MEMORANDUM DATE: March 20, 1995

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-30772

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

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. WA-CA-30772

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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **APRIL 19, 1995**, 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: March 20, 1995
Washington, DC

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, AFL-CIO Charging Party	Case No. WA-CA-30772

William C. Owen, Esquire
Mr. Al Hilliard
For the Respondent

Christopher M. Feldenzer, Esquire
Susan Kane, Esquire
For the General Counsel

Mr. Terence J. Bonner
By Brief: Deborah S. Wagner, Esquire
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 unilaterally changed its Firearms

[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)".

Policy without affording the Union prior notice and an opportunity to negotiate concerning the impact and implementation of the changes. Respondent asserts that it did not change the negotiated Firearms Policy, Administrative Manual (AM), Section 4210, for the most part but, to the extent that any change was made, the subject matter of its action was "covered by" the negotiated agreement so as to foreclose further negotiations on the matter.

This case was initiated by a charge filed on July 1, 1993[2] (G.C. Exh. 1(a)) and the Complaint and Notice of Hearing issued on December 30, 1993, with the date of the hearing to be determined (G.C. Exh. 1(b)). By Notice dated May 20, 1994 (G.C. Exh. 1(d)), the hearing was set for July 29, 1994; by Order dated June 14, 1994 (G.C. Exh. 1(e)), the hearing was rescheduled for July 21, 1994; and by Order dated July 7, 1994, the hearing was further rescheduled for August 10, 1994 (G.C. Exh. 1(f)), pursuant to which a hearing was duly held on August 10, 1994, 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, September 12, 1994, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, on timely motion of the Charging Party to which the other parties did not object, for good cause shown, to November 14, 1994. The Charging Party, Respondent and General Counsel each timely filed, or mailed, an excellent brief received on, or before November 18, 1994, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

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[2] General Counsel's formal documents as received from the Reporter were totally confused and wholly incorrect as assembled. Thus, two sets of formal documents for DA-CA-30772 were received. One set, under a cover sheet for 30772, actually consisted of formal documents from four cases: 30370, 30677, 30772 and 30789; the other set, also under a cover sheet for 30772, consisted of formal documents in Case No. DA-CA-30370. From the formal documents received, a correct set of formal documents for DA-CA-30772 has been assembled and the Index and Description of Formal Documents as submitted for 30370 has been corrected to show the formal documents in this case and a complete set of General Counsel's formal documents as received in evidence in this case (G.C. Exhs. 1(a) - 1(g)) are now part of the exhibit file.

Findings

1. The U.S. Department of Justice, Immigration and Naturalization Service, hereinafter, "INS"), has recognized the American Federation of Government Employees (National Council of Immigration and Naturalization Service Locals and National Border Patrol Council) as the bargaining agent for all non-excluded employees of the Immigration and Naturalization Service (Res. Exh. A, Art. 1). This case involves only the unit represented by the National Border Patrol Council (hereinafter, "Union") which consists of about 4,500 employees in 21 sectors, covering the continental United States and Puerto Rico (Tr. 8, 23, 74, 92). For the purpose of this case, the Border Patrol, although a constituent part of INS, will be referred to as "Respondent".

2. About 90% of the unit employees are authorized to carry firearms in the performance of their duties (Tr. 8, 12), indeed, the carrying of arms is, for the great majority of Border Patrol Agents, a condition of their employment.

3. INS and the Union entered into an Agreement covering the unit employees on September 30, 1976 (Res. Exh. A; Tr. 23, 24-25) which is still in effect. Article 15, entitled, "Development and Training", provides, in relevant part, as follows:

> "A. The Agency and the Union agree that the training and development of employees within the unit is a matter of primary importance to the parties. Through the procedures established for employee-management cooperation, the parties shall seek the maximum training and development of all employees. The Agency agrees to develop and maintain forward-looking effective policies and programs designed to achieve this purpose, consistent with its needs.
>
> . . .
>
> "G. All personnel authorized by the Agency to carry firearms shall be provided training in the use of such firearms and must qualify on the course of fire prescribed for their positions on a quarterly basis. The type of firearms normally carried by the employee in the performance of his duties will be used for the purpose of qualification and training.
>
> H. Night firearm training shall be given all Border Patrol Agents at least annually. A night familiarization and training course will be given

annually to any other officer required or authorized to carry firearms when requested by such officer and the training can be carried out within a reasonable proximity of his official duty station." (Res. Exh. A, Art. 15, Sections A, G and H).

4. In 1989, Respondent negotiated with the Union a firearms policy which was incorporated in Respondent's Administrative Manual (AM) as Section 4210 (G.C. Exh. 3, Tr. 9, 27). Mr. Terence J. Bonner, President of the Union (Tr. 7), was chief negotiator for the Union (Tr. 10) and Mr. Gary Runyon, now Administrator of the INS National Firearms Unit (Tr. 26) and previously had been an Assistant Chief in Headquarters, Border Patrol (Tr. 26), represented the Border Patrol in the negotiations with the Union in 1989 (Tr. 27). AM 4210 was effective November 1, 1989 (G.C. Exh. 3; Tr. 10). Interestingly, the covering memorandum to "Regional Commissioners", dated October 26, 1989, stated,

> "Attached is the final version of AM Section 4210. this (sic) version of the AM Section has been negotiated with both Unions and incorporates all changes that have been agreed upon by Management and the Unions. . . . Presently, no substantial changes may be made in this Section which would impact on the bargaining unit without reopening negotiations.
>
> . . ." (G.C. Exh. 3).

5. On January 5, 1993, Mr. Michael S. Williams, Chief, U.S. Border Patrol, issued a policy memorandum, effective immediately, to All Chief Patrol Agents, Associated Chiefs and other agency representatives (G.C. Exh. 2, Tr. 9). Mr. Runyon prepared this policy memorandum, ". . . for the signature of the Chief Patrol Agent in Border Patrol . . ." (Tr. 27). The Union was given no notice or opportunity to bargain (Tr. 11); the new policy memorandum was not disseminated to employees (Tr. 11) although, by its terms, it took effect immediately (Tr. 11).

There is no dispute that the new firearms policy memorandum made changes. Mr. Runyon testified that it was designed to address some recommendations made by the Inspector General and, ". . . was designed to reaffirm or reiterate as an existing policy" (Tr. 27); that the 1989 agreement had been misinterpreted and the new policy memorandum clarified the 1989 policy (Tr. 28); however, he asserted that the provision of AM 4210, Paragraph 21, "Firearms Qualifications", which provided,

> "Exception. An officer may be excused from a quarterly qualification during any authorized absence from the officer's official duty station . . . The Authorizing Official shall require that the officer qualify as soon as practical upon return to duty." (AM 4210, Par. 21, p. 28)

created a loophole so that, ". . . if he had an excused absence, he could go on forever, as far as not having qualified . . ." and we put in the new policy memorandum, ". . . a new thing . . . we now (sic) saying you cannot go over two consecutive quarters without qualifying." (Tr. 54).

