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, DC Respondent	Case No. DA-CA-30370 (55 FLRA 93)
and AMERICAN FEDERATION OF GOVERNMENT NATIONAL BORDER PATROL COUNCIL AFL-CIO Charging Party	

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 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 **AUGUST 23, 1999**, and addressed to:

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

ELI NASH, JR.
Administrative Law Judge

Dated: July 20, 1999
Washington, DC

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

MEMORANDUM DATE: July 20, 1999

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

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

Respondent

and Case No. DA-CA-30370
(55 FLRA 93)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 99-34
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE WASHINGTON, DC Respondent	Case No. DA-CA-30370 (55 FLRA 93)
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	

R. Virginia Comella, Representative
For the Respondent

Deborah S. Wagner, Esquire
For the Charging Party

Susan L. Kane, Esquire
For the General Counsel

Before: Eli Nash Jr.
Administrative Law Judge

DECISION ON REMAND

Statement of the Case

On January 12, 1999, the Authority remanded the instant matter to the Office of Administrative Law Judges in order to: (1) reopen the hearing to address Respondent's affirmative defense that the implementation of the side handle baton program was consistent with the necessary functioning of the Agency; (2) enable the parties to address by brief whether the side handle baton program was covered by the parties' expired collective bargaining agreement; and (3) enable the parties to address whether the Authority's decision in *United States Immigration and Naturalization Service, Washington, DC*, 55 FLRA 69 (1999), should be applied retroactively to the section 7116(a)(6) allegation

in this case, and, if so, whether Respondent violated section 7116(a)(6) of the Statute.

The case involves the implementation of a side handle baton program by Respondent, the first stage of which was a side handle baton training program. In its remand of the case the Authority found that the instant unfair labor practice charge was timely filed, that Respondent implemented the side handle baton program on December 8, 1992, which was prior to completion of negotiations and while the matter was pending before the Federal Service Impasses Panel (Panel), and that the implementation of the side handle baton program had more than a *de minimis* impact on bargaining unit employees, conditions of employment. 55 FLRA at 96-97.

A hearing on the remand was held on April 8, 1999, in Washington, DC. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. The General Counsel, the Charging Party and the Respondent filed timely post-hearing briefs.

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

Findings of Fact

The facts surrounding events through February of 1993, are more fully set out in the Judge's decision and in 55 FLRA at 93-94, and are summarized below.

In a memorandum dated April 2, 1992, Respondent informed the Union that it was planning to adopt the expandable side handle baton as an intermediate force weapon to be issued to all agents and attached what it referred to as the "Expandable Side-Handle Baton Training Program" which "cover[ed] most of the salient facts relating to this weapon, relevant policy, and certification for its use." (G.C. Exh. 4). Prior to this time, a straight baton was optional equipment for the agents. (55 FLRA at 93).

The Union and Respondent exchanged several letters in which the Union raised questions and bargaining proposals about the side handle baton, and Respondent provided answers to the Union's questions, including a letter from Respondent dated June 12, 1992, in which Respondent now referred to the program as the "Side-Handle Baton Program" and stated that carrying the side handle baton and training in the side

handle baton would be optional. (G.C. Exh.6)[1] Among other things which the Union proposed in its letters to Respondent, the Union proposed by letter dated July 25, 1992, that agents not be required to carry a side handle baton in adverse field conditions including freight train checks and when they need to quickly exit a vehicle. (G.C. Exh. 8 at 2).

On September 10, 1992, Respondent wrote to the Union, stating that "due to demands of public safety and officer safety[,]" Respondent has decided to begin immediate implementation of the side handle baton program. (G.C. Exh. 12). Respondent rejected ground rules proposals the Union had submitted, claimed that the Union had not submitted any proposals relating to the impact of the proposed policy change, and stated that it "stands ready to meet with [the Union] in Washington, DC" over proposals the Union submits after implementation of the program has begun. (G.C. Exh. 12 at 2). On September 14, 1992, the Union submitted the following letters: (1) to Respondent disputing Respondent's claim that the Union had not submitted bargaining proposals, arguing that the twelve proposals submitted on July 25, 1992, "remain in full force and effect," rejecting Respondent's offer to limit bargaining to post-implementation matters, notifying Respondent that it planned to seek the assistance of the Panel and the Federal Mediation and Conciliation Service (FMCS) to resolve the instant bargaining dispute, and reiterating its demand that implementation be held in abeyance pending the completion of bargaining (G.C. Exh. 13); (2) to the FMCS to expedite the bargaining process (G.C. Exh. 14); and (3) to the Panel requesting consideration of a negotiation impasse and containing the Union's and Respondent's proposals on issues relating to the side handle baton program. (G.C. Exh. 15).

