UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: April 15, 1999

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

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

Respondent

and Case No. WA-CA-80124

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL BORDER PATROL
COUNCIL

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 AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL Charging Party	Case No. WA-CA-80124

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 **MAY 17, 1999**, 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: April 15, 1999
Washington, DC

OALJ 99-23

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 AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL Charging Party	Case No. WA-CA-80124

Sharon K. Pendergast, Esquire
Edwin S. Campbell, Jr., Esquire
For the Respondent

Matthew B. Cohen, Esquire
Thomas F. Bianco, Esquire
For the General Counsel

Mr. T.J. Bonner
Deborah S. Wagner, Esquire
By Brief
For the Charging Party

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 implemented a policy entitled "Enforcement Standard: Body Searches" without providing the Charging Party an opportunity to review the document and bargain with respect thereto, as required by the Statute.

This case was initiated by a charge filed on November 25, 1997 (G.C. Exh. 1(a)) and the Complaint and Notice of Hearing issued on June 30, 1998 (G.C. Exh. 1(b)), setting the hearing for September 24, 1998. By Order dated August 14, 1998 (G.C. Exh. 1(h)), Respondent's Motion to postpone hearing was granted and the hearing was rescheduled for October 1, 1998; by Order dated August 18, 1998 (G.C. Exh. 1(i)), General Counsel's Motion to reschedule hearing was granted and the hearing was rescheduled for September 25, 1998; and by Order dated August 25, 1998, General Counsel's further motion to reschedule hearing was granted and the hearing was, again, rescheduled for October 1, 1998, pursuant to which, a hearing was duly held on October 1, 1998, in Washington, D.C., 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 each party waived. At the conclusion of the hearing, November 2, 1998, was fixed as the date for the mailing post-hearing briefs, which time subsequently was extended, on motion of Respondent, to which the other parties did not object, for good cause shown, to November 25, 1998, and Charging Party, Respondent and General Counsel each timely filed, or mailed, an excellent brief, received on, or before, November 30, 1998, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

Findings

1. Respondent, United States Department of Justice, Immigration and Naturalization Service (hereinafter, "INS"), has recognized the American Federation of Government Employees, AFL-CIO (hereinafter, "AFGE"), as the exclusive representative of a nationwide unit of all non-excluded personnel of the Immigration and Naturalization Service.

[1] 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)".

The National Border Patrol Council (hereinafter, the "Union") is an agent of AFGE for the purpose of representing the approximately 8,000 employees of the National Border Patrol which is a component of INS (Tr. 30).

2. Border Patrol Officers are responsible for detecting, apprehending and processing those individuals who enter the United States illegally, and routinely search such individuals incident to their arrest because some who enter this country illegally conceal knives, razor blades, or other weapons in their clothing or on their persons.[2] (Tr. 28).

3. According to the testimony of Ms. Lydia St. John-Mellado, Director of the Office of Investigations for INS, there had never been clear guidelines governing the performance of body searches by Officers in the field. Rather, there were a number of manuals and handbooks containing policy guidance, but not a single, clear and comprehensive statement of policy to govern all INS employees on the subject of body searches (Tr. 127-28, 131-32). Accordingly, in 1995, she began to put together a single policy on the subject which would help all INS employees to avoid personal liability as a result of lawsuits arising from allegedly improper body searches (Tr. 128-29, 132).

4. Her first draft of the policy statement on body searches was transmitted to T.J. Bonner for comment on February 6, 1995 (G.C. Exh. 2; Tr. 30-31, 134). Mr. Bonner responded with proposed changes on March 9, 1995 (G.C. Exh. 3; Tr. 32, 135). Thereafter, the parties met on a number of occasions to discuss the language of the draft body search policy but never reached complete agreement (Tr. 34, 136). After each meeting Ms. St. John-Mellado took the Union's proposed revisions to her legal advisor, INS Assistant General Counsel Peder Anderson, and incorporated the Union's suggestions into the draft policy whenever Mr. Anderson's review indicated that they were not inconsistent with the Constitution and federal law (Tr. 136, 171-72).

5. On October 8, 1996, Respondent circulated a revised draft policy on body searches to the Union, indicating in a

[2] Mr. T.J. Bonner, who has served as the Union's president since 1989, and has been a Border Patrol Officer since 1978, testified that he had conducted approximately 10,000 body searches in his career, although none during the past four years while he has been on 100% official time representing the unit employees' interests as Union president (Tr. 29, 105-06).

cover letter that many, but not all, of the Union's prior suggestions had been incorporated and provided the Union a further opportunity to respond (G.C. Exh. 4; Tr. 32-33, 137-38).