Although the record is both clear and undisputed that Respondent negotiated the Service Firearms Policy with the Union, General Counsel has eschewed AM 4210 as a collective bargaining agreement[3] and states that, ". . . Respondent had no duty to bargain over the substance of its decision to change the firearms policy" but, ". . . had a duty . . . to bargain over the impact and implementation of the revised firearms policy if any of the changes . . . had more than a de minimis impact on employees." (General Counsel's Brief, p. 9).

Respondent, on the other hand asserts, in effect, that while it was a right of management to establish a firearms policy it elected, pursuant to § 6(b)(1) of the Statute, to negotiate the firearms policy with the Union and, inasmuch as

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[3] The charge asserted that,

> ". . . Respondent unilaterally implemented a policy modifying . . . its firearms policy. No notice or opportunity to bargain . . . was ever afforded . . ." (G.C. Exh. 1(a)).

The Complaint alleges that,

> ". . . Respondent . . . modified . . . [its] existing Firearms Policy contained in Section 4210 of Respondent's Administrative Manual."

and that Respondent implemented the change,

> ". . . without affording the Union prior notice and an opportunity to negotiate the impact and implementation of the change." (G.C. Exh. 1(b), Par. 10 and 11).

the parties have negotiated an agreement, it is not required to negotiate further as to matters "covered by" agreement.[4]

Background and Application of
"Covered by" as I conceive it

The background of the Authority's "covered by" test was fully reviewed by the Court in Department of the Navy, Marine Corps Logistics Base [Albany, Georgia and Barstow, California[5]] v. FLRA, 962 F.2d 48 (D.C. Cir. 1992). The Court stated, in part,

> "We conclude that under any reasonable definition of the term 'covered by,' the impact and implementation matters related to employee

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4
I reject General Counsel's contention that because the parties' Master Agreement (Res. Exh. A) was negotiated under E.O. 11491, that, ". . . none of the matters addressed in that agreement" can be considered "covered by" an agreement within the meaning of U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993) (hereinafter, "HHS, SSA") (General Counsel's Brief, pp. 18-19). Not only is this contention in derogation of § 35 of the Statute, but it misconceives and wholly distorts the Authority's rulings. Internal Revenue Service, 29 FLRA 162 (1987), concerned a union's mid-term bargaining request, and the Authority held, in part, "In agreement with the court, we find that express Congressional intent to promote and expand collective bargaining . . . is advanced by permitting labor organizations in certain circumstances to initiate bargaining during the term of a collective bargaining agreement." (id., at 165) . . . the duty to bargain . . . requires an agency to bargain during the term of a collective bargaining agreement . . . concerning matters which are not contained in the agreement. . . ." (id., at 166). In HHS, SSA, supra, the Authority's emphasis was on "collective bargaining agreement" and it stated, in part, that, ". . . Initially, we will determine whether the matter is expressly contained in the collective bargaining agreement. . . ." (id., 47 FLRA at 1018). In this regard, a collective bargaining agreement negotiated under E.O. 11491 is a valid, lawful and binding agreement as the Authority has specifically recognized. U.S. Immigration and Naturalization Service, 24 FLRA 786, 790 (1986).

5
Department of the Navy, Marine Corps Logistics Base, Albany, Georgia, 39 FLRA 1060 (1991) (hereinafter, "Albany"); following remand: 45 FLRA 502 (1992); Department of the Navy, Marine Corps Logistics Base, Barstow, California, 39 FLRA 1126 (1991) (hereinafter, "Barstow"); following remand: 45 FLRA 533 (1992).

details and performance criteria are covered by Articles 16 and 31 of the MLA. . . .

. . .

". . . the MLA plainly authorized the Marine Corps to detail employees and establish performance criteria in the manner that it did. Consequently, the agency's actions did not effect a 'change' in the employees' conditions of employment, and so no bargaining obligation arose. . . ." (id., at 62).

The Court noted that it need not, and did not, ". . . attempt to establish a definitive test for determining when an otherwise bargainable matter is 'covered by' a public sector collective bargaining agreement, such that there is no further duty . . . to engage in 'impact and implementation' bargaining with respect to that matter." (id., at 62). The Court stated in conclusion,

"Once the confusion engendered by the Authority's impermissible 'waiver' approach is removed, it becomes clear that this is an easy case. The FSLMRS gave the Marine Corps the right to 'detail' employees and set performance criteria, subject to the obligation that the agency bargain with the union over the impact and implementation of its exercise of those rights. Here, the Marine Corps fulfilled its obligation by bargaining with the AFGE during the negotiations leading up to the adoption of the MLA. The results of that bargaining are Articles 16 and 31 of the Agreement, which set forth specific, agreed-upon procedures that the Marine Corps must follow when it implements employee details and revises performance standards. As the Authority concedes, the Marine Corps followed these bargained-for procedures in the two cases at bar. The Statute requires no more." (id., at 62)

The Authority in its decisions on remand in Albany, supra, 45 FLRA at 505 and Barstow, supra, 45 FLRA at 536, "In accordance with the instructions of the Court" dismissed the complaints; but in HHS, SSA, supra, the Authority adopted a "covered by" test. The Authority stated, in part, as follows:

". . . we strongly agree with the court in Marine Corps that '[i]mplicit in [the] statutory purpose is the need to provide the parties to such an agreement with stability and repose with respect to matters reduced to writing in the agreement.'

962 F.2d at 59. We also agree that to require an exact congruence between a provision of a contract and a proposal offered by a union in order for an agency to have no duty to engage in mid-term bargaining on the matter, would, in many cases, effectively nullify the terms of the parties' existing agreement. Accordingly, to the extent that any of our decisions require such congruence, they will no longer be followed. . .

"In sum, in examining whether a matter is contained in or covered by an agreement, we must be sensitive both to the policies embodied in the Statute favoring the resolution of disputes through bargaining and to the disruption that can result from endless negotiations over the same general subject matter. Thus, the stability and repose that we seek must provide a respite from unwanted change to both parties: upon execution of an agreement, an agency should be free from a requirement to continue negotiations over terms and conditions of employment already resolved by the previous bargaining; similarly, a union should be secure in the knowledge that the agency may not rely on that agreement to unilaterally change terms and conditions that were in no manner the subject of bargaining. . . .

"With these principles in mind, we will set forth a framework for determining whether a contract provision covers a matter in dispute. Initially, we will determine whether the matter is expressly contained in the collective bargaining agreement. In this examination, we will not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute. . . .

