The memorandum provided:

> There have been several recent events in Immigration & Naturalization Service (INS) field locations involving suspected exposure to a known carrier of an infectious agent. To clarify whether local program funds should be used to pay for the subsequent diagnostic testing, the Environmental Occupational Safety and Health (EOSH) Division researched current [OWCP] policy pertaining to exposure to infectious agents, CA-810 (Injury Compensation for Federal Employees), Ch. 2-1 (attached). The OWCP policy

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[2] Hereafter, all dates are 2001 unless otherwise indicated.

is that both a work-related injury and exposure to a known carrier of an infectious disease must occur before OWCP will pay for diagnostic testing. Fear of exposure to an infectious agent is not, in and of itself, enough to obtain OWCP payment of testing costs.

> Since OWCP will not pay for diagnostic testing based solely upon any suspected exposure to a known carrier of an infectious agent, we conclude that local program funds may not be used either. Although we are empathetic to an employee's fear of exposure, the employee can seek other means (e.g., out of pocket expense or personal health insurance) to pay for such diagnostic testing.

After reading the memorandum, Hunt asked Colburn what it meant. Colburn replied that it precluded management from paying for Linares' medical bills. Hunt then asked if the Yentzer policy memorandum had been negotiated with the Union and Colburn responded that he did not believe so. This was new to Hunt as he had never before seen the Yentzer memorandum, and it had been his understanding that the policy had been that whenever a Border patrol agent was exposed to bodily fluids, the Agent could get blood tests, gamma-globulin shots and the like. Colburn also conceded that he had not previously seen the Yentzer memorandum. To Hunt's knowledge, the memorandum had never been distributed to employees or supervisors. Hunt then initiated inquiries to determine whether the policy set forth in the March 1, 1999 memorandum had ever been negotiated with the Union at the national level.

T.J. Bonner, NBPC President since February 1989, is the individual designated to receive all notices of national-level changes in conditions of employment. Bonner testified that under the CBA, such notices are always furnished in writing. Bonner's undisputed testimony reveals that indeed the NBPC was never notified, either verbally or in writing, concerning Respondent Washington's issuance of the March 1, 1999 memorandum. Upon being provided a copy of the March 1, 1999 memorandum in or about November or December 2001, Bonner performed an exhaustive search of his records, but found nothing related to any policy concerning reimbursement for medical diagnostic testing. The only thing Bonner found was a June 1997 notice of proposed implementation of a 29-chapter Safety and Health manual and a notice concerning what was termed a Positive Case Management manual (related to the Federal Employee's Compensation Act), neither of which contained anything related to an INS policy with respect to reimbursement of employees for medical diagnostic testing expenses.

Linares' Grievance Seeking Reimbursement [3]

Hunt presented a Step 1 oral grievance to Field Office Supervisor Felix Chavez on January 19 seeking reimbursement by management for Linares's medical testing. Chavez denied the grievance by stating that he did not have authority to overturn management at the Sector or INS level. Hunt then proceeded to Step 2 by filing a written grievance with Aguilar, but Aguilar also denied the grievance. The Union's grievance alleged a violation of CBA Article 18 related both to safety and health and to management's alleged failure to expedite payments. At no time during processing of the grievance did the Union allege that management had changed a policy or a past practice without prior notice to the Union. Ultimately, Linares was reimbursed for his medical testing expenses in resolution of his grievance at Step 3 when he was paid out of Western Region Litigation funds.

Respondent Tucson Sector's Reimbursement of Other Border Patrol Agents for Medical Diagnostic Testing