6. The Union received the revised draft on October 17 and responded with a 9-page letter from Mr. Bonner dated November 18, 1996 (G.C. Exh. 5; Tr. 39). In its letter, the Union proposed specific revisions to the draft policy, including a narrower definition of "strip search" and a broader definition of "pat down." As explained by Mr. Bonner, and confirmed by both Ms. St. John-Mellado and Mr. Anderson, the revised draft policy on body searches would treat the removal or rearrangement of any clothing as a strip search requiring a Border Patrol Officer to have a reasonable and articulable level of suspicion that the detained or arrested individual was concealing a weapon or other contraband before such a search could be undertaken. By contrast, the Union proposed that a strip search be defined as the removal of clothing down to the underwear with the resultant exposure
of skin surfaces not normally exposed to public view. Conversely, the Union proposed to expand the definition of a pat down to include the removal of outer layers of a suspect's clothing to search for concealed weapons or contraband without having a reasonable suspicion that such items were being concealed. As Mr. Bonner explained, suspects often enter the United States wearing multiple layers of heavy clothing, thereby making the detection of concealed weapons difficult, if not impossible, by the use of nothing more than a Border Patrol Officer's open hands to pat down the suspects' outer garments (G.C. Exh. 5; Tr. 36-37, 39, 44-52, 54-55, 154-56, 187-193). When Mr. Bonner brought these concerns about the draft policy to Ms. St. John-Mellado's attention, she referred Mr. Bonner to INS attorney Anderson for the legal explanation since she is not an attorney; Mr. Anderson met with Mr. Bonner thereafter and heard his concerns for the Border Patrol Officers' safety, but authorized no changes to the draft policy following that discussion (Tr. 138-39, 178-80).[3]

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[3] Mr. Anderson explained that he made no changes to the policy after meeting with Mr. Bonner because his subsequent research into federal case law persuaded him that the Union's position was legally untenable. However, he never communicated these conclusions to the Union, either verbally or in writing, and, therefore, I excluded the legal memorandum he later drafted which Respondent attempted to introduce as an exhibit at the hearing (Res. Exh. 8 (rejected); Tr. 180-84).

The Union also proposed to modify the draft policy on body searches in several other respects: to search, incident to a lawful arrest, the area immediately surrounding and under the control of the suspect, which proposal Respondent rejected on the basis that such issues are dealt with in other policy statements and should not be included in the body search policy; to treat minors (under the age of 18) the same as other suspects by searching them for weapons and contraband without having a reasonable suspicion to do so, which proposal Respondent rejected as inconsistent with the requirements of law; and to guarantee that Border Patrol Officers would be represented by Department of Justice attorneys if they are sued as the result of conducting body searches under established INS policy (G.C. Exh. 5; Tr. 44, 62-64, 140-41, 142-43, 162, 193). Additionally, the Union objected to the draft policy's new requirement that all body searches conducted by Border Patrol Officers be accompanied by contemporaneous memoranda setting forth the grounds believed to justify such conduct, but Respondent deemed the new requirement necessary in order to defend against subsequently filed lawsuits (Tr. 92, 94, 141-42).

In its November 18, 1996, letter to management, referred to above, the Union again requested the opportunity to bargain and insisted that, "implementation of the proposed policy be held in abeyance pending the completion of all phases of bargaining, including the resolution of all attendant third party proceedings." (G.C. Exh. 5).

7. On May 28, 1997, INS Commissioner Doris Meissner issued the final policy entitled, "Enforcement Standard-Body Searches." In her cover memorandum, the Commissioner indicated that, "[i]mplementation of the Standard will include a transition period of 30 days from receipt." The documents were distributed to all Regional and District Directors, Chief Patrol Officers and training facilities within INS (G.C. Exh. 6). They were not sent to the Union (Id.; Tr. 39-41, 144-45). Mr. Bonner first learned in July, 1997, while attending a meeting at an INS training academy, that the final policy on body searches had been issued in May, 1997. He raised the matter with Respondent's Chief of Labor and Employee Relations, Mr. Edwin Campbell, and thereafter received a copy of the final policy through the mail with a cover letter from Mr. Campbell dated September 12, 1997 (G.C. Exh. 7; Tr. 40-41).

In his cover letter, Mr. Campbell acknowledged that the, "final revision," accompanied by the Commissioner's May 28 memo, "was inadvertently transmitted to the field offices prior to having notified you of the Service's intent to implement." Mr. Campbell referred to the Union's letter

dated November 18, 1996, and indicated that all of the Union's proposed revisions had been incorporated into the final policy except those which the INS's Office of General Counsel advised were, "outside of the mandatory scope of collective bargaining either because they are inconsistent with Federal law or because they contravene reserved statutory management rights, or both. In the absence of negotiable proposals concerning the implementation and impact of the body search policy, the INS was free to implement that policy." The letter concluded with a statement of regret that a mutually agreeable policy could not be worked out despite lengthy attempts to do so, but that INS concluded it was, "essential, in both the public interest and that of INS employees, to proceed with implementation of this much-needed policy." (G.C. Exh. 7).