"If the provision does not expressly encompass the matter, we will next determine whether the subject is 'inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract.' C & S Industries, Inc., 158 NLRB 454, 459 (1966), cited with approval in Marine Corps, 962 F.2d at 60. In this regard, we will determine whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is

expressly articulated in the provision. If so, we will conclude that the subject matter is covered by the contract provision. . . .

"We recognize that in some cases it will be difficult to determine whether the matter sought to be bargained is, in fact, an aspect of matters already negotiated. For example, if the parties have negotiated procedures and appropriate arrange-ments to be operative when management decides to detail employees, . . . it may not be self-evident that the contract provisions were intended to apply if management institutes a wholly new detail program, or decides during the term of the contract to detail employees who previously had never been subject to being detailed. To determine whether such matters are covered by an agreement, we will examine whether, based on the circumstances of the case, the parties reasonably should have contem-plated that the agreement would foreclose further bargaining in such instances. In this examination, we will, where possible or pertinent, examine all record evidence. See, for example, Triangle PWC, Inc., 231 NLRB 492 (1977) (based on evidence of prior agreement and bargaining history, the Board determined that the subject of pension benefit levels was covered by the agreement). If the subject matter in dispute is only tangentially related to the provisions of the agreement and, on examination, we conclude that it was not a subject that should have been contemplated as within the intended scope of the provision, we will not find that it is covered by that provision. In such circumstances, there will be an obligation to bargain." (47 FLRA at 1017-1019).

This case presents an interesting variant[6] namely, that Respondent, rather than directly taking action, such as detailing employees, issued a new firearms policy statement. Whether Respondent changed the negotiated policy, AM 4210, is not precisely the question, although, as I view it, that may be the practical effect. Strictly speaking, the question is, as Respondent asserts, a twofold inquiry. First, was there a change; and second, if there were, was Respondent's action (change) "covered by" the negotiated policy agreement? Since we are confronted with a negotiated agreement, Respondent can unilaterally change that agreement without bargaining on the impact and implementation of its change, as I conceive application of "covered by", only if that change was permitted by the negotiated agreement. For example, if the parties had negotiated a policy statement that, "In the event of a disciplinary removal, the employee will, if his removal is appealed, remain in a pay status until a final decision of the Merit Systems Protection Board is rendered." If the agency issued a new statement that, "In the event of a disciplinary removal, the employee will be paid during the period of the removal only if the Merit Systems Protection Board does not sustain the removal", this is a change not permitted by the negotiated statement, i.e., not "covered by" the agreement and the agency could not, lawfully, unilaterally implement any such change without, at least, notice and opportunity for the union to bargain on the impact and implementation of the change. On the other hand, if the negotiated statement were, "In the event of a disciplinary removal, the employee will remain in a pay status if the agency retains him, or her, on duty pending decision of the Merit Systems Protection Board." Thereafter, the agency issues a statement, "In the event of a disciplinary removal, the employee shall not be retained in a duty status pending decision of the Merit Systems Protection Board". This is permitted by the negotiated agreement, i.e., is "covered by" the agreement and the agency would not be obligated to bargain further.

6
As noted above, the Union and General Counsel eschewed AM 4210 as a collective bargaining agreement. Where there is a collective bargaining agreement, it might be asserted any substantial change constitutes a repudiation of the agreement and a violation of § 16(a)(5) and (1). Rolla Research Center, U.S. Bureau of Mines, Rolla, Missouri, 29 FLRA 107, 115 (1987); Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 30 FLRA 697, 701 (1987); Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211, 1220, 1222 (1991). Were repudiation asserted because the agreement had unilaterally been changed, the issue would be whether the agreement had been changed and "covered by" would not be an issue.

The changes challenged in this case are set forth hereinafter with my determination as to each:

(a) Proficiency Requirement

Negotiated (G.C. Exh. 3, p. 27-28)

"21. Firearms Qualifica-tions. "Service officers who are authorized to carry handguns shall attend quarterly qualification and shall be required to qualify on the standard Service handgun qualification course by firing a score of 70% or more (see Exhibit IV [p. 44, et seq.]) Officers must also demonstrate safe operating techniques and proper execution of immediate action drills in order to be certified proficient . . . Those who are considered deficient will not be authorized to carry a handgun until the deficiencies have been corrected. (Emphasis in original).

. . .

"In addition to the quarterly handgun qualifica-tions, at least one course shall be conducted each year to familiarize officers with firing under low-light level conditions (see Exhibit V [p. 51, et seq.])

"All officers authorized to use shoulder weapons will be afforded quarterly training in their handling, use, and care. . . . all officers authorized to use shoulder weapons shall be required to qualify quarterly on the standard Service shoulder weapon qualification course by firing a score of 70% or more (see Exhibit VI - VIII [VI, p. 54, et seq. Service Automatic Weapon; VII, p. 58, et seq. Service Shot-gun; VIII, p. 63, et seq. Service Rifle]). Officers must also demonstrate safe operating techniques and proper execution of immed-iate action drills in order to be certified proficient . . . . Those who are considered deficient will not be authorized to carry a shoulder weapon until the deficiencies have been corrected. . . . (G.C. Exh. 3, pp. 27-28).

Respondent's Change (G.C. Exh. 2, pp. 1-2)

The disputed change is this sentence,

". . . Any officer who is unable to complete any portion of any firearms qualification course because of physical disability or other incapacity may not be considered as proficient in the use of the firearm involved." (G.C. Exh. 2, p. 2) (Emphasis in original).

Exhibit IV of AM 4210 at page 50 makes it clear that a score of 70%, or more, means the total score for all distances and all positions. From my cursory review, when firing from all stages, only 10 of 72 shots are from a kneeling position (6 of 60 shots through the 25 yard stage only) so that if no shots were fired from a kneeling position, it would be possible to score 310 (270 through the 25 yard stage only), so that it would be quite possible to qualify - a required 252 on the full course and a required 210 through the 25 yard stage only -- indeed, to qualify as a Sharpshooter on the full course and even Expert on the short course. It is conceded that AM 4210 merely required qualification, "by firing a score of 70% or more" and Mr. Bonner testified that before January 5, 1993, if an officer could not kneel, ". . . these agents were excused from that requirement. As long as they got an overall 70 percent score, they were considered proficient . . . ." (Tr. 12).

The issue is not establishment of a condition of employment by practice, but solely whether Respondent changed a negotiated agreement. I am well aware that the Authority in HHS, SSA, supra, did, indeed, state, that,

> ". . . Initially we will determine whether the matter is expressly contained in the collective bargaining agreement . . . we will not require an exact congruence of language , but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute. . . .
>
> "If the provision does not expressly encompass the matter, we will next determine whether the subject is 'inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract.' C & S Industries, Inc., 158 NLRB 454, 459 (1966). . . ." (47 FLRA at 1018).