Border patrol agent John Dair, who works in the Respondent Tucson Sector's Naco, Arizona Station, described an incident on January 24, 1998 during which he apprehended a woman who had run a checkpoint. Dair indicated that the woman had been ejected from her car and suffered a severe head injury. During Dair's efforts to assist the woman, he was exposed to her blood through a cut on his hand. This exposure gave rise to concerns that he had been exposed to a blood-borne disease, such as AIDS or Hepatitis-C. Accordingly, the next morning, prior to working his afternoon shift, Dair contacted the Tucson Medical Center to which the woman had been airlifted to request that the woman voluntarily consent to provide a blood sample for testing purposes. At work that afternoon, Dair's supervisors sent him to a local hospital to have his own blood tested for infectious disease. According to Dair, the bill for Dair's initial testing was paid by the Respondent's Tucson Sector Office. Although Dair later learned that the blood tests performed on the woman were positive for Hepatitis-C, the screening tests were not conclusive and follow-up tests were needed. Unfortunately, definitive follow-up tests could not be performed on the woman's blood because the hospital had discarded the woman's blood sample and the woman had been

[3] Based on the findings in this matter, it is unnecessary to decide whether the Linares grievance acted as a bar to these proceedings under section 7116(d).

discharged. Dair shared these preliminary results and the fact that follow-up tests could not be conducted with his supervisors, including Victor Manjarrez, second-in-charge at the Naco Station.

Dair obtained 3 more blood tests to test for Hepatitis-C 6 weeks, 3 months and 6 months after the exposure at a cost of approximately $212. Dair paid for these follow-up tests out of his own pocket, but sought reimbursement from Respondent Tucson Sector management by first submitting the bills to Manjarrez and then to the Sector Office. The Sector Office responded that they had paid for Dair's initial blood test in error, but would not pay for any of Dair's 3 subsequent blood tests. After Dair sought Union assistance, and later contacted OSHA; OSHA assisted his efforts to seek reimbursement. Dair was ultimately reimbursed for the $212 cost of his follow-up blood tests when the Naco Station Secretary, Frances Reichey, handed Dair cash and he signed a receipt. While Dair was not certain of the source of this cash, it was his understanding it had come from the Naco Station imprest fund. Indeed, Manjarrez told Dair that the payment had been authorized by the Tucson Sector Assistant Chief Patrol Agent then in charge of such matters for the Naco Station.

Perry Short, a Border patrol agent at the Tucson Station since 1993, was involved in a shooting incident on September 12, 1996 during a vehicle stop. Short described the incident in detail during the hearing. During Short's efforts to administer first aid to the resident alien who had been shot, Short was exposed to voluminous amounts of the resident alien's blood, soaking his uniform and gloves. Assistant Chief Patrol Agent Pyeatt and several other supervisors had arrived on the scene of the shooting soon after Short called in for assistance. Respondent Tucson Sector arranged for Short to have blood drawn by a Dr. Dasse on September 18, 1996 to run tests following the shooting incident. Tucson Sector management paid for the blood test and payment was authorized by Pyeatt, then the Assistant Chief Patrol Agent with responsibility for the Tucson Station. Short had a follow-up blood test on December 12, 1996 which was also paid for by the Respondent Tucson Sector, where payment from the Imprest Fund was authorized by Pyeatt. Colburn described how Hunt, in representing Linares, had claimed that the Sector had paid for Short's blood tests, but asserted that management was unable to find any records regarding the Sector's reimbursement of Short.

Kerry Heck, employed as a Supervisory Border patrol agent at the Douglas Border Patrol Station, described how she believed she had been exposed to tuberculosis on May 22,

2000 during the performance of her duties. Heck stated that the alien to whom she had been exposed appeared to be sick. Although it was uncertain whether the alien had TB, Heck's TB tests were paid for by the government. Heck was unsure whether the tests were paid for by the INS or by OWCP.

OWCP and INS Policy

Glenn Pritchard, Director of Respondent Washington's EOSH Division, described the policy with regard to diagnostic testing as contained in OWCP Publication CA 810 (810 Guidance), at Chapter 2.1 covering "Exposure to Infectious Agents" as requiring 2 things – 1) a work-related "exposure" 2) a known carrier of an infectious disease – for the government to pay for such testing.[4] Pritchard also said that although the OWCP was "not viewed as a regulatory agency per se," management treated is as such because it "follows" OWCP regulations. Pritchard later stated his "opinion" that OWCP has sole and exclusive jurisdiction to determine whether funds should be expended for diagnostic medical testing, but conceded that he could not identify any particular legal authority for this assertion. Relying on his opinion that the OWCP has sole and exclusive jurisdiction, Pritchard asserted that Respondent could not provide compensation for diagnostic medical testing unless both conditions were met (i.e., an exposure to a known carrier). When asked if there was anything in the OWCP policy that would prevent the INS from establishing a policy that it would pay for diagnostic testing even if the employee had not been exposed to a "known" carrier of an infectious disease, Pritchard claimed that "the entire 20 CFR 10 documentation" uses the term "sole and exclusive remedy," and therefore opined that there was no other