On October 28, 1992, the Panel directed the parties to negotiate, on a concentrated schedule, within the next 30 days over all remaining issues in dispute. (G.C. Exh. 16). The parties negotiated and met with a mediator from the FMCS. The parties resolved a number of issues during these negotiations, but many more remained unresolved. At the end of these negotiations, the mediator certified that the parties were at impasse. (Tr. at 32).

On November 17, 1992, the Union outlined the areas where it believed the parties had reached agreement and set forth proposals covering where they had not, including a

[1] By letter to the Union dated August 19, 1992, Respondent reiterated its position that it did not intend to force any agent to attend the side handle baton training.

proposal demanding that Respondent maintain the *status quo.* (G.C. Exh. 17; Tr. at 32). The Union asked Respondent to sign a Memorandum of Understanding (MOU) covering the areas of agreement. (G.C. Exh. 17 at 6; Tr. at 32). By letter to the Union dated December 8, 1992, Respondent acknowledged that the matters set forth in the MOU were initialed by the parties during negotiations but stated that Respondent would not sign the MOU at present because the MOU did not represent a final agreement and Respondent did not want to submit the agreement to the Department of Justice for approval piecemeal. (G.C. Exh. 18). Respondent further stated that it would not maintain the *status quo* because it "consider[ed] the implementation of the Side-Handle Baton program to be necessary to the functioning of the [Immigration and Naturalization] Service and is proceeding with implementation in accordance with our previous notice to you." (G.C. Exh. at 1). According to Respondent, a "basic intermediate force weapon with accompanying policies has been determined to be essential." (G.C. Exh. 18 at 1). As found by the Authority, Respondent implemented the side handle baton program on December 8, 1992. 55 FLRA at 96.

The Union filed the instant unfair labor practice charge on January 4, 1993. The Panel relinquished jurisdiction over the parties, dispute by letter dated February 4, 1993, noting that Respondent had implemented the disputed program and that the instant unfair labor practice charge had been filed over that implementation. (G.C. Exh. 20). The complaint in this case issued on December 10, 1993, and was amended during the initial hearing on August 10, 1994, by Administrative Law Judge William B. Devaney, who issued a recommended decision and order in this case on April 20, 1995 (OALJ 95-43), finding that the Respondent had committed unfair labor practices in violation of the Statute. The case was remanded by the Authority on January 12, 1999.

In the meantime, on August 27, 1996, Administrative Law Judge Jesse Etelson, issued a recommended decision and order in *U.S. Department of Justice, Immigration and Naturalization Service*, Case No. WA-CA-50048, (OALJ 96-63), finding, among other things, that on November 3, 1993, the Respondent forwarded to the Union a "New Immigration and Naturalization Service policy on NonDeadly Force" and noting that it was more detailed than the Side Handle Baton Policy and varied from the Side Handle Baton Policy in certain respects.[2] On January 5, 1999, Administrative Law Judge Garvin Lee Oliver, issued a recommended decision and order

[2] Case No. WA-CA-50048, OALJ 96-63, is currently pending before the Authority.

in *U.S. Department of Justice, Immigration and Naturalization Service, Washington, DC*, Case No. WA-CA-70267, OALJ 99-12, ALJD Report No. 140 (adopted by the Authority, pursuant to 5 C.F.R. § 2423.41(a), by Order dated February 26, 1999), concerning Respondent's 1996 proposed "Enforcement Standard-Use of Non-deadly Force." Judge Oliver found, among other things, that the parties agreed on December 17, 1998, to immediate implementation of the collapsible steel baton and that Respondent would not expose any bargaining unit employees to OC spray pending Panel resolution of that remaining issue. OALJ 99-12 at 3 n.2. On February 3, 1999, the Panel issued a decision and order in *Department of Justice, Immigration and Naturalization Service, Washington, DC*, Case No. 98 FSIP 158 (Panel Release No. 417, February 26, 1999), on the negotiation impasse.[3] Despite the parties' December 17, 1998, interim agreement and the Panel's decision, the side handle baton program remains in effect as, on March 25, 1999, the parties stipulated that pursuant to the side handle baton program, Respondent was conducting ongoing recertification training in the side handle baton for bargaining unit employees who were authorized to use the baton. (Jt. Exh. 1).

As of October 2, 1998, the date of the hearing in OALJ 99-12, and April 8, 1999, the date of the remand hearing in the instant case, about ten to fifteen percent of Border Patrol agents were authorized to use the side handle baton, which left eighty-five to ninety percent of the agents without an intermediate force baton until the "Enforcement Standard-Use of Non-deadly Force" is actually implemented in the field. (Tr. at 106; G.C. Exh. 22 at 52, 62).

Testimony on Remand

Pursuant to the Authority's Order, the Respondent presented witnesses Richard Moody ane Carl Henderson, who testified about the reasons for the implementation of the side handle baton training program and sought to support Respondent's position that the side handle baton program was necessary for the functioning of the agency.