The provisions of the negotiated agreement do not expressly contain any requirement that to be considered proficient every portion of the qualification course must be completed nor is mandatory completion of every portion of the qualification

course inseparably bound up with firearms qualification so as to be, "'plainly an aspect . . . covered by the contract'", which requires for qualification only the, "firing a score of 70% or more" and demonstration of, "safe operating techniques and proper execution of immediate action drills [Exhibit III, p. 43]." Accordingly, Respondent's change was not "covered by" AM 4210 and Respondent violated § 16(a)(5) and (1) of the Statute by its unilateral action in changing AM 4210 without giving the Union prior notice and opportunity to bargain on the impact and implementation of this change.

(b) Effect of failure to qualify

Negotiated

4. "D. . . . No officer will be authorized to carry a firearm unless that officer . . . is currently qualified with that particular firearm." (G.C. Exh. 3, 4.D., p. 4).

21. ". . . Those who are considered deficient will not be authorized to carry a handgun until the deficiencies have been corrected." (G.C. Exh. 3, 21., p. 27).

"Those who are considered deficient will not be authorized to carry a shoulder weapon until the deficiencies have been corrected." (G.C. Exh. 3, 21., pp. 27-28).

"Firearms Qualification Reports

. . . The Authorizing Official or the official's representative will . . . direct further training for those officers who fail to qualify. . . .

"Officers who fail to qualify will be given remedial training and a reasonable opportunity to qualify. If the officer has n ot qualified within 30 days, the Authorizing Official will revoke the officer's authority to carry a firearm." (G.C. Exh. 3, 21., p. 28).

4. "C. . . . In all cases where the authority of an individual employee to carry a firearm while in the performance of duty is withdrawn . . . management will consider the require-ment for carrying a firearm when assigning duties to the affected employee." (G.C. Exh. 3, 4.C., p. 4).

Respondent's Change

The disputed change is this sentence,

"In instances where the carrying of a firearm is a condition of employment, officers who are unable to demonstrate acceptable proficiency with the firearm within thirty days may be subjected to adverse administrative actions, including reassignment to other duties, and removal from employment where appropriate." (G.C. Exh. 2, p. 5).

Mr. Bonner testified,

> ". . . previously, under the existing policy, if somebody failed to demonstrate acceptable proficiency with the firearm, they would merely be subject to reassignment. Under the revised policy, they would be subject to removal from employment, termination." (Tr. 12).

Mr. Runyon testified that this was not a change at all, but, "I believe it's consistent with current policy." (Tr. 51). On cross-examination he further elaborated,

> "Q This is a condition of employment, is it not, that an officer that's required to carry the firearm, be qualified?
>
> "A That's right. It is required that a person carry a firearm as a condition of employment. What would happen if I didn't qualify would be, that I would go -- first of all, they would afford me a period of time to go through remedial training.
>
> "Once I've done that, if I still can't qualify, then they would have what's called a fitness for duty assessment done on me. If I'm not able to -- if I'm still not able to do the job as a Border Patrol agent, then I would be removed.
>
> "Now, that's not part of this policy, but it's part of INS policy, overall INS policy."
>
> . . .
>
> "Q BY MR. FELDENZER: Where precisely would the removal policy be found? . . .
>
> "A I would refer you to those sections in the Personnel Manual . . .

"Q What Personnel Manual?

"A Administrative Manual discusses sections on personnel. I don't have any knowledge of what section that is.

"Q Prior to January of 1993, what typically happened with a Border Patrol agent who didn't qualify?

. . .

"A They would be given every opportunity to qualify, and I don't know a single instance where we haven't had a person qualify after being given remedial training.

"Q Are you aware of any instances where they were given desk duties or administrative type duties?

"A No. . . ." (Tr. 69-71).

Plainly, AM 4210, beyond stating that if the officer has not, with remedial training, qualified within 30 days, his authorization to carry a firearm will be removed, does not say what will happen in that event, other than to say that when the authority to carry a firearm is withdrawn, ". . . management will consider the requirement for carrying a firearm when assigning duties to the affected employee." I fully credit Mr. Runyon's testimony that, as Program Manager for Border Patrol's Firearms program and/or Administrator of the INS National Firearms Unit since at least 1989, he did not know of a single instance where an officer had failed to qualify after remedial training (Tr. 71) nor did he know of any instance that any employee had been given desk or administrative duties because of his inability to quality (Tr. 71). I do not credit Mr. Bonner's testimony that "under the 1989 policy", "If that failed [qualification], then they would reassign them to administrative duties that did not require them to carry a firearm." (Tr. 13). His assertion was wholly unsupported and was directly contradicted by the testimony of Mr. Runyon which I have credited. I conclude, therefore, that the record fails to establish that any officer after 1989 failed to qualify after remedial training and further that the record fails to establish any occasion after 1989, to reassign any officer to other duties because of failure to qualify. That there was a policy should such contingency occur, both parties agree, although perhaps not on the details, and there is no reason whatever to doubt that, as Mr. Runyon stated that "policy" was not part of AM 4210, but

was part of "overall INS policy . . . Administrative Manual . . ." (Tr. 70).

But all of this begs the question. In negotiating AM 4210, the parties did not address the consequences of the removal of an officer's authorization to carry a firearm. Respondent in its new policy statement provided that in such event the officer,

> ". . . may be subjected to adverse administrative actions, including reassignment to other duties, and removal from employment where appropriate." (G.C. Exh. 2, p. 5).

By introducing a consequences, or "penalty", provision into the firearms policy statement, Respondent changed AM 4210 in a significant manner. Obviously, penalty was not inseparably bound up with the agreement dealing will removal of authorization to carry a firearm, cf. USDA Forest Service, Pacific Northwest Region, Portland, Oregon, 48 FLRA 857, 860 (1993). Indeed, the policy concerning penalty was set forth elsewhere. If Respondent is correct, that the policy, including "removal from employment where appropriate" was the same before the implementation of its January 5, 1993, policy statement, Respondent, nevertheless, changed the negotiated agreement by adding a penalty provision to the firearms policy agreement which had never been part of the negotiated agreement. If the Union is correct, that the policy before January 5, 1993, had been that an officer would only be reassigned, Respondent further changed the negotiated agreement by altering the prior penalty policy as well as by adding a penalty provision which had never been part of the negotiated agreement. It is unnecessary to decided, and I expressly do not decide, which version of the penalty policy is correct inasmuch as, Respondent's change, by adding a "penalty" provision, was not "covered by" AM 4210 and Respondent violated §§ 16(a)(5) and (1) of the Statute by its unilateral action in changing AM 4210 without giving the Union prior notice and opportunity to bargain on the impact and implementation of this change.

(c) Detail Exemption

Negotiated

"21. Firearm Qualifi-cations.

"Service officers . . . shall attend quarterly qualification and shall be required to qualify on the standard Service handgun qualification course . . .