8. There was conflicting testimony concerning whether the final policy on body searches changed the Border Patrol Officers' conditions of employment. Mr. Bonner testified that the new policy, as implemented, made two big changes in the way that body searches are to be conducted: the definition of pat down and strip search (referred to above), and the level of suspicion needed before a search may be conducted (Tr. 70-71). Under the old practice, as under the new policy, a Border Patrol Officer needed reasonable suspicion to pat down or to strip search a detained or stopped person. Once arrested, however, according to Mr. Bonner, no reasonable suspicion was needed in order to conduct a pat down or a strip search; an Officer could use his, or her, discretion and common sense for self-protection in determining what action, if any, to take and how such action should be taken. In the latter regard, for example, Mr. Bonner indicated that, for obvious reasons, strip searches would not be conducted next to a highway and that, except in extraordinary circumstances, cross-gender strip searches would not be performed (Tr. 72-74). Under the new policy, <u>following an arrest</u>, an Officer may not remove or rearrange any of the suspect's clothing without considering such action a strip search requiring reasonable suspicion and the completion of forms documenting why the search was deemed necessary (Tr. 74-75).

Mr. John Esquivel, Respondent's Assistant Chief of Border Patrol, testified that he was a supervisory Border Patrol Officer in the El Paso sector at the time that the new policy was issued, and that in his opinion the only change was that the new policy was in writing but made no change in how field operations were conducted (Tr. 166-68). Mr. Esquivel further testified that he received the new policy through the chain of command in July, 1997, and was

promoted to his current position in December 1997 (Tr. 168-69).

I credit the specific and thorough testimony of Mr. Bonner with respect to how the re-definition of pat down and strip search changed the way that Border Patrol Officers were required to interact with persons in the field, and the extent to which searches that involved the removal or rearrangement of any article of a suspect's clothing required written justification, over the general and conclusory testimony of Mr. Esquivel.

CONCLUSIONS

A. Jurisdiction

I conclude, contrary to Respondent's contention, that the Authority has jurisdiction over the instant proceeding. More particularly, I find that Respondent's reliance on the D.C. Circuit's decision, in United States Department of Treasury, U.S. Customs Service v. FLRA, 43 F.3d 682 (D.C. Cir. 1994), is misplaced. In Customs Service, the court held that an arbitrator and the Authority both lacked jurisdiction over a union grievance which alleged that an agency misinterpreted and misapplied a provision in a Federal law the agency had been authorized by Congress to administer because the law in question governed international trade rather than being directed toward employee working conditions. 43 F.2d at 689.[4] The Authority, acquiesced in the D.C. Circuit's conclusion that the Federal law in question did not affect conditions of employment but, rather, governed international trade. U.S. Department of the Treasury, U.S. Customs Service, Pacific Region and National Treasury Employees Union, 50 FLRA 656, 659 (1995). In a subsequent case involving a different Federal law, the Authority distinguished Customs Service and found that the arbitrator had jurisdiction over the grievance. U.S. Department of Justice, Federal Bureau of Prisons, Medical Facility for Federal Prisons and American Federation of Government Employees, Local 1612, 51 FLRA 1126 (1996). In short, I do not read the court's decision in

[4] The Ninth Circuit subsequently declined to follow the D.C. Circuit's decision in Customs Service, holding, instead, that it lacked jurisdiction under the Statute to review the Authority's decision in an arbitration case which involved an alleged violation of the same Federal law at issue in Customs Service. See National Treasury Employees Union v. FLRA, 112 F.3d 402, 404-05 (9th Cir. 1997).

Customs Service to preclude the Authority from exercising jurisdiction in an unfair labor practice case when an agency raises a Federal law as an affirmative defense to an alleged refusal to bargain in good faith.

Moreover, I reject Respondent's further argument that the Immigration Act of 1990 removed from the scope of the term, "conditions of employment", the entire area of body searches conducted by Immigration Officers. Section 503 of that law, relied on by Respondent, codifies and expands the authority of Immigration Officers to carry weapons, make arrests, and use deadly force pursuant to regulations promulgated by the Attorney General. Nothing in the language of that law ,or its legislative history, compels the conclusion that Congress specifically dealt with body searches, much less how body searches were to be conducted; nor is there any indication that discretion to regulate concerning body searches should be solely and exclusively exercised by the Attorney General. Indeed, the manner in which Respondent approached its decision to revise the existing practice of conducting body searches undercuts the idea that the change had no effect on established conditions of employment, or that only the Attorney General can regulate on that subject. Thus, Respondent's proposed draft of the revised body search policy was sent to the Union for review and comments; the Union made proposals and sought to negotiate; some Union proposals were incorporated into the revised policy; the draft policy was re-circulated for further Union proposals; and the parties met on several occasions to address their differences. All of which is consistent with Respondent's understanding that it had an obligation to bargain with respect to the impact and implementation of its decision to change how and when the bargaining unit employees conduct body searches. Accordingly, I find that the complaint in this case is properly before me.

B. The Body Search Policy

Respondent has the right under § 6(a)(1) of the Statute to determine its internal security practices, and it exercised that right when it promulgated its body search policy. That is, the body search policy was a plan to secure or safeguard its personnel, physical property and/or operations against internal and external risks by issuing a formal policy designed to protect INS employees from physical harm and financial liability by prescribing when and how they should conduct body searches of individuals suspected of illegal entry into the United States. Respondent also was acting to protect its operations from

lawsuits against INS for alleged violations of individuals' constitutional rights arising from their detention and body searches. Respondent has established a reasonable connection between the goal of safeguarding its personnel and operations and the practice designed to implement that goal, even though it might be argued that some other plan would have been more effective. See Fraternal Order of Police, Lodge 1-F and U.S. Department of Veterans Affairs, Providence Medical Center, 51 FLRA 143, 144-45 (1995); American Federation of Government Employees, Local 1920 and U.S. Department of Defense, Army and Air Force Exchange Service, Fort Hood Exchange, Fort Hood, Texas, 47 FLRA 340, 348-49 (1993). General Counsel and the Union concede the foregoing.