Moody, as a Border Patrol Assistant Chief, was responsible for the training program including the use of intermediate force. (Tr. at 17-18). Moody affirmed that officers have a range of alternatives in the application of force to apprehend and detain individuals starting from the

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[3] At the General Counsel's request, official notice is taken of the Panel's Decision in Case No. 98 FSIP 158, and of the Administrative Law Judges Decisions and Orders in OALJ 99-12 and OALJ 96-63.

officer's presence and voice commands to deadly force-the use of a firearm. The side handle baton is an intermediate force device used on a subject who is actively resistant. (*Id.* at 19-20). Moody also testified that prior to 1991, Respondent did not have a "nationwide standardized intermediate use of force training program." The Border Patrol Chief at that time, Michael Williams, was concerned with the large number of assaults on agents in the field. Due to this concern, Respondent began considering and researching various intermediate force options. These results were "presented to senior managers in a meeting in Buffalo, New York. The side handle baton was selected for adoption for nationwide use. Other alternatives were considered but not adopted, included the collapsible straight baton and "numchukkas." (*Id.* at 21).

According to Respondent, the side handle baton was selected because it was the most versatile tool. In addition to its use as a striking tool, it could be used as a control and restraint tool and to block blows. The side handle baton's design provides a method for blocking blows without exposing the officer's hand. The baton can also be spun at a greater speed than other batons making for more effective strikes. (*Id.* at 20-22).

The evidence revealed that some Border Patrol locations already employed intermediate force weapons. San Diego, for instance, used the straight wooden baton with training from the Koga Institute. In the same vein, El Paso developed and implemented a pilot program using the side handle baton. Agents in other locations were using a variety of devices including sap gloves and blackjacks. However, there was no national standard; many agents were not trained and even when trained, the agents were not recertified. (*Id.* at 23-24). The only training received by all Border Patrol Agents was a four hour introductory course at the Border Patrol Academy, but agents were not issued the batons at the Academy and many were not issued the batons in the field. (*Id.* at 25).

Respondent also maintained that there was a safety concern as well as a worry about Respondent's liability because of an increase in the number of assaults against Border Patrol Agents. With regard to potential liability it appears that Respondent was worried that failure to have a uniform training program, as well as officers being assigned to use devices without training, was negligent. There was also a concern for safety (*Id.* at 24-25).

The side handle baton training program provided an initial 12 hour training course which included instruction and practice in the different techniques in using the device

and a written test on when to use the baton leading to certification. In addition, an 8 hour training and recertification was required. The number of hours and the certification/recertification requirement was determined by looking at the training provided by other law enforcement agencies which used the baton. (*Id.* at 29).

The policy was implemented because assaults were increasing. There was also a concern for adverse publicity. Williams obviously felt that it was necessary to get the tool out to the field in a timely manner in order to protect agents, minimize assaults, and protect the public. (*Id.* at 31).

Henderson was the program coordinator during the development of the side handle baton training program. He testified that prior to the adoption of the side handle baton, there was no program on the use of intermediate force weapons. Individuals purchased items on their own, while some sector including San Diego and El Paso had *ad hoc* programs. (*Id.* at 54-56).

Henderson stated that officers needed an intermediate force device for situations when an officer cannot control a subject with his hands. Officers cannot immediately revert to deadly force. Also, smaller officers need a device that enhances their own physical capabilities when dealing with larger individuals. Agents need a weapon that can intimidate when they are dealing with multiple arrests. There were concerns for liability for the numerous assaults against Border Patrol Agents. (*Id.* at 57).

The side handle baton met those needs. It is a versatile weapon that allows officers to better control and restrain people. The baton reinforces the agent’s grip, allowing arm locks. It allows the agent to block effectively and to strike. Straight batons, in comparison are nothing more than a striking or impact tool. (*Id.* at 58, 63, 72-73).

The 12 hour training program developed the officers, ability to determine the level of force required, understand what they are doing, and skillfully use the device. A focus of the training was making sure that officers could justify their actions. Before this program, "there was nothing there" and "sort of a huge vacuum." (*Id.* at 60-61). The program provided for certification and recertification to assure current skills.

The Respondent’s rejected Exhibit G, a video-tape purporting to demonstrate the uses of the side handle baton,

would have illustrated the versatility and superiority of the side handle baton as an intermediate force weapon. This tape was introduced in lieu of the demonstration by Henderson, that the Respondent had attempted to introduce in the prior hearing before Judge William Devaney. (*Id.* at 64-65). Since the record already supports a claim that the side handle baton is an excellent intermediate force weapon the tape would, in my view, be merely repetitious.