. . .

"In addition to the quarterly handgun qualifications . . .

". . . all officers authorized to use shoulder weapons shall be required to qualify quarterly . . .

. . .

> "Exception. An officer may be excused from a quarterly qualification during any authorized absence from the officer's official duty station. The letters 'D N F' ('did not fire') will be placed opposite the officer's name with a notation of the reason for the absence. The Author-izing Official shall require that the officer qualify as soon as practical upon return to duty." (G.C. Exh. 3, 21., pp. 27-28) (Emphasis in original).

Respondent's Change

"Relocation of Authorization to Carry a Firearm Due to Non-Participation in Quar-terly Firearms Qualifica-tions" [the Full text of Respondent's new provision may be found on pp. 5-7 of G.C. Exh. 2. Only brief highlights are set forth hereinafter].

". . . the Authorizing Official may excuse an officer . . . for one quarter . . . shall be provided the opportunity to make up their missed qualification within thirty days of their return to the duty station.

"If an officer does not participate in the required quarterly firearms qualifi-cation for two consecutive quarters, the Authorizing Official shall revoke the officer's authority to carry a firearm. . . (G.C. Exh. 2, p. 5).

"Firearms Qualification of Detailed Officers

". . . the officer shall notify supervisory or management . . . at the temporary duty station of . . . need to qualify during that quarter.

". . . shall make reasonable efforts to provide the means and opportunity for the officer to qualify. If the opportunity . . . can not be provided . . . may authorize the officer to continue to carry the firearm for . . . no longer than ninety days.

. . .

"If the detail is expected to exceed ninety days, during the ninety day period, . . . Official . . . should . . . provide the means and opportunity for the officer to qualify. . . .

"If at the end of the ninety day period, the officer has not qualified . . . must evaluate the officer's need . . . to carry the firearm. . . . If the . . . need . . . is not compelling . . . authorization . . . shall be revoked. If . . . need . . . is compelling . . . may either grant an additional ninety days . . . or request . . . officer be returned . . . where qualification may take place . . . may then he returned to . . . detail, or be replaced. . . . (G.C. Exh. 2, p. 6).

Unless authorized in writing by the Executive Associate Commissioner for Operations, under no circumstances shall a detailed officer be authorized to carry a firearm after one hundred and eighty days . . . without . . .

qualifying . . . ." (G.C. Exh. 2, p. 7) (Emphasis in original).

The negotiated "Exception" was an unambiguous, discrete and complete provision that, "An officer may be excused from a quarterly qualification during any authorized absence from the officer's official duty station" and that he shall, ". . . qualify as soon as practical upon return to duty." As Mr. Bonner, who had been the Union's chief negotiator, stated,

> "The 1989 firearms policy allowed officers to be excused from the requirement to qualify if they were on authorized absence, such as, annual leave, sick leave, administrative leave, away on detail, anything that took them away from their location where they normally qualify.
>
> "There was no limit on the number of consecutive quarterly qualifications that an agent could miss. . . ." (Tr. 13-14).

Mr. Runyon, who had been Respondent's chief negotiator, fully agreed but said Respondent saw this as a "loophole" (Tr. 53). Of course, not having to qualify while away on authorized absence was against the basic premise that a person had to qualify every quarter - this is why it was denominated "Exception". This is what the parties negotiated. Wholly aside from Respondent's characterization, it was wholly sensible as an exception to excuse an officer from quarterly qualification during authorized absence from his, or her, official duty station; it was concise; and it was neat in comparison with Respondent's prolix change. By no stretch of the imagination can Respondent's "new thing" (Tr. 54), i.e., its new policy, be considered an aspect of the negotiated "Exception" and the new policy most certainly was not inseparably bound up with the Exception of AM 4210 so that it was not obligated to bargain with the Union over the change. To the contrary, Respondent wholly altered the negotiated "Exception" and thereby violated §§ 16(a)(5) and (1) of the Statute by its unilateral action in changing AM 4210 without giving the Union prior notice and opportunity to bargain on the impact and implementation of the change.

(d) Inspection of Weapons

Negotiated

"4. Carrying Firearms

"B. . . .

"(1) Border Patrol Agents . . . shall be authorized to carry an approved firearm . . . ." (G.C. Exh. 3, p. 3).

"D. . . . No officer will be authorized to carry a firearm unless that officer . . . is currently qualified with that particular firearm . . .

"E. More than one Service-approved handgun may be carried . . . only when approved in writing . . . ."

"F. Authorization to carry personally-owned handguns . . . shall be limited specifically to Service-approved revolvers and semi-automatic pistols that have been authorized for that officer . . . ." (G.C. Exh. 3, p. 4).

"11. Approval Service Issued Firearms

. . .

"All officers listed in Subsection 4 are authorized to carry either a Service-issued or approved revolver or a Service-issued or approved semi-automatic pistol . . . ."

"A. Handguns

"1. [Service-issued revolvers] (G.C. Exh. 3, p. 15).

"2. [Service-issued semi-automatic pistols]

"B. Shoulder-weapons - '. . . issued only to officers . . . currently qualified with that particular weapon . . .

"1. Shotgun . . .

"2. Rifles . . . (G.C. Exh. 3, p. 16)

"3. Automatic Weapons . . .

"4. Special Weapons . . .

"5. Any non-standard firearms . . . may be retained in inventory only with the written permission of the Commissioner or Deputy Commissioner . . . ." (G.C. Exh. 3, p. 17) (Emphasis in original).

"12. Approved Personally - Owned Firearms

A. Handguns. Author-ization to carry personally-owned handguns . . . shall be limited specifically to Service-approved revolvers and semi-automatic pistols as follows:

(1) Revolvers . . .

(2) Semi-automatic Pistols . . .

"Any officer desiring to carry a semi-automatic pistol must satisfactorily complete the transitional training . . . approved by the Firearms Review Board. . . . In addition, personally-owned handguns must be inspected and certified in writing by the District or Sector Firearms Instruc-tor. . . ." (G.C. Exh. 3, pp. 17-18).

"22. Inspection of Firearms

"The Firearms Instructors or Range Officers shall thoroughly inspect all handguns at each quarterly qualification . . . . In addition, the Firearms Instructor shall inspect the handgun of each officer who enters on duty in a District or Sector and conduct a similar inspection when a handgun is issued, exchanged, or turned in. Appropriate action shall be taken immediately when the handgun does not meet Service standards. Super-visors may require more frequent inspections." (G.C. Exh. 3, p. 28).

. . .

"Any firearm that fails to pass a safety inspection shall not be used . . . ." (G.C. Exh. 7, p. 29).

"EXHIBIT II

"Firearms Safety Rules

. . .

"Safety While on Duty

. . .