Nevertheless, when an agency exercises a reserved right of management under § 6(a) of the Statute, it is obligated to notify and negotiate with the exclusive representative of its employees, under §§ 6(b)(2) and (3) of the Statute, over the implementation and impact of the change in working conditions as long as such change is more than de minimis. Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee, 50 FLRA 220, 222 (1995); United States Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California, 43 FLRA 642, 658-63 (1991)(INS, San Diego), enforced, 12 F.3d 882 (9th Cir. 1993); U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Hartford District Office, Hartford, Connecticut, 41 FLRA 1309, 1317 (1991). In this case, there is no dispute that Respondent's decision to issue a body search policy would change working conditions for bargaining unit employees not only in terms of when, where, and how body searches were to be conducted but also in terms of the written reports that Officers would be required to prepare whenever a body search was conducted. In addition, failure to follow the policy could subject employees to discipline. There is also no dispute that these changes would have more than a de minimis effect on the unit employees.

The allegations of the Complaint were shown by the testimony and evidence to be quite untrue, or very misleading, in several respects. For example, the allegation of Paragraph 24 of the Complaint that before 1997, ". . . the Charging Party did not have a policy concerning body searches . . . ." (G.C. Exh. 1(b), Par. 24), presumably should have asserted that before 1997, Respondent did not have a policy concerning body searches; but it did have policies for body searches which were set forth in Officer's Handbooks (G.C. Exh. 2; Tr. 108, 109,

110, 111, 128). The allegation of Paragraph 27 that Respondent, ". . . did not give the Charging Party . . . an opportunity to bargain in connection with the document. . . .", is correct but very misleading as to bargaining about the policy on body searches. As the Compliant itself shows, the policy on body searches was sent to the Union on February 6, 1995 (G.C. Exh. 1(b), Pars. 11, 12); the Union responded with counterproposals (id., Par. 13); Respondent submitted a revised document on May 6, 1996 (id., Pars. 13, 14, 15, 16); and the Union, on June 19, 1996, submitted counter proposals and a request that bargaining be completed before implementation (id., Par. 17); on October 8, 1996, Respondent submitted to the Union a further revision (id., Pars. 18, 19); and on November 18, 1996, the Union submitted proposals and renewed its proposal that bargaining be completed before implementation (id., Par. 20).

What this case really concerns is Respondent's implementation of the body search policy before completion of bargaining on I & I. That Respondent unilaterally implemented the body search policy on May 28, 1997, was conceded by Respondent and its defense is that, ". . . there were no negotiable [Union] proposals pending at the time of implementation." (Respondent's Brief, p. 13 n.5).

The standard for determining whether a proposal is within the duty to bargain as an "appropriate arrangement" under § 6(b)(3) of the Statute is set forth in National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA 24 (1986)(KANG). The Authority initially determines whether the proposal is intended to be an "arrangement" for employees adversely affected by the exercise of a management right. An arrangement must seek to mitigate adverse effects "flowing from the exercise of a protected management right." National Treasury Employees Union and U.S. Department of Commerce, Patent and Trademark Office, 53 FLRA 539, 545-46 (1997), citing United States Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service v. FLRA, 960 F.2d 1068, 1073 (D.C. Cir. 1992).

The claimed arrangement must also be sufficiently "tailored" to compensate or benefit employees suffering adverse effects attributable to the exercise of management's right(s). As the Authority reaffirmed, relying on United States Department of the Interior, Minerals Management Service, New Orleans, Louisiana v. FLRA, 969 F.2d 1158, 1162 (D.C. Cir. 1992), § 6(b)(3) brings within the duty to bargain proposals that provide "balm" to be administered

"only to hurts arising from" the exercise of management rights. American Federation of Government Employees, National Border Patrol Council and U.S. Department of Justice, Immigration and Naturalization Service, 51 FLRA 1308, 1319 (1996). That section of the Statute does not bring within the duty to bargain proposals that are so broad in their sweep that the "balm" would be applied to employees indiscriminately without regard to whether the group as a whole is likely to suffer, or has suffered, adverse effects as a consequence of management action under § 6. Id. In this case, the Union's proposed revisions to the new body search policy would apply to all of the employees in the bargaining unit and therefore would apply "balm" only to the group which is likely to suffer or which has suffered adverse effects due to management's action under § 6(a)(1) of the Statute. Respondent does not contend otherwise.

If the proposal is an arrangement that is sufficiently tailored, the Authority then determines whether it is "appropriate," or whether it is inappropriate because it excessively interferes with the relevant management right (s). KANG, 21 FLRA at 31-33. In doing so, the Authority weighs the benefits afforded to employees under the arrangement against the intrusion on the exercise of management's rights. Id.