The Charging Party's witnesses, Jeff Everley and T.J. Bonner testified that a program for use of the wooden straight baton was in place in San Diego and El Centro and that there was training in these programs under the Koga method. (*Id.* at 84-85, 101-02). They testified that the side handle baton was inconvenient to carry (*Id.* at 86), and that there were injuries in the training on the side handle baton (*Id.* at 88, 103). Many officers did not use the baton because of these concerns. (*Id.* at 87, 106). The training on the baton had more emphasis on control and restraint techniques than had prior training. (*Id.* at 102). In their experience they had not personally used these control and restraint techniques in the field. (*Id.* at 88, 104). Both witnesses were Union Officials who spend much of their time conducting Union business. (*Id.* at 87-88, 108-09). While both witnesses had received training in the side handle baton, neither was a certified instructor. (*Id.* at 85, 109).

In rebuttal, Henderson testified that the Koga training was twenty years out-of-date. There were two techniques used in the Koga training that have been proven ineffective: (1) the delivery of strikes from the ring; and (2) the use of multiple strikes until the subject is down. Current techniques provide for batons to be used from the ready position and not the ring. They also provide that the officer strikes and reevaluates the situation before striking again. (*Id.* at 116-18).

Analysis and Conclusions

A. *Respondent Failed to Prove that Implementation of the Baton Program was Inconsistent with the Necessary Functioning of the Agency*

The main question to be resolved by this remand is whether the Respondent established its defense that the unilateral implementation of the side handle baton program prior to completing negotiations, and while the matter was still pending before the Panel, was consistent with the necessary functioning of the Agency.

1. Standard for necessary functioning of the agency

Initially, it is noted that the Authority's remand in this case states that there was "some support for a conclusion that implementation of the side handle baton training program was consistent with the necessary functioning of the Agency" but, there was reluctance to find that the Respondent had met its burden on the record as it stood. The Authority thus, noted that the evidence relied on by Judge Devaney did support his conclusion that the implementation was not consistent with the necessary functioning of the agency.

For the reasons set forth below, the undersigned agrees with Judge Devaney's conclusion that implementation of the side handle baton program was not consistent with the necessary functioning of the agency.

Respondent stated that Chief Williams determined that there was a need to implement a program of consistent training and use of a standard intermediate force device for all border patrol agents.[4] The reasons for this included concerns: (1) that an intermediate force tool be available for all officers; (2) about the increase of assaults against agents; (3) about the safety of both officers and the public; (4) about adverse publicity; and (5) about possible liability of the agency. (Tr. at 30-31).[5] It is undisputed that training is needed in order for the side handle baton to be used safely and effectively. Respondent argues that the selection of the side handle baton as the intermediate choice weapon involved management's right to determine its internal security procedures under section 7106(a)(1), and technology, methods and means of performing work under section 7106(b)(1) of the Statute, respectively."[6]

For the foregoing reasons, I find no merit in Respondent's argument that implementation of the side handle baton training program was consistent with the "necessary

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[4] In my opinion, it is unnecessary to address Respondent's Fourth Amendment argument to resolve the instant matter.

[5] Respondent raised the issue of internal security in its brief, but presented no evidence to that effect. In the circumstances, it is found that no internal security issue was involved in this matter and, therefore, Respondent's contention that the side handle baton was a internal security matter is rejected.

[6] The negotiations herein took place prior to the issuance of Executive Order 12871.

functioning" of the Border Patrol and the Immigration and Naturalization Service.

The standard for establishing that implementing changes in unit employees conditions of employment prior to completing bargaining obligations was consistent with the necessary functioning of the agency has repeatedly been set out by the Authority. *For example*, *Defense Logistics Agency, Defense Industrial Plant Equipment Center, Memphis, Tennessee*, 44 FLRA 599, 616-18 (1992)(*DLA*). "Necessary functioning" is synonymous with compelling need and overriding exigency. *Overseas Education Association, Inc. and Department of Defense Dependents Schools*, 29 FLRA 734, 739-40 (1987)(Proposal 3) *enforced as to other matters sub nom.* Overseas Education *Association v. FLRA*, 872 F.2d 1032 (D.C. Cir. 1988) (*per curiam*) and 911 F.2d 743 (D.C. Cir. 1990)(*en banc*). This affirmative defense, if established, allows an agency to sidetrack the normal bargaining process and implement without having negotiated to agreement or impasse. To prevail on this defense, a respondent must offer affirmative proof that an "overriding exigency" existed which required immediate implementation. *U.S. Department of the Air Force, 832D Combat Support Group, Luke Air Force Base, Arizona,* 36 FLRA 289, 300 (1990); *22 Combat Support Group (SAC), March Air Force Base, California,* 25 FLRA 289, 301 (1987).[7]

As discussed below, Respondent failed to prove its affirmative defense. *See generally U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82-84 (1997).