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4 Pritchard explained that the 810 Guidance is an organic, evolving document and testified that he could not say exactly how long Chapter 2.1 had been in place. The excerpt of the 810 Guidance introduced into evidence by the Respondents indicates that it was revised in January 1999, but does not identify in what respects it was revised. Indeed, under questioning by the Respondents' Counsel, Pritchard indicated that this excerpt shouldn't be considered "gospel."

mechanism available for INS employees to seek compensation for such medical tests.5

Pritchard also identified himself as the author of the March 1, 1999 memorandum signed by, David Yentzer. Pritchard explained that through anecdotal circumstances, it had become evident to him that there was ignorance of the regulation, that there was "some loose interpretation" that needed to be "solidified." This led him to believe that a "reiteration" of existing policy was needed to address what he perceived as a "misuse" or a "misunderstanding." Although the March 1, 1999 memorandum uses the word "clarify," Pritchard denied that it represented a new policy; Pritchard denied that the memorandum constituted a clarification of existing policy, insisting that the memo was a clarification only "as long as clarification is interpreted as reiteration." Although

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5 Employee Relations Specialist Lisa Martinez testified that she did not know whether there was any law, rule or regulation that would prevent the INS from establishing a policy different from the OWCP policy regarding reimbursement for diagnostic tests.

conceding that the INS had never before issued any type of

policy pronouncement on the subject of diagnostic testing, Pritchard claimed that this was not something new. Pritchard also claimed that the "research" done by his EOSH office was not necessary to reach the "conclusion" described in the second paragraph of the memorandum, but was merely for "reaffirmation" of what they already believed. Use of the term "conclude" was explained as merely to convey to employees that the policy described in the memorandum was "not an immediate off-the-cuff response that management gets accused of."

Pritchard testified that in preparation for the hearing, he reviewed INS records to determine how many blood-borne and air-borne pathogen claims had been accepted and denied by the OWCP between January 1, 1991 and January 1, 2002 and concluded that none had been accepted unless both factors were present. Employee Relations Specialist Lisa Martinez also claimed that in her 5 years at the Tucson Sector, the Sector had complied with the OWCP and INS policies concerning reimbursement for medical diagnostic testing. Pritchard conceded that his review was limited to OWCP records, and that such a review did not preclude the possibility that Border Patrol Stations and/or Sector Offices (as opposed to the OWCP) might have compensated employees for diagnostic medical testing. Pritchard also was not surprised to learn that Border patrol agents within the Tucson Sector had been reimbursed out of local program funds for tests where they did not satisfy the criterion of exposure to a known carrier of an infectious disease.

Pritchard speculated as to what a Border patrol agent was to do if s/he was exposed to blood of an unknown origin. Pritchard stated that a diagnostic test would not prevent the illness from occurring, but would merely "open the door" for a physician to treat the individual. Pritchard, therefore, sought to distinguish diagnostic work from treatment. In this regard, Pritchard noted that employees could use their insurance or pay out-of-pocket for diagnostic tests. Pritchard went on to say that it "bothered" him "that a person would not want to pay for the diagnostics, but would want the government to pay" even though the exposure was incurred in the performance of his/her duties and it would be impossible to determine whether s/he had a legitimate claim to treatment without diagnostic tests.