I conclude that the Union's proposed revisions to the new body search policy, which sought to re-define the terms, "strip search", and, "pat down", and which sought to modify the language in other provisions of the policy to reflect those re-definitions, were all intended as "arrangements" for adversely affected employees. In other words, the Union intended the proposed revisions to preserve the established practice under which Border Patrol Officers who stopped, detained and arrested suspected illegal aliens would be permitted to pat them down and, if deemed necessary, strip search them. The proposed revisions constitute arrangements because they are intended to protect the safety of bargaining unit employees by permitting them to search for concealed weapons in a far more meaningful way than Respondent's body search policy would allow. More specifically, the Union's re-definition of "pat down" and related provisions would permit an Officer to remove a series of bulky outer layers of clothing worn by suspected illegal aliens and "feel" rather than merely "touch" such articles of clothing individually before returning them to the suspect if the Officer's search would otherwise be "hampered" (rather than "prevented" as Respondent's policy would require) without having engaged in a "strip search." In addition, it would permit the Officer to pat down the suspect without removing the lighter-weight underlayers of clothing, thus providing a better opportunity for discovery

of hidden weapons located close to the suspect's body without requiring the removal of all the suspect's clothing. Conversely, Respondent's policy would deem the removal or even the rearrangement of any article of clothing to constitute a "strip search" requiring the Officer conducting the "search" to have reasonable cause to believe that the suspect is concealing weapons on his or her person and to justify such action by preparing a detailed written report of the incident. The Union's proposed revisions to the new body search policy were intended to permit Officers in the field to protect themselves against the dangers of concealed weapons by taking reasonable steps to detect them.5

The Union's proposed arrangements are "appropriate". I conclude that the proposed arrangements are appropriate in that they would afford employees considerably more protection against the inherent danger of weapons concealed in the clothing or on the person of individuals who have been detained as suspected illegal aliens. The magnitude of the danger to such Officers if they are unable to remove outer layers of heavy clothing and manipulate them in order to detect hidden weapons, and then to pat down the suspect (s) with their hands before returning the outer garments to the suspect(s) is great, and the corresponding benefits to the affected employees, if they are able to take the foregoing steps, is substantial.

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Similarly, I find that the Union's proposal to authorize Officers to search the immediate area under the control of a detained suspect is intended as an arrangement to protect employees against the danger of weapons being retrieved and used by the suspect under detention. Respondent does not contend otherwise, but instead rejected the proposal as extraneous to the subject of body searches. I do not find Respondent's reason for refusing to bargain over inclusion of the Union's proposal to be persuasive. In my view, searching the immediate area is sufficiently related to the subject of body searches that such a provision contained in the final policy -- even if duplicative of guidance set forth elsewhere -- would provide useful guidance to the affected employees. Since one of the stated purposes for issuing the body search policy was to create a comprehensive and unified set of instructions for its employees, Respondent's objection to this proposal on the basis of over-inclusiveness would appear to be inconsistent with that stated goal. As support for its position, Respondent relies on an Authority decision cited at 23 FLRA 502. No such decision is reported at that citation, and with due diligence I have been unable to find the decision. Thus, I am unable to consider or comment on it.

Conversely, the proposed arrangements would not excessively intrude on the exercise of Respondent's right to determine its internal security practices. That is, Respondent's decision to promulgate one clear and comprehensive body search policy to guide its employees' conduct and thereby protect the employees against financial liability, the suspects against unreasonable searches, and its operations against criticism, is still inviolate. Moreover, Respondent has not demonstrated that it has been criticized or held liable -- financially or otherwise -- for unreasonable searches committed by its Border Patrol Officers in the past. Indeed, the length of time that Respondent devoted to the development of its new body search policy -- approximately 28 months from Respondent's transmittal of the first draft policy to the Union until its issuance of the final enforcement standard--suggests that there was no urgency to replace the existing practices, particularly since the field Officers were given training periodically on new developments in Federal law governing proper body searches.6

Similarly, I am not persuaded that the established body search practices were unlawful or that the Union's proposed revisions to the new policy are contrary to law. I note that the Union was never informed by Respondent why any of its proposals was unlawful. As previously found, Ms. St. John-Mellado -- the author of Respondent's body search policy -- could not explain to Mr. Bonner why some of the Union's proposed revisions to the policy were legally unacceptable because she is not an attorney; and her legal advisor --Respondent's Assistant General Counsel, Mr. Anderson -- admitted that he neither explained his legal objections to Mr. Bonner nor provided the Union with any supporting legal precedent in writing. Moreover, I have examined the cases cited by Respondent in its post-hearing brief to support the claim that the Union's rejected proposals were contrary to law and remain unpersuaded that Respondent's assertions are well-founded. In my view, consistent with Ms. St. John-

6 To the extent that Respondent now contends that some Union proposals were rejected because their placement might cause confusion, such as putting a statement concerning the purpose(s) of the body search policy into the section defining the term "pat down," I find that the real reason for their rejection was the content and not the location of the language and that Respondent made no effort to reach agreement with the Union on a different location for the proposed language. Moreover, Respondent's asserted justification, merely underscores the fact that bargaining had not been completed.