2. Respondent did not meet the standard

Respondent's witnesses testified that unilateral implementation of the side handle baton program was

[7] In an earlier case, *Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Laredo, Texas*, 23 FLRA 90 (1986), cited by the Authority in 55 FLRA at 97, the Authority noted that in that case, necessary functioning was described as necessary for the agency to perform its mission. That case involved management's ability to exercise management rights to change existing conditions of employment during the pendency of a question concerning representation--which had been pending for years--as opposed to implementation of changes prior to the completion of bargaining. To the extent that 23 FLRA 90 applies a different standard to those different circumstances, under either definition of necessary functioning, Respondent here has failed to make its case.

necessary based on the functions the baton can perform, the lack of a written national policy, and concerns with lawsuits, liability, assaults, and publicity.

Regarding the functions of the side handle baton, Respondent already had a non-deadly force weapon available--the straight baton--on which employees were trained which could perform essentially the same functions of blocking and striking as a side handle baton. (Tr. at 83-84, 99). Though Respondent's witness Henderson testified at the initial hearing that a straight baton can only be used to strike (Tr. at 85).[8] Respondent's witness in OALJ 99-12, non-deadly force expert William Jumbeck, testified that both the side handle baton and the collapsible baton (a straight baton) have the capabilities to strike and block. (G.C. Exh. 22 at 51).[9] Further, it was unrefuted that, in field agents experience, the side handle baton was difficult to use because it got caught on barbed wire, in the brush, and on freight trains (Tr. at 105), it was uncomfortable to wear on

[8] Henderson modified that testimony for the remand hearing by acknowledging that a straight baton can be used to block a blow, but is less effective. (Tr. at 68, 72). He also modified his testimony from the initial hearing that there was no straight baton or training in the straight baton (Tr. at 70) to mirror that of Respondent witness Richard Moody regarding the so-called "ad hoc" intermediate force programs at the San Diego and El Paso sectors. (Tr. at 56; 22-23). As such and in view of the Authority's finding, as confirmed by Agency correspondences (G.C. Exh. 4 at titled page and unnumbered page 1 and G.C. Exh. 9 at unnumbered 2), that straight batons were optional equipment authorized for agents prior to the side handle baton program, Henderson lacks credibility. Moody's credibility is undermined as his testimony concerning the current use of the side handle baton was at times inconsistent, and at times consistent, with a statement that was stipulated by the parties. (Tr. at 35, 46; Jt. Exh. 1). *U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Aeronautical Charting Division, Washington, D.C.*, 54 FLRA 987, 1006 n.11 (1998) (credibility considerations include prior inconsistent statements by the witness and the consistency of the witness' testimony with other record evidence). In short, both the above witnesses appeared to tailor their testimony in an attempt to provide a consistent post-hoc rationalization for Respondent's premature implementation of the side handle baton program.

[9] Jumbeck was credited by Judge Oliver in OALJ 99-12, at 3 n.2.

the belt when inside the vehicle, and that it was a safety hazard for vehicle stops (Tr. at 85, 87, 104). The side handle baton was more difficult to master (Tr. at 102-03; G.C. Exh. 22 at 51), and there was evidence that agents found the side handle baton less effective at striking. (Tr. at 97). Although agents were taught control and restraint techniques during the side handle baton training, there is no evidence that such techniques were useful in the field. (Tr. at 88-89, 104). Moreover, they were not the only control and restraint techniques available to field agents as agents are taught, and use in the field, empty hand restraint and control techniques. (Tr. at 89, 96).

Problems noted above with the side handle baton were raised by the Union (G.C. Exh. 8 at 2), and certainly foreseeable if, as Respondent contends, there was a pilot use of the side handle baton in the El Paso sector by then-Sector Chief Mike Williams prior to 1991 (Tr. at 23).[10] If the difficult control, restraint and other techniques asserted by Respondent to be incapable of being performed with a straight baton were necessary to the agents' performance of their duties, Respondent would not have switched back to a straight baton.

As to the lack of a written national policy, agents were taught at the academy and in other training when non-deadly or intermediate force was and was not warranted, including what constituted non-deadly force and where agents were and were not authorized to strike subjects. (Tr. at 37, 101-02). If Respondent had a compelling need to circulate a piece of paper nationwide, that purpose admittedly could have been achieved without changing from an intermediate force weapon on which agents had already been trained. Instead, Respondent first proposed the side handle baton program in April 1992 and did not deem it consistent with the necessary functioning of the Agency until December 1992--hardly an overriding exigency or emergency situation that permits implementation without first completing the bargaining process.