Colburn testified that he was aware of the current INS policy concerning diagnostic testing of agents as he had been briefed by management's Human Resources Department on the OWCP policy sometime between January and March 2001. Colburn indicated that OWCP policy was consistent with the

policy described in the Yentzer memorandum. Colburn indicated that, to his knowledge, the policy had been the same since he became a supervisor in 1983. Colburn further stated that the Respondent Tucson Sector had no role in development of the OWCP or INS policy with regard to reimbursement for diagnostic tests. Despite his view that Respondent Tucson Sector had complied with the INS policy, Colburn acknowledged that there may have been instances in which the Sector failed to comply with the policy. Colburn opined, however, that he did not believe that a practice had been created under which Respondent Tucson Sector would provide funding for diagnostic tests that were not covered by INS policy.

Analysis and Conclusions

The Respondents in this case have repeatedly contended that the Department of Labor, Office of Workmens' Compensation is exclusively responsible for providing compensation for diagnostic testing only after an employee has established that a condition was acquired within the scope of duty through exposure from a known source of infectious agents. In its post hearing brief, Counsel for the General Counsel pointed this tribunal to the Authority's decision in *National Treasury Employees Union, NTEU Chapter 51 & Internal Revenue Service, Wichita District Office*, 40 FLRA 614 (1991)(*NTEU*). In that case, where the claims were covered by the Federal Employees Compensation Act (FECA), the agency filed exceptions to an arbitrator's award directing the agency, among other things, to pay for unit employees' medical examinations following feared exposure to a toxic chemical (methyl ethyl ketone). After the Authority sought and considered an advisory opinion from OWCP concerning the legality of the arbitrator's remedy, the Authority concluded:

> In our view, the particular items for which the Arbitrator ordered payment or reimbursement are within the exclusive jurisdiction of the FECA and its implementing regulations and do not pertain to matters over which the Agency may have separate authority to grant payment.

Id., at 630.

> A review of [OWCP regulatory] provisions demonstrate that they are specifically designed to cover situations where employees believe that they have sustained on-the-job injuries and are seeking payment or reimbursement for expenses connected

> with such injuries. We find that the grievants' claim in this case falls squarely within the scope of the regulations. . . . In our view, the Arbitrator was not empowered to direct the Agency to make payments that are exclusively governed by the FECA's implementing regulations.

Id., at 631.

The *NTEU* case specifically involved reimbursement for out-of-pocket medical care costs which were covered exclusively by the FECA making it squarely on point with the issue herein. Although the General Counsel pointed to the case, it now claims that Respondents did not raise as a defense that the OWCP maintains exclusive jurisdiction over payment for diagnostic medical testing for potential exposure to infectious disease. As noted above, Respondents have certainly claimed that this matter was under the exclusive province of OWCP. In any event, subject matter jurisdiction can be raised at any stage of the Authority's proceedings. See *United States Department of Veterans Affairs, Veteran Affairs, Veterans Affairs Medical Center, Asheville, North Carolina*, 57 FLRA 681 (2002); *United States Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, San Francisco, Cal., and Laborers' Int'l Union of North America, Local 1276*, 55 FLRA 193, 195 (1999). It would be neglectful to ignore the Authority's holding concerning jurisdiction in the *NTEU* case. While the case was brought to my attention by the General Counsel, it most certainly raises the issue of whether or not Respondents were responsible for such
payments and whether the Tucson Sector paid a sufficient number of these claims to support the General Counsel's contention that a past practice existed.

Although under the *NTEU* decision, compensation for diagnostic medical testing is subject to the OWCP's exclusive jurisdiction and, thereby excluded from the scope of bargaining due to coverage by the OWCP's government-wide regulations, the General Counsel submits that the past practice allegation against Respondent Tucson Sector remain alive. I agree. Critical to the instant case is whether a past practice has been established, however. If so, Respondent would be able to correct the unlawful practice when discovered, but would also be obligated to provide the exclusive representative with notice of the change and, upon request, bargain, to the extent consistent with law and regulation, over procedures and appropriate arrangements for employees adversely affected by the change. *Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana,* 9 FLRA 543, 546

at n.9 (1982); *accord, Department of the Air Force, Air Force Logistics Command, Ogden Air Logistics Center, Hill Air Force Base, Utah,* 17 FLRA 394 (1985).