Mellado's testimony that her main objective in drafting the new body search policy was to shield INS employees and the agency itself from financial liability in connection with the performance of body searches, Respondent chose to be very conservative in its directives. I find nothing in the case law cited by Respondent which compels the conclusion that the removal or rearrangement of any article of a suspect's clothing--even a hat--constitutes a "strip search" which must be supported by a reasonable suspicion that the suspect is concealing weapons. On the other hand, as Mr. Bonner stated, ". . . suspicion was required in all instances for a lawful stop." (Tr. 112-113) and a "pat down," could be undertaken by a field Officer to protect against concealed weapons without the same degree of suspicion as required for a true "strip search."

With regard to the Union's proposals to retain the practice of conducting strip searches routinely in Detention facilities, including body searches of minors, again I conclude that the proposals are intended as arrangements in order to enhance the safety of bargaining unit employees. However, these proposals excessively interfere with Respondent's right to determine its internal security practices. Unlike the previous proposals which would govern Border Patrol Officers in the field where the dangers to their safety are highest, sometimes involving the detention of many suspects simultaneously at night, these proposals would apply after the suspects have been patted down and/or strip searched in the field and have been transported to one of Respondent's Detention facilities for incarceration. At this point, the environment is (or is capable of being) far more controlled. Each suspect can be processed individually; the facility is (or can be) well-lighted; and the arresting Officer is (or can be) performing detention-related duties with other Officers nearby. In these circumstances, with the reduced risks to the employees' safety and the heightened responsibility of INS given that a suspect is being detained in a Federal facility operated by Respondent, coupled with the fact that the Union's proposals would authorize "strip" searches under the narrow definition of that term (i.e., exposure of skin surfaces not ordinarily seen in public) with no requirement for reasonable suspicion that weapons are being concealed, the Union's proposals would interfere excessively with Respondent's right to determine its internal security practices. This is equally true for adults and minors who have been detained.

The Union's proposal is to permit body cavity searches without warrants if qualified medical personnel decide that immediate action is necessary. The Union contends that the

exception it proposes to the general rule that a warrant is necessary before a body cavity search may be performed is justified because, otherwise, for example, a suspect in custody could swallow drugs in his possession in order to destroy evidence and die as a result, which death would be blamed on the custodial Officer. Unlike the Union's other proposals discussed above, this one is not designed to protect the employees' safety but, rather, is directed toward preventing perceived financial or disciplinary exposure. Nevertheless, it is proffered in order to insulate bargaining unit employees against foreseeable adverse effects arising from Respondent's issuance of its new body search policy. Accordingly, I conclude that the proposal was intended as an arrangement. However, I further conclude that the proposal excessively interferes with Respondent's reserved management rights. First, the proposal inferentially would require Respondent to employ or retain medical personnel at or near each of its Detention facilities to authorize body cavity searches in emergency situations, although there is no record evidence that such medical personnel are currently employed and deployed as the Union's proposal would require. Second, if the proposal were adopted, Respondent's medical personnel would be forced to make split-second decisions based on incomplete facts or speculation whether to authorize the most invasive and embarrassing type of body search without the legal protection of a telephonic judicially-issued warrant. The proposal thus would shift liability from the custodial Officer to the medical personnel in question. Finally, in my judgment, if the hypothetical situation envisaged by the Union were to happen, and the responsible Officer were following the terms of Respondent's policy, the employee's conduct thereby would be insulated against personal financial liability or against disciplinary action.7 On balance, I conclude that the Union's proposed arrangement would excessively interfere with management's rights in this instance.

In terms of protecting unit employees from liability arising from lawsuits brought against them in connection with allegedly unreasonable searches, the Union proposed to modify Respondent's policy in two respects. First, it would limit an Officer's liability for searches which are conducted in "deliberate disregard for" INS policy rather than searches conducted "contrary to" it. The literal

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Moreover, Respondent apparently concedes that an exception already exists which would justify searching a suspect's mouth for weapons or contraband (such as drugs) without first obtaining a warrant. If so, the Union's hypothetical example to support its proposal breaks down.

language of the proposal would protect Officers even if they failed to follow the terms of the policy unless it could be proven that they acted wilfully -- i.e., with the specific intent to disregard the policy's directives. While I conclude that the proposal is intended as an arrangement by shielding employees from liability for conducting searches in violation of the policy's terms, I find that it would excessively interfere with management's right to require compliance with the policy by removing liability unless wilful defiance could be demonstrated.