2. Firearms shall be inspected in conjunction with the quarterly qualification shoots and at uniform inspections. . . ." (G.C. Exh. 3, p. 36).

Respondent's Change

"Non-authorized Firearms

"In response to several recent field incidents involving the carrying and/or discharge of non-authorized firearms, CPA's [Chief Patrol Agents] are required to conduct periodic inspections of each officer's authorized fire-arms(s) in their location. These inspections should be conducted by the Sector Firearms Instructor of Range Officer in conjunction with the function and safety inspections, and certified correct by an Assistant Chief or above. These in-spections shall be conducted in order to determine that all firearms carried by officers . . . are either Service-issued or Service-approved in compliance with AM Section 4210, Subsections 11 and 12. If the firearms are not specifically listed in these subsections, they are not authorized." (G.C. Exh. 2, p. 8). (Emphasis in original).

General Counsel's assertion that, "The policy sets forth no specific guidelines on how or where the inspections will occur . . . ." (General Counsel's Brief, p. 5), simply is not correct. The January 5, 1993, policy quite specifically stated: "These inspections should be conducted by the Sector Firearms Instructor or Range Officer in conjunction with the function and safety inspections . . . ." Respondent's January 5, 1993, statement concerning "Inspection of Weapons" is expressly contained in the negotiated agreement (AM 4210) and there was no further obligation to bargain. HHS, SSA, supra.

(e) Training Day

Negotiated

"Master Agreement - Res. Exh. A

Article 15 - Develop-ment and Training

"A. . . . The Agency agrees to develop and maintain forward-looking . . . programs . . . consistent with its needs.

. . .

"D. The Agency agrees to make available to employees, training opportunities and seminars consistent with Agency goals. . . ." (Res. Exh. A, Art. 15, Sections, A (p. 21) and D. (p. 21)).

"4. Carrying Firearms

"D. . . . all Service personnel authorized to carry firearms must attend quarterly firearms qualifications . . . . No officer will be authorized to carry a firearm unless . . . currently qualified with that particular firearm." (G.C. Exh. 3, p. 4).

"9. SERVICE FIREARMS REVIEW BOARD

"The Service Firearms Review Board (FRB), acting under the Office of the Deputy Commissioner, is responsible for all policy issues relating to firearms. The Board will . . . make recommendations for changes to the Administrative Manual. The Board will address . . . training, qualifications. . . ." (G.C. Exh. 3, p. 11).

"12. Approved Personally-owned Firearms

. . .

"Any officer desiring to carry a semi-automatic pistol must satisfactorily complete the transitional training that has been approved by the Firearms Review Board. . . ." (G.C. Exh. 3, p. 18).

"13. Automatic Weapons

. . .

"A. . . . Each Chief Patrol Agent or District Director shall designate . . . [an] Automatic Weapons Control

Officer . . . he will supervise all training and qualifications. . . ."

. . .

"G. Officers will be required to success-fully complete a formal training course, approved by the Fire-arms Review Board . . . The training will include the mission of the weapon, operation and performance parameters . . . and the safe operation and handling of the automatic weapon." (G.C. Exh. 3, p. 21).

"20. Training

. . .

"C. . . . The Firearms Instructor shall conduct training courses as needed in firearms safety and marksmanship for all officers required or designated to carry firearms. . . ." (G.C. Exh. 3, p. 27).

"21. Firearms Qualifications

"Service officers who are authorized to carry handguns shall attend quarterly qualifica-tion and shall be required to qualify . . . . Officers must also demonstrate safe operating techniques and proper execution of immediate action drills in order to be certi-fied proficient . . . .

. . .

"In addition to the quarterly handgun qualifications, at least one course shall be conducted each year to familiarize officers with firing under low-light level conditions (See Exhibit V).

"All officers author-ized to use shoulder weapons will be afforded quarterly training in their handling, use, and care. . . . shall be required to qualify quarterly on the standard Service shoulder weapon quali-fication course . . . must also demonstrate safe operating tech-niques and proper execution of immediate action drills . . . to be certified . . . ." (G.C. Exh. 3, p. 27).

Respondent's Change

"Quarterly Training"

"In conjunction with the quarterly firearms qualifications for officers, Chief Patrol Agents are to schedule the remainder of the day for training. The training that will be conducted shall be a minimum of three hours of classroom instruction and shall be assigned during the normal work day. The training may be conducted on any portion of the Service policy listed below. However, certain issues must be addressed bi-annually at a minimum such as the policy on the use of deadly force. The following general topics are examples of subjects that shall be discussed in the training sessions. At the discretion of the Chief Patrol Agent's (sic), other topics may be added as needed.

"(1) Service policy on the use of deadly force (bi-annual),

"(2) Escalation of force model policy (bi-annual),

"(3) Subsections of AM 4210 (quarterly on a continuing basis),

"(4) Vehicle Pursuit policies (bi-annual)

"(5) Integrity awareness, ethics, and professionalism (bi-annually)

"This training is intended to reinforce critical areas of Service policy and to ensure that each officer clearly understands the policy, guidelines, operating instructions, and the application of the policy. During classroom discussions, officers should be afforded the opportunity to resolve particular areas of confusion in the policy, and thereby attain an improved ability to deal with difficult situations professionally.

"All training must be documented. All course guidelines and lesson plans must be certified by the Chief Patrol Agent of the Sector, and coordinated with the Chief Patrol Agent of the Border Patrol Academy to ensure consistency with existing training programs.

Training files shall be maintained in each Sector, and contain the following:

> (1) One file shall contain current approved lesson plans and Instructor Guides for all courses taught in the Sector. Copies . . . shall be forwarded to the Border Patrol Academy. . . ."
>
> (2) A separate file shall contain a record of the dates, times, places, subject matter, and participants in all sector training activities. This file shall also contain a roster which has been signed by each student who attended the class certifying partici-pation and receipt of the training. This file shall be main-tained for an indefinite period.

"These files shall be subject to periodic review during routine field inspec-tions. Notwithstanding the requirement to coordinate the training course guide-lines and lesson plans with the Border Patrol Academy, Chief Patrol Agents shall implement training on the use of deadly force immedi-ately." (G.C. Exh. 2, p. 9-10).

General Counsel asserts, "As part of this new training day, employees are required to receive a minimum of 3 hours of classroom instruction . . . . A number of employees are assigned to remote outposts . . . 1 to 3 hours away from approved firearms ranges . . . [and] may be forced to work uncompensated overtime in order to qualify and attend 3 hours of classroom instruction. . . . The 1989 firearms policy did not provide for a training day, nor did it require 3 hours of classroom instruction as part of the quarterly firearm quali-fications. . . ." (General Counsel's Brief, pp. 5-6). What General Counsel asserts may be quite true, but that is not controlling. The issue is whether Respondent's declaration of

a "Training Day" and prescription of three hours of classroom instruction was "covered by" its negotiated agreements? For reasons set forth hereinafter, I conclude that it was.