Regarding the alleged lawsuit, liability, and publicity concerns, Respondent raised these concerns for the first time at the remand hearing and offered bare assertions of two witnesses who have no legal background and who offered no proof to back up their assertions. Though Respondent would be the custodian of such records, the instant record contains no evidence of the number of lawsuits filed against

[10] Williams left El Paso to become Chief of the Border Patrol, and thereafter, the side handle baton program was developed for nationwide application. (Tr. at 30-31).

the Border Patrol in any given year (let alone any relevant year), whether the number of lawsuits had increased in any particular years, who filed the lawsuits, any monetary judgments against the Border Patrol, the extent to which any lawsuits were filed by the public based on the use of deadly or non-deadly force by agents, and any examples where agents could not defend their choice of force in court. Similarly, with the concern about the increase in assaults on agents, Respondent failed to offer evidence of such an increase or any evidence as to whether the alleged increase was in proportion to the increased number of agents in the field. Respondent also did not furnish any studies or other information to support its assertion and failed to prove whether studies indicated the circumstances of the assaults or anything beyond the number of assaults on agents of the Immigration and Naturalization Service, as opposed to the Border Patrol. Where the majority of subjects are compliant (Tr. at 107-08), and in the absence of affirmative support for its concerns, Respondent's concerns lack merit. Finally, Respondent provided no support for or explanation of its asserted concern about adverse publicity and public scrutiny.

Through at least August 1992, use of and training in the side handle baton was to be optional (G.C. Exhs. 6, 9), and Respondent sat idle for eight months before asserting that immediate implementation of the side handle baton program was consistent with the necessary functioning of the Agency. Even in its December 8, 1992 letter, Respondent noted that it was not currently making the side handle baton a minimum qualification for employment, a performance element of the job, or a pass/fail requirement for the Border Patrol Academy. (G.C. Exh. 18). In the six years that the side handle baton program has been in effect, it has not been treated by all sectors as mandatory. (Tr. at 87). Even before the latest non-deadly force agreement was signed by the parties, only ten to fifteen percent of employees were using the side handle baton (G.C. Exh. 22 at 52), and, despite that low figure, agents have not"') been disciplined for failing to carry the side handle baton. (G.C. Exh. 22 at 64).

In the absence of proof of an overriding exigency, required immediate implementation, Respondent's evidence simply does not meet its burden of proof that unilateral implementation of the side handle baton program was consistent with the necessary functioning of the Agency. *For example, Olam Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California,* 51 FLRA 797, 826-27 (1996) and *DLA*, 44 FLRA at 615-18 (no "acute need" to implement change in working conditions before

completion of negotiations); *Social Security Administration,* 35 FLRA 296, 302-03 (1990)(insufficient-evidence presented by respondent demonstrating its necessary functioning defense).11

B. *Respondent Failed to Prove its Defense that the Matter in Dispute was Covered by the Parties CBA*

The second issue on remand is whether or not Respondent established its defense that the matter in dispute is covered by the parties' expired CBA. It is the Respondent's position that Articles 15 and 17 of the CBA covered the side handle baton training program. Those articles concerning "Development and Training" and "Health and Safety" are subjects that are traditionally considered conditions of employment and therefore mandatory subjects of bargaining under the law. There is no evidence that those provisions had ever been modified in any manner.

The Authority noted in 55 FLRA 93, that it previously found in *United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas,* 51 FLRA 768 (1996)(Del Rio) *aff'd, AFGE, National Border Patrol Council, Local 2366 v. FLRA*, 114 F.3d 1214 (D.C. Cir. 1997) *(Local 2366 v. FLRA)* that the parties' 1976 collective bargaining agreement expired in 1979. 55 FLRA at 99. In *Del Rio,* the Authority stated that although provisions resulting from bargaining over mandatory subjects generally survive the expiration of an agreement,

> the continuation of individual provisions, by operation of law, to govern aspects of the parties, relationship during a period following expiration of a term agreement, has never been held to constitute a collective bargaining agreement.

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11 It also falls short of supporting the offer of proof made by Respondent during the initial hearing and relied on by the Authority (55 FLRA at 98), in remanding this case. The evidence does not reveal, as claimed by Respondent, that Henderson will testify that use of bare hands or the straight baton as opposed to the side handle baton "will consistently and to a reasonable degree of expert certainty result in a greater number of Agents being injured, a greater number of bystanders being injured, a greater number of suspects escaping, and he will state that to a degree of expert certainty that without this all of these things would happen." (Tr. at 78-79). This testimony is merely speculation.

51 FLRA at 773. In affirming the Authority's decision in Del Rio, the U.S. Court of Appeals for the District of Columbia Circuit noted in *Local 2366 v. FLRA,* that a union can compel negotiations on bargainable issues that arise after the expiration of a collective bargaining agreement by demanding bargaining at the appropriate level of representation.

Respondent argues that the matter in dispute is covered-by the parties' 1976 expired agreement within the meaning of *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993)(*SSA*). There is no dispute that the Union requested bargaining over the side handle baton program at the appropriate level of representation i.e. the national level. Consistent with *Del Rio*, there was no existing collective bargaining agreement in effect at the time of the notice to the Union of the side handle baton program or its unilateral implementation. As the parties had no existing collective bargaining agreement at all relevant times and as the Union appropriately requested to bargain at the national level, the instant dispute could not have been covered by the collective bargaining agreement, and Respondent was required to bargain.