The Union's second proposed modification would require INS to "ensure" rather than merely "recommend" that if an employee were sued despite conducting a search in accordance with the policy, a Department of Justice attorney would be appointed to represent the employee's interests. This proposal has the attributes of an arrangement, but it goes beyond Respondent's ability to perform. As Respondent notes, there are Government-wide regulations which apply in determining when Department of Justice attorneys will be appointed to represent Federal employees in lawsuits arising out of their performance of official duties. Under 28 CFR § 50.15(a), a Federal employee may be provided representation when the actions for which the representation is requested reasonably appear to have been performed within the scope of the employee's employment, "and where the Attorney General or his designee determines that providing representation would otherwise be in the interest of the United States." (Emphasis added.) Procedurally, § 50.15(a)(1) requires the employee's "employing federal agency" to submit, unless deemed clearly unwarranted, "a statement containing its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation," and § 50.15(a)(2) provides that upon receipt of the employee's request for counsel, "the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States." (Emphasis added.) The clear language of the foregoing regulations indicates that INS (as the employing federal agency) may recommend that legal representation be provided to one of its employees, but that only the Attorney General or her, or his, designee is empowered to decide whether providing such representation would be in the interest of the United States. By requiring the INS to guarantee what the Attorney General has the sole discretion to provide, the Union's proposal is inconsistent

with a Government-wide regulation.[8] To the extent the Union contends that its proposal would require INS (rather than the Justice Department) to provide an attorney, the Union's stated intent is facially inconsistent with the terms of its proposal. That is, the proposal would require INS to ensure the appointment of a Department of Justice attorney to represent unit employees in lawsuits arising from the performance of body search duties.

Having examined the Union proposals that were pending when Respondent implemented its final enforcement standard concerning body searches on May 28, 1997, and which the parties have disputed in this proceeding, I conclude that several proposals pertaining to the definitions of "pat down" and "strip search" are within the duty to bargain. Accordingly, I further conclude that Respondent, by implementing the final body search policy while negotiable proposals were still on the bargaining table, violated § 16 (a)(5) and (1) of the Statute. The next and final question is what should constitute an appropriate remedy.

C. Remedy

General Counsel and the Union urge that, in addition to a cease and desist order and nationwide posting, Respondent should be required to rescind its final body search policy and restore the pre-existing practice until the bargaining process has been completed. Both assert that a status quo ante remedy is appropriate by applying the factors identified by the Authority in FCI, 8 FLRA at 606. Respondent agrees that the FCI factors should be applied, but contends that an analysis of those factors compels a conclusion that status quo ante relief is not warranted in this case.

In FCI, the Authority identified the following as being at least some of the factors to be considered in determining whether a status quo ante remedy is appropriate in a given case to remedy an agency's failure to fulfill its statutory duty to bargain over the impact and implementation of its

[8] 28 CFR § 50.15, by its terms, applies to Federal employees, defined in subsection (a) to include, "present and former Federal officials and employees." The mere fact that the "federal employing agency", in this case INS, is a component of the Justice Department, does not alter the fact that in deciding whether to provide legal representation to a Border Patrol Officer, the Attorney General would be applying a standard applicable to all employees of the Federal government rather than an internal regulation applicable only to employees within the Department of Justice.

decision to exercise under § 6(a) of the Statute a reserved management right which changes unit employees' conditions of employment: (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the wilfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.

With respect to the first factor, it is undisputed that Respondent notified the Union early in February, 1995, that it intended to issue a new body search policy and provided the Union a copy of the draft policy for review and comment. It is also undisputed that Respondent repeated the foregoing process on subsequent occasions whenever the language of a prior draft was modified either by incorporating revisions proposed by the Union or refinements initiated by management.

Second, it is equally clear and uncontested that the Union responded with requests to negotiate over the draft body search policy whenever Respondent provided copies of draft language to the Union for review and comment.

Third, although I have found that Respondent violated its duty to bargain in good faith by implementing the final body search policy before negotiations had been completed, I further conclude that such bargaining violation was not wilful. In this regard, I again note that Respondent not only gave the Union notice of the draft body search policy and an opportunity to offer proposed modifications, but incorporated into the policy whatever Union proposals were deemed consistent with law by Respondent's legal advisor. Additionally, while the bases for Respondent's legal objections were not articulated to the Union, the parties met on at least 3 or 4 occasions to discuss the language of

disputed provisions in the draft policy.[9] Finally, I conclude that issuance of the final enforcement standard on body searches was not in deliberate defiance of Respondent's duty to bargain in good faith under the Statute. Thus, I credit Ms. St. John-Mellado's testimony that nobody was more surprised than she was to learn that the INS Commissioner had signed and issued the final policy without responding to the Union's last proposals submitted on November 18, 1996, or even notifying the Union of the action that was about to be taken, and that the reason for the breakdown was the replacement of key personnel within INS who were knowledgeable concerning the status of the parties' negotiations with individuals who had had no prior involvement in the process. For all of these reasons, I conclude that there was no wilfulness to Respondent's bargaining violation.