Absent its Master Agreement, the inherent right of management to prescribe the content and nature of training would be inferred, inter alia, from the myriad provisions of AM 4210 which give Respondent such authority, e.g., "The Firearms Instructor shall conduct training courses as needed in firearms safety and marksmanship. . . ."; "Officers must also demonstrate safe operating techniques. . . ."; but Article 15 section A and D (Res. Exh. A), specifically provide that, "The Agency agrees to develop and maintain . . . programs . . . consistent with its needs" (Sec. A) and that, "The Agency agrees to make available to employees, training opportunities and seminars consistent with Agency goals. . . ." (Sec. D). Moreover, Paragraph 5 of AM 4210, entitled, "Use of Deadly Force Involving Firearms" sets forth the Policy for the use of deadly force (G.C. Exh. 3, pp. 4-5); Paragraph 6 of AM 4210, entitled "Firearms Aboard Commercial Aircraft" (G.C. Exh. 3, pp. 5-7); Paragraph 7 of AM 4210, entitled "Firearms in Foreign Assignments" (G.C. Exh. 3, pp. 7-8); Paragraph 8, entitled "Shooting Incidents" (G.C. Exh. 3, pp. 8-11) by strong and clear inference all involve policy matters, the understanding of which, the application of which, and developments about which Respondent is obligated to instruct its employees. Without question, such instruction is also part and parcel of training in firearms safety as provided in AM 4210 and consistent with Respondent's needs and goals as provided in the Master Agreement, Art. 15, Section A and D. Accordingly, I conclude that Respondent's January 5, 1993, policy concerning "Training Day", ". . . is so commonly considered to be an aspect of the matter set forth in the provisions that the negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision." HHS, SSA, supra, 47 FLRA at 1018; that it, ". . . is inseparably bound up with" (USDA Forest Service, supra, 48 FLRA at 860), the provisions of the negotiated agreements - MLA and AM 4210 - so that Respondent was not obligated to bargain over the matter of "Training Day".

(f) Firearms Instructors - Training

Negotiated

"20. Training

"A. Training Officers:

"Firearms Instructors - Officer(s) assigned the collateral duty by the Authorizing Official in each

District or Sector . . . The Firearms Instructor will train Range Officers and oversee field firearms training and safety. . . .

"Range Officers – Officer(s) assigned the collateral duty by the Authorizing Official . . . . He/she will assist the Firearms Instructor as necessary. . . .

"B. Certification require-ments – Each Author-izing Official . . . shall designate Firearms Instructors and/or Range Officers to conduct quarterly qualifications. If possible, selections should be made from personnel who have been detailed to FLETC as Range Officers. All designated Firearms Instructors will attend a certified Firearms Instructor Training Program (FITP) at FLETC, or an equivalent program . . . prior to conducting training in the District or Sector. the Firearms Instruc-tors shall attend a basic armorer's school at FLETC prior to making repairs . . . . Standardized training will be conducted by certified Firearms Instructors for Range Officers . . . .

"C. Duties – . . . All Firearms Instructors must be certified with particular Service firearms prior to their instructing others in their use. . . ." (G.C. Exh. 3, pp. 26–27). (Emphasis in original).

Respondent's Change

"Firearms Instructors" (G.C. Exh. 2, p. 11) made extensive provision for certification and recertification of Instructors; however, the only portion in dispute is the following:

"Beginning in FY 93, all Firearms Instructors shall be required to attend a minimum of sixteen (16) hours additional training annually to retain their Firearms Instructor status. This training may be obtained from approved Federal, state, and local law enforcement organi-zations, military organi-zations, National Rifle Association Law Enforcement Firearms Instructor Courses, or training courses offered by manufacturers and commercial organizations. All training that is not conducted at the Border Patrol Academy must be approved by the Firearms Review Board (FRB). A copy of the officer's training course certification shall be provided to the Special Assistant to the FRB for inclusion in the file, and maintained on the FRB's database of Firearms Instructors. The Firearms Instructor's FITP recertifi-cation training shall fulfill that particular instructor's annual requirement for two years.

"Failure of INS Firearms Instructors to successfully complete the required sixteen (16) hours of annual training shall result in suspension of their Firearms Instructor designation . . . ." (G.C. Exh. 2, p. 11).

General Counsel asserts that, "The revised firearms policy does not specifically address whether employee instructors receive the 16 hours of training on duty time, who pays for the training, and whether duty time is provided for instructors to seek out the training. . . . The 1989 firearms policy required employees to take the FITP training in order to qualify as a firearms instructor but required no additional annual training. . . ." (General Counsel's Brief, p. 6).

It is true that the January 5, 1993, statement does not specifically address whether instructors receive the 16 hours of training on duty time, who pays for the training, and whether duty time is provided for the training; but, then, neither does AM 4210. It is not entirely correct that AM 4210 required employees to take the FITP training to qualify as a Firearms Instructor but required no additional training. Paragraph 20.B. provides that, "Each Authorizing Official . . . shall designate Firearms Instructors . . . to conduct quarterly qualifications" and that, "All designated Firearms Instructors will attend a certified Firearms Instructor Training Program (FITP) at FLETC, or an equivalent program . . . <u>prior</u> to conducting training in the District or Sector. The Firearms Instructors shall attend a basic

armorer's school at FLETC prior to making repairs . . . ." Thus, Respondent has total discretion as to the frequency of designating Firearms Instructors for quarterly qualifications. If it wished it could do it annually or even quarterly; and Respondent has total discretion to require that each designated Firearms Instructor attend or certified FITP before conducting training in any quarter. In addition, Firearms Instructors must attend armorer's school before making repairs. Further, subsection C provides that, "All Firearms Instructors must be certified with Particular Service firearms prior to their instructing others in their use. . . ." (Emphasis in original), which directly infers further training.

Because AM 4210 was left wholly ambiguous as to frequency of certification, recertification, etc., Respondent's January 5, 1993, statement specifically addressed these matters as follows:

> "Before an officer can be appointed . . . Fire-arms Instructor . . . he/she must have successfully completed the Firearms Instructor Training Program (FITP) course at the Border Patrol Academy. . . . are to be trained, and certified . . . in the use of all firearms authorized for use. . . . required to be FITP recertified within five years of their original certification or last recertification . . . . Recertification may be achieved by serving as a Firearms Instructor for an FITP, a basic training session, on two or more advanced firearms training programs. Recertification may also be achieved by attending and successfully completing an FITP course at the Border Patrol Academy. This required training is for the continuing professional education of the firearms instructors. No substitu-tions of training are allowed for the certification or recertification process other than those listed above." (G.C. Exh. 3, p. 11).