Moreover, even assuming *arguendo,* that the covered by defense applies to the terms of an expired contract, Judge Devaney found that the side handle baton program was not covered by the terms of the parties' agreement. 55 FLRA at 111, citing Resp. Exh. A, Article 15 ("Development and Training") of the parties' 1976 agreement sets forth general points about the parties, training programs which existed at that time. Subsections G and H -reference specific training commitments by Respondent concerning firearms; subsection J provides for a labor-management relations program; subsection L refers to an electronic technician's training program. (Resp. Exh. at 22-23) Article 15 does not, and indeed, cannot, refer to the side handle baton or its training program because it was not in existence in 1976 when the parties entered into this agreement. Thus, the article does not, and could not, encompass the impact and implementation issues connected with the 1992 side handle baton program and does not cover the matters in dispute. See *Department of the Treasury, United States Customs Service, El Paso, Texas*, 55 FLRA 43, 46-47 (1998)(video tape recording not covered by the contract term "tape recording" where, for eleven years following the inclusion of the term "tape recording," agency did not possess video recording equipment); *United States Department of the Air Force, Air Force Materiel Command*, 54 FLRA 914, 921 (1998)(parties could not have contemplated the VSIP program in their

agreement as Congress did not create the VSIP program until two years after the agreement was already in effect).

In this case the Authority has already identified impact that was more than *de minimis*, making it unnecessary, as Respondent contends, to look at whether the contract contains provision dealing with other than adverse impact of the change. *Id. See also Social Security Administration, Douglas Branch Office, Douglas Arizona*, 48 FLRA 383 (1993) (*Douglas*).

Further, Respondent's conduct is inconsistent with its contention that the matters at issue were covered by the contract. Respondent notified the Union of the new side handle baton program (G.C. Exh. 4), responded to the Union's proposals and submitted counter-proposals relating to the program (G.C. Exh. 6, 9), negotiated with the Union over the program, and initialed off on certain issues relating to the side handle baton program (G.C. Exh. 18). Not even in its December 8, 1992, letter did Respondent raise the covered by defense. Thus, Respondent did not contemplate that the agreement "foreclose[d] further bargaining" on the side handle baton program within the meaning of *SSA*. *See Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia,* 53 FLRA 1092, 1093, 1103-07 (1998) (rejection of covered by defense).

Accordingly, it is concluded that Respondent failed to establish that the side handle baton program was covered by the parties, expired 1976 collective bargaining agreement.

C. *The Modified Standard for Resolving Section 7116(a)(6) Allegations Should be Applied Retroactively, in this Case*

The final question on remand is whether 55 FLRA 69 where the Authority created a new standard for determining whether an agency violates section 7116(a)(6) of the Statute, should be applied retroactively to the section 7116 (a)(6) allegation in this case, and if so, whether or not Respondent violated the Statute. Under the new standard, where an agency fails and refuses to maintain the *status quo* while the matter is pending before the Panel, the Authority will find a violation of section 7116(a)(6) only where the maintenance of the *status quo* has been directed by impasse procedures or decisions of the Panel. 55 FLRA at 78.

In this case, the Panel accepted the parties' dispute and, by letter dated October 28, 1992, directed the parties to negotiate on a concentrated schedule during the 30 days following receipt of the letter. (G.C. Exh. 16). The Panel

noted that if no agreement had been reached, the Panel would take whatever action it deemed appropriate to resolve the impasse.

I conclude, for the same reasons stated by Judge Oliver in his recent decision on remand from the Authority in 55 FLRA 69 (OALJ 99-30, June 7, 1999, slip op. at 7-10), that the revised analytical framework under section 7116(a)(6) announced by the Authority in that case should be applied retroactively, consistent with the well recognized general principle that new rules established in the course of agency adjudications should be applied retroactively unless it can be shown that to do so would cause a manifest injustice on a party or parties.

In the circumstances of this case, I find that a manifest injustice cannot be demonstrated. Thus, the complaint in this case alleged an independent violation of section 7116(a)(5) of the Statute in addition to a violation of section 7116(a)(6), and the parties fully litigated the 7116(a)(5) allegation. As the Authority emphasized in 55 FLRA 69, the revised analytical framework under section 7116 (a)(6) does not expand an agency's right to implement changes in conditions of employment prior to completing negotiations over the proposed changes (55 FLRA at 72), and leaves undisturbed the requirement--enforced under section 7116(a)(5)--to maintain the status quo until impasse resolution procedures have been completed (*Id.* at 76, 78). I have found that Respondent violated section 7116(a)(1) and (5) of the Statute by implementing the side handle baton program, which thereby changed unit employees' conditions of employment in more than a *de minimis* manner, prior to the completion of the entire bargaining process. As more fully addressed below, the order to be provided in this case will fully remedy the Respondent's violation of the duty to bargain in good faith. Nothing further would be added by a finding (through the application of then-existing case law) that the Respondent's implementation of the side handle baton program while the matter was pending before the Panel constituted a separate violation of section 7116(a)(6) of the Statute. In these circumstances, I find that retroactive application of the Authority's revised analytical framework under section 7116(a)(6) would create no injustice to the General Counsel or the Charging Party at all.