With regard to whether a past practice has been established in this case, it is axiomatic that the General Counsel bears the burden of establishing each and every allegation of the alleged unfair labor practice in order to establish a violation of the Statute. See *U.S. Department of Commerce, Patent and Trademark Office*, 54 FLRA 360, 370 (1998). In order to show that a past practice existed herein it was necessary to demonstrate that there was a practice which was consistently exercised or followed over an extended period of time with the knowledge and express or implied consent of responsible management officials. *Defense Distribution Region West, Tracy, California*, 43 FLRA 1539 (1992); *U.S. Department of Labor, Washington, D.C.*, 38 FLRA 899 (1990). The General Counsel offered instances where reimbursement for diagnostic tests were made by the Tucson Sector: Border patrol agent Short (September 1996), Border patrol agent Dair (January 1998), Border patrol Agent Linares and supervisory Border patrol agent Heck (May 2000) who had diagnostic medical tests reimbursed by Respondent Tucson Sector. The General Counsel maintained that these reimbursements extended over a significant period, and the evidence disclosed that the payments (at least for Short and Dair) were authorized by high-level management officials at the Assistant Chief Patrol Agent level. It is noted that the 1996 and 1998 payments occurred before the 2001 Yentzer memorandum. Linares, on the other hand, was reimbursed out the Sector's Litigation fund after filing a grievance and would, therefore, hardly qualify as evidence establishing a past practice.[6] And, Heck testified that she would guess that her payment was made by "the government or OWCP or whoever, I don't know. . . ." Consequently, Heck's testimony shed no light on the issue.

In my opinion, the evidence proffered by the General Counsel is insufficient to show by a preponderance of the evidence that a past practice existed in this matter.[7] It

[6] It is unnecessary to decide whether Linares' grievance involving Respondent's refusal to pay for diagnostic tests in January 2001 constituted a section 7116(d) bar.

[7] Since it is found that a consistent practice of reimbursing employees who were potentially exposed to infectious diseases was not shown, it is unnecessary to address the issue of whether reimbursement was made with the knowledge and express or implied consent of responsible management officials.

is undisputed that Respondent Tucson paid for several employees to obtain diagnostic medical testing when exposed to potentially infectious disease. The General Counsel complains that compliance with items 10 and 11 of its subpoena would aid it in establishing that additional agents in the Tucson Sector were reimbursed for diagnostic tests by high level management officials in the Tucson Sector. Notwithstanding this claim, it is not clear that such evidence would demonstrate that the Tucson Sector consistently reimbursed employees for diagnostic tests to the extent that a past practice would be established. While I am not unmindful of the Authority support of its administrative law judges drawing adverse inferences where there is a failure to call a witness to testify or a failure to produce documents in response to properly served subpoenas, I will forego the opportunity to do so in this case because of, among other things, the paucity of other evidence on the issue. *See, Internal Revenue Service, Philadelphia Service Center*, 54 FLRA 674, 682 (1998) (witness); and *Indian Health Service, Crow Hospital, Crow Agency, Montana,* 57 FLRA 109, 113 at n.2 (2001)(based on other finding, Authority finds it unnecessary to pass on Judge's failure to draw adverse inferences based on improper failure to provide subpoenaed information).

The initial question that must be asked, concerning whether an adverse inference should be drawn in this matter, is whether there is sufficient evidence to establish the General Counsel's case if I were to draw an adverse inference from Respondents failure to comply with the subpoena. With regard to the subpoenaed items at issue, items 10 and 11 included OWCP records dating back to September 1996 in the possession of Respondent Tucson. Some of these OWCP claims probably were filed by Border patrol agents following on-duty exposure to infectious disease and/ or air- or blood-borne pathogens. The General Counsel contends that access to the subpoenaed records would provide it with the opportunity to contact bargaining unit employees to ascertain the extent to which they sought reimbursement from Respondent Tucson Sector and to determine the extent to which they, like Short, Dair and possibly Heck, received such reimbursement. Admittedly the General Counsel was looking for additional evidence in support of the alleged past practice at the hearing, but it did not establish, in my opinion, that the OWCP records would show payment by the Tucson Sector. My conclusion is that if the documents did not show that the Tucson Sector made such payments then they would provide no direct evidence regarding the alleged violation herein and, would therefore, be irrelevant. Thus, one could not draw an adverse inference from Respondent's failure to comply with the subpoenaed materials (item 10 and

11) that these OWCP records would provide evidence of Respondent Tucson having made payment for diagnostic testing. Therefore, it appears to me that the OWCP records are not material to this matter.