Fourth, I have found that Respondent's new body search policy adversely affected the thousands of bargaining unit employees by increasing the danger to them from concealed weapons remaining undetected under the more restrictive rules governing pat downs and strip searches, and by requiring unit employees to prepare lengthy reports articulating their reasonable suspicion supporting strip searches under Respondent's expansive definition of that

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[9] The Union asserts that Respondent was not represented at these negotiations by individuals authorized to reach an agreement, and that such failure is indicative of bad faith which should be considered as a factor in deciding whether a status quo ante remedy is appropriate. Without passing upon whether an agency's demonstrated bad faith during negotiations--e.g., "surface bargaining"--is a separate factor to consider, I find that the Union's contention in this case is unsupported by the record. Thus, the undisputed evidence shows that Ms. St. John-Mellado, the driving force behind and author of the body search policy, was present during the negotiations. It would be improper to conflate the parties' failure to resolve their disagreements during those bargaining sessions with the absence of authority on the part of Respondent's representatives to reach an agreement.

term.[10] However, neither the General Counsel nor the Union submitted any evidence at the hearing or argument in their post-hearing briefs that the new body search policy, which went into effect in June, 1997, had resulted in actual injury to any bargaining unit employee by means of concealed weapons or otherwise. Nor did the General Counsel or the Union provide any evidence concerning the number of reports submitted and the amount of time it took to prepare them.

Finally, in terms of the degree of disruption that a status quo ante remedy would have on Respondent's operation, I find that rescission of the body search policy would significantly impair its effectiveness. I note that issuance of the new policy was designed to replace a fragmented and confusing group of management guidelines with a comprehensive and unitary directive to INS Officers in an area of central importance to accomplishing the agency's mission. Moreover, it appears that most of the provisions contained in the new policy are no longer in dispute. Ordering rescission of the policy, which has been in effect for nearly two years might, indeed, would, cause more confusion than permitting the policy to remain in effect while the parties negotiate over the few negotiable proposals still at issue.

On balance, particularly since Respondent notified and bargained with the Union over the contents of the new body search policy; incorporated many Union proposals into the policy; prematurely issued the new policy more out of inadvertence than wilfulness; and since there was no evidence presented of injury or other actual adverse effects experienced by unit employees; I conclude that a status quo

[10] As I understand the Union's position, there is no proposal seeking to eliminate the reporting requirement. If there had been, I would have found such a proposal to excessively interfere with management's right to protect its operations by having employees create contemporaneous records articulating their reasonable suspicions justifying the decisions to conduct strip searches. That is, the reports would allow Border Patrol Officers to refresh their recollections about the particular reasons why they strip searched suspects in the event of lawsuits filed against them and INS years later. Rather, the Union's approach would minimize the adverse effects of the reporting requirement by re-defining when such reports are required. In other words, by permitting the removal and tactile inspection of a suspect's outer layers of clothing without considering such action to be a strip search, the Union would indirectly eliminate the need for a report justifying why a strip search was deemed necessary.

ante order should not be issued to remedy the unfair labor practice found to have been committed in this case. However, consistent with remedial orders issued in similar cases, I shall order Respondent to cease and desist from such unlawful conduct and to post a notice signed by the Commissioner of INS nationwide wherever bargaining unit employees are located.[11]

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 Justice, Immigration and Naturalization Service, Washington, D.C., shall:

1. Cease and desist from:

(a) Issuing a final policy governing the performance of body searches by Border Patrol Officers without completion of bargaining with the American Federation of Government Employees, National Border Patrol Council, the exclusive representative of a nationwide bargaining unit of its employees, to the extent consistent with law and regulations, concerning the procedures to be observed in implementing that policy and appropriate arrangements for employees adversely affected by that policy.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request of the American Federation of Government Employees, National Border Patrol Council, the exclusive representative of a nationwide unit of its employees, bargain to the extent consistent with law and regulations, concerning the procedures to be observed in implementing that policy and appropriate arrangements for employees adversely affected by that policy.

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[11] I specifically find a nationwide posting to be warranted since the new policy was issued by the Commissioner and was applicable to all the employees in the nationwide bargaining unit.

(b) Post at all of its facilities where bargaining unit employees are located copies of the attached Notice on forms furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commissioner of the Immigration and Naturalization Service and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure
that these Notices are not altered, defaced, or covered by any other material.

(c) 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 Washington Region, Federal Labor Relations Authority, Tech World Plaza, 800 K Street, NW., Suite 910, Washington, D.C. 20001, 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: April 15, 1999
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 Justice, Immigration and Naturalization Service, Washington, D.C., violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES NATIONWIDE THAT:

WE WILL NOT issue a final policy governing the performance of body searches by Border Patrol Officers without completion of bargaining with the American Federation of Government Employees, National Border Patrol Council, the exclusive representative of a nationwide bargaining unit of our employees, to the extent consistent with law and regulations, concerning the procedures to be observed in implementing that policy and appropriate arrangements for employees adversely affected by that policy.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the American Federation of Government Employees, National Border Patrol Council, the exclusive representative of a nationwide unit of our employees, bargain to the extent consistent with law and regulations concerning the procedures to be observed in implementing that policy and appropriate arrangements for employees adversely affected by that policy.

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

Date: _____ By: _____
Commissioner
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, Washington Region, Tech World Plaza, 800 K Street, NW., Suite 910, Washington, D.C. 20001, and whose telephone number is: (202) 482-6700.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. WA-CA-80124, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Sharon K. Pendergast, Labor
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T.J. Bonner, President
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Employees, National Border Patrol Council
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REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: April 15, 1999
Washington, DC