As noted at the outset, the Union raised no question whatever about these provisions which plainly changed AM 4210, all of which underscores the conclusion that AM 4210 granted Respondent broad, and essentially unrestricted, authority concerning the training and qualifications of Firearms Instructors.

I have considered Respondent's argument that Article 15, Section A, of the parties' Master Agreement applies and reject that contention. Unlike the application of Article 15 with respect to designation of Training Day and institution of

mandatory classroom instruction, where nothing contained in AM 4210 specifically addressed the content or character of training, AM 4210 specifically addresses certification and training for Firearms Instructors. Therefore, the question is whether Respondent's January 5, 1993, policy regarding sixteen hours of additional training annually for Firearms Instructors is "covered by" AM 4210. I conclude that it was "covered by" AM 4210 because it, ". . . is inseparably bound up with or commonly considered to be an aspect of the matter set forth in the provision [AM 4210] such that the negotiations [of AM 4210] will be presumed to have foreclosure further bargaining over . . . regardless of whether it is expressly articulated in the provision [AM 4210]." Sacramento Air Logistics Center, McClellan Air Force Base, California, 47 FLRA 1161, 1165 (1993); HHS, SSA, supra, 47 FLRA at 1018; USDA Forest Service, supra, 48 FLRA at 860.

Having found that Respondent violated §§ 16(a)(5) and (1) by unilaterally changing the negotiated firearms policy with regard to: Proficiency Requirement (to mandate completion of every portion of any qualification course); Effect of Failure to Qualify (to make penalty, including removal, part of firearms policy); and Detail Exception (to remove exemption from qualification while on detail and to provide training during details), without giving the Union prior notice and opportunity to bargain on the impact and implementation of the changes in conditions of employment, General Counsel and the Charging Party seek a status quo ante remedy. Although Respondent argues that a status quo ante remedy would be "clearly inappropriate" (Respondent's Brief, p. 44, et seq.), the testimony of Mr. Kent G. Williams, Assistant Adminis-trator, National Firearms Unit, Altoona, Pennsylvania (Tr. 78), who was called as a witness to address the appropriateness, or more correctly the inappropriateness, of a status quo ante remedy (Tr. 78), directed his concern to classroom instruction which, as part of Training Day, I have found to have been "covered by" AM 4210. Safety considera-tions attach to Inspection of Weapons and Firearms Instructors Training but I have also found these to have been "covered by" AM 4210. I find no credible evidence that a status quo ante remedy as to the violations found would disrupt or impair the efficiency or effectiveness of Respondent in any manner. Indeed it is conceded that from November 1, 1989, until January 5, 1993, Respondent operated under those provisions of AM 4210 without problem. The impact experienced by adversely affected employees and the Union is very great indeed, as Respondent unilaterally changed quite specific provisions of the firearms policy negotiated by the parties in 1989 which demeaned the Union and interfered with the right of employees to be represented by the Union in bargaining concerning changes of their conditions of employment. Accordingly, applying the standards of Federal Correctional Institution,

8 FLRA 604, 606 (1982), I find that a status quo ante remedy is necessary in order to effectuate the purposes and policies of the Statute.

It is therefore, recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118,it is hereby ordered that the U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing and refusing to give the American Federation of Government Employees, National Border Patrol Council, AFL-CIO (hereinafter "Union"), the exclusive national representative of certain of its employees, prior notice of any intended change in the negotiated Firearms Policy (AM 4210) and the opportunity to negotiate over the procedures that it will observe in exercising its authority with regard to any such proposed change and concerning appropriate arrangements for employees adversely affected by any such change.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured 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) Forthwith withdraw and rescind all provisions of its January 5, 1993, Firearms Policy Statement, entitled: "Proficiency Requirement"; "Revocation of Authorization to Carry a Firearm Due to Non-Participation in Quarterly Firearms Qualifications"; "Firearms Qualifications of Detailed Officers"; and the last paragraph of the statement entitled, "Revocation of Authorization to Carry a Firearm Due to Inability to Demonstrate Acceptable Proficiency" which begins: "In instances where" and ends with the phrase, "and removed from employment where appropriate."

(b) Forthwith follow and apply, unless and until changed in accordance with law, those provisions of AM 4210 which it unlawfully changed on January 5, 1993, i.e.: all provisions of Paragraph 21, entitled, "Firearms Qualifica-

tions" and specifically including the concluding provisions entitled: "Exception." and the penultimate paragraph beginning: "Officers who fail" and ending with the phrase, "will revoke the Officer's authority to carry a firearm."

(c) Notify the Union of any intention to change the provisions of AM 4210, Paragraph 21, entitled, "Firearms Qualifications" and, upon request, negotiate with the Union concerning the procedures to be observed in implementing any such change and concerning appropriate arrangements for employees adversely affected by such change.

(d) Post at its facilities throughout the continental United States and Puerto Rico, in all 21 sectors where employees represented by the Union are employed and at the Border Patrol Academy, 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 Chief, U.S. Border Patrol, and shall be posted and maintained for 60 consecutive days thereafter, in each sector 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.

(e) Pursuant to § 2423.30 of the Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, 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: March 20, 1995
Washington, DC

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to give the American Federation of Government Employees, National Border Patrol Council, AFL-CIO (hereinafter "Union"), the exclusive representative of certain of our employees, prior notice of any intended changes in our negotiated Firearms Policy (AM 4210) and the opportunity to negotiate over the procedures that we will observe in exercising any authority to make any such change and concerning appropriate arrangements for employees adversely affected by the exercise of any authority to change the negotiated Firearms Policy.

WE WILL FORTHWITH withdraw and rescind all provisions of our January 5, 1993, Firearms Policy Statement, entitled: "Proficiency Requirement"; "Revocation of Authorization to Carry a Firearm Due to Non-Participation in Quarterly Firearms Qualifications"; "Firearms Qualifications of Detailed Officers"; and the last paragraph of the statement entitled, "Revocation of Authorization to Carry a Firearm Due to Inability to Demonstrate Acceptable Proficiency" which begins: "In instances where" and ends with the phrase, "and removal from employment where appropriate."

WE WILL FORTHWITH follow and apply, until and unless changed in accordance with law, those provisions of AM 4210 which we unlawfully changed on January 5, 1993, specifically: all provisions of Paragraph 21, entitled, "Firearms Qualifications".

WE WILL notify the Union of any intention to change the provisions of AM 4210, Paragraph 21, entitled, "Firearms Qualifications" and, WE WILL upon request, negotiate with the Union concerning the procedures to be observed in implementing any such change and concerning appropriate arrangements for employees adversely affected by any such change.

WE WILL NOT in any like or related manner, interfere with,

restrain or coerce our employees in the exercise of their rights assured 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 of the Federal Labor Relations Authority, Washington Region, whose address is: 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. WA-CA-30772, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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