Accordingly, it is found that the production of the items 10 and 11 would not establish a past practice such as alleged in this matter. In such circumstances, I decline to make such an adverse inference in the matter. It is further found that the record did not establish by a preponderance of the evidence that reimbursement for diagnostic tests was consistently done in the Tucson Sector.

The General Counsel also insists that Respondent Washington implemented a change in policy concerning payment for diagnostic medical tests for bargaining unit employees exposed to potentially infectious agents and/or bodily fluids by the issuance of David Yentzer's March 1, 1999 memorandum. Again it is crucial to the General Counsel's case that a past practice of such reimbursement existed. The Yentzer memorandum was first seen in the Tucson Sector on January 12, 2001 when Colburn showed a copy to Local 2544 Chief Steward Hunt. EOSH Director Pritchard testified that the March 1 memorandum drafted
by him for Yentzer's signature did not represent a change, but was merely a reiteration of policy. In essence, Pritchard's testimony reveals that the INS policy in this matter is to assure that OWCP policy is complied with. Further the record reveals only a few instances where employees were reimbursed contrary to the OWCP policy that is the exclusive means of obtaining reimbursement for out-of-pocket medical expenses. The General Counsel suggests, however that use of the word "clarify" indicates that there was some question prior to the March 1, 1999 memorandum as to what circumstances would justify reimbursement for employees' medical diagnostic testing. I read the Yentzer memorandum as simply describing the OWCP policy for reimbursement and cautioning its field locations that even if they had made reimbursements in the past for suspected exposure to a known carrier of an infectious disease, that future payment should not be made from INS funds.

It is undisputed that the first time any employees represented by Local 2544 learned that there was a policy concerning infectious disease limiting reimbursement for diagnostic medical testing to situations where the "exposure" was to a "known" carrier was when Colburn provided a copy to Hunt on January 12, 2001 when addressing Linares' claim for reimbursement. Not even Colburn was aware of the Yentzer policy memorandum prior to January 2001. Indeed, the evidence suggests that the March 1, 1999

memorandum was never distributed among employees within the Respondents' Tucson Sector. There is no doubt that the Yentzer memorandum was not known to employees and managers working in the Tucson Sector, and it was never negotiated with the NBPC or Local 2544.

Crucial to the General Counsel concerning the implementation of a new policy by the Yentzer memorandum is whether a past practice existed of Respondents paying such claims. The General Counsel sought and failed to establish that a past practice existed in the Tucson Sector of reimbursing employees for diagnostic tests.

Accordingly, it is concluded that Respondent Washington did not implement a new policy concerning the agency's payment of diagnostic medical testing costs associated with exposure to potentially infectious agents and/or bodily fluids through issuance of Yentzer's March 1, 1999 memorandum. Consequently, it is found that Respondent Washington had no obligation to provide notice either to the NBPC or to Local 2544 of issuance of the Yentzer memorandum of March 1, 1999, and therefore, did not violate section 7116(a)(1) and (5) of the Statute.

Based on all of the above, it is recommended that the Authority adopt the following:

ORDER

It is hereby ordered that the Complaint in DE-CA-01-0416, be and it, hereby is, dismissed in its entirety.

Issued, Washington, DC, January 31, 2003.

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ELI NASH Chief
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, Chief Administrative Law Judge, in Case No. DE-CA-01-0416, were sent to the following parties in the manner indicated:

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

Matthew L. Jarvinen 7000 1670 0000 1175 1426
Counsel for the General Counsel
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