Based on all of the foregoing, it is found and concluded that by unilaterally implementing the side handle baton program prior to completing negotiations and while the matter was pending before the Panel, the Respondent violated section 7116(a)(1) and (5) of the Statute. I further

conclude that the section 7116(a)(6) allegation of this complaint should be dismissed.

The Remedy

In addition to the normal posting, the General Counsel requested that Respondent be required to post the Notice nationwide, and that the notice be signed by the Commissioner of the Immigration and Naturalization Service. Applying the factors set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982), the Judge in OALJ 95-43 found that a *status quo* remedy was appropriate in this case. (OALJ 95-43, slip op. at 31-32). To the extent that it remains possible, Counsel for the General Counsel requests that a status quo remedy be granted which orders the Respondent to discontinue the side handle baton program for the ten to fifteen percent of unit employees who are still required to follow it and to rescind any disciplinary actions issued to any unit employees in connection with the side handle baton program, including any disciplinary actions taken after the April 8, 1999, remand hearing. See *Department of Health and Human Services, Social Security Administration, and Social Security Administration, Field Operations, Region II,* 35 FLRA 940, 951-53 (1990); *Department of Health and Human Services, Social Security Administration, Dallas Region, Dallas, Texas*, 32 FLRA 521 (1988).

Respondent contends that the parties have already agreed to immediate implementation of the collapsible steel baton making a *status quo* remedy moot. Furthermore, Respondent contends that because the collapsible steel baton has already been negotiated by the parties, additional bargaining is unnecessary.

In all the circumstances of this case, I find that it would effectuate the purposes and policies of the Statute to require the Respondent to discontinue all aspects of the side handle baton program for bargaining unit employees; remove all adverse effects on bargaining unit employees as a result of the programs unlawful implementation; and post notices nationwide signed by the Commissioner. Further, if the Respondent decides to reactivate the side handle baton program in the future, it must notify and bargain with the Union upon request, as required by the Federal Service Labor-Management Relations Statute.

Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Department of Justice, Immigration and Naturalization Service, Washington, DC, shall:

1. Cease and desist from:

(a) Unilaterally implementing the side handle baton program prior to completion of negotiations, and while the matter is pending before the Federal Service Impasses Panel.

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

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

(a) Discontinue the side handle baton program, including any recertification training; rescind any disciplinary actions taken against bargaining unit employees in connection with the side handle baton program; and remove any other adverse effects on bargaining unit employees (such as lower performance ratings and evaluations) attributed to the implementation of the side handle baton program.

(b) Notify the American Federation of Government Employees, National Border Patrol Council, in advance of any proposed changes in conditions of employment, including the side handle baton program. Provide the Union with any other new non-deadly force policies or programs, and an opportunity to bargain over any changes as required by the Statute.

(c) Post at its facilities where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commissioner of 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Washington, DC Regional Office, Federal Labor

Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, July 20, 1999.

_____

Eli Nash, Jr.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Justice, Immigration and Naturalization Service, Washington, DC, has violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT, unilaterally implement the side handle baton program prior to completion of negotiations and while the matter is pending before the Federal Service Impasses Panel.

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

WE WILL, discontinue the side handle baton program, including any recertification training; rescind any disciplinary actions taken against bargaining unit employees in connection with the side handle baton program; and remove any other adverse effects on bargaining unit employees (such as lower performance ratings and evaluations) attributed to the implementation of the side handle baton program.

WE WILL, notify the American Federation of Government Employees, National Border Patrol Council, in advance of any proposed changes in conditions of employment, including the side handle baton program. Provide the Union with any other new non-deadly force policies or programs, and an opportunity to bargain over such programs, as required by the Federal Service Labor-Management Relations Statute.

_____
(Activity)

Date:_____
By:_____
(Signature)
(Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 800 K Street NW., Suite 910, Washington, DC 20001, and whose telephone number is: (202)482-6700.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by ELI NASH, JR., Administrative Law Judge, in Case No. DA-CA-30370, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT — **CERTIFIED NOS:**

Susan Kane, Esquire — P168-059-655
Federal Labor Relations Authority
55 W. Monroe Street, Suite 1150
Chicago, IL 60603

Deborah Wagner, Esquire — P168-059-656
AFGE, NBPC
1500 W. Canada Hill Drive
Tucson, AZ 85737

R. Virginia Comella — P168-059-657
Employee Relations Specialist
DOJ, INS, Suite 5000
800 K Street, N.W.
Washington, DC 20001

REGULAR MAIL:

Bobby Harnage, President
AFGE, AFL-CIO
80 F Street, NW.
Washington, DC 20001

_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: JULY 20, 1999
WASHINGTON, DC