

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

DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION, TUCSON SECTOR, TUCSON, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2544 Charging Party	Case No. DE-CA-02-0428

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JANUARY 20, 2004**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, Suite 300
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 19, 2003
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: December 19, 2003

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: WILLIAM B. DEVANEY
ADMINISTRATIVE LAW JUDGE

SUBJECT: DEPARTMENT OF HOMELAND SECURITY
BORDER AND TRANSPORTATION SECURITY
DIRECTORATE BUREAU OF CUSTOMS AND
BORDER PROTECTION, TUCSON SECTOR,
TUCSON, ARIZONA

Respondent

and
CA-02-0428

Case No. DE-

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2544

Charging Party

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

Enclosures

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General Counsel's motion to take official notice of Respondent's name change, joined by Respondent, is granted and the name of Respondent, pursuant to the Department of Homeland Security Reorganization Act, November 25, 2002, effective March 1, 2003, has been changed as requested.

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION, TUCSON SECTOR, TUCSON, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2544 Charging Party	Case No. DE-CA-02-0428

Michael Farley, Esquire
For the General Counsel

Ms. Karen Rubio
Ms. Catherine C. Sun
For the Respondent

Mr. Edward Tuffly
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. 2, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1 et seq., concerns whether Respondent's failure and refusal to give notice and opportunity to bargain prior to, and/or

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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)".

its refusal to bargain about, Respondent's decision to send an overload of alien detainees from Casa Grande Station to Tucson Station for processing.

This case was initiated by a charge filed on May 1, 2002 (G.C. Exh. 1(b)) which alleged violation of §§ 16(a) (1), (5) and (8) of the Statute. The Complaint issued on September 30, 2002 (G.C. Exh. 1(c)); alleged violation only of §§ 16(a) (5) and (1) of the Statute; and set the hearing for February 26, 2003, at a place to be determined in Tucson, Arizona; and by notice dated February 12, 2003, the location of the hearing in Tucson was fixed, pursuant to which a hearing was duly held in Tucson, Arizona, on February 26, 2003, 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 offered the opportunity to present oral argument which each party waived. At the conclusion of the hearing, by agreement of the parties, March 31, 2003, was fixed as the date for mailing post-hearing briefs. Respondent and General Counsel each timely mailed an excellent brief, received on April 3, 2003, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

FINDINGS

1. The American Federation of Government Employees (hereinafter, "AFGE"), National Border Patrol Council, is the exclusive representative of a nation-wide bargaining unit of employees within the Department of Justice, Border Patrol, now Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, including Agents assigned to the Tucson Sector, Tucson, Arizona. The U.S. Immigration and Naturalization Service and the National Border Patrol Council are parties to an expired nation-wide collective bargaining agreement (G.C. Exh. 2), which the parties continue to honor (Tr. 22). AFGE, Local 2544 (hereinafter, "Union") is an agent of AFGE for representation of bargaining unit employees in the Tucson Section.

2. The Border Patrol consists of about 21 geographic sectors throughout the United States, including the Tucson Sector. Mr. David Aguilar, Chief Patrol Agent, is the manager of the Tucson Sector (Tr. 24) which encompasses the entire state of Arizona with the exception of two countries in the western part of the State (Tr. 19-20). The Tucson Sector consists of eight Stations: Ajo; Casa Grande (CAG); Douglas (DGL); NACO (NCO); Nogales (NGL); Sonoita (SON);

Tucson (TUS); and Willcox (WCX) (G.C. Exh. 6; Tr. 26, 47-48).

Each Station is headed by a Patrol Agent in charge (PAIC) and an Assistant Patrol Agent in Charge (APAIC). Ms. Clyde J. Benzenhoefer is PAIC of the Tucson Station (Tr. 33, 168) and Mr. Roy P. Gwaltney is APAIC of the Tucson Station (G.C. Exh. 4; Tr. 37).

Mr. Edward (Bud) Tuffly, Senior Patrol Agent at the Tucson Station for 17 years (Tr. 18), is President of the Union (Tr. 19). Mr. Tuffly estimated the number of Agents at Casa Grande Station as about 80 (Tr. 28) and about 130 at Tucson Station (Tr. 27). Mr. Benzenhoefer said there were, and had been, approximately 200 Agents at the Tucson Station since April, 2002, including 30 Agents assigned each month from the Nogales Station (Tr. 169). Mr. Benzenhoefer said Agents do line watch duty, which means patrolling the international border throughout the Tucson Station's area; respond to calls within the Tucson metropolitan area, transport arrested aliens and perform processing, i.e., paperwork on aliens apprehended and brought to the Station (Tr. 169). Mr. Benzenhoefer said Agents rotate through the various duties (id.); that, normally, they are assigned to process apprehensions that they bring into the Station, but are provided assistance when the number is more than one Agent can handle (Tr. 171). Mr. Benzenhoefer also stated that since April, 2002, with 30 agents each month from Nogales, he actually had five or six more Agents in the field than previously (Tr. 175).

3. On March 21, 2002, one alien arrested at Casa Grande was sent to Tucson for processing. From March 21 through March 30, 2002, Casa Grande made 2,830 arrests of aliens of which 449 were sent to Tucson for processing (G.C. Exh. 7).

General Counsel Exhibit 6 shows a total of 40,072 arrests for April through September, 2002, by Casa Grande, of which, 19,065 were sent to Tucson for processing (G.C. Exh. 7). General Counsel Exhibit 7 shows a total of only 38,261 arrests by Casa Grande, of which 19,065 were sent to Tucson for processing; but whether the number of arrests was 40,072 or 38,261, it is obvious that less than half of Casa Grande's arrests were sent to Tucson for processing during the six month period of April through September, 2002.

4. Mr. Benzenhoefer was assigned to San Diego for a week in the beginning of April, 2002 (Tr. 179) and Mr. Gwaltney on April 17, 2002, first gave notice of processing increase; that in addition to the two regularly

scheduled Agents to Transport and Processing, three additional slots on overtime were added. Mr. Benzenhoefer by e-mail on April 25, 2002, and telephone call the same day, advised Mr. Tuffly of the processing of Casa Grande arrested aliens at Tucson, etc. (G.C. Exh. 4; Tr. 34).

5. On April 25, 2002, Mr. Tuffly wrote Mr. Benzenhoefer and: (a) protested that processing aliens apprehended by Casa Grande had been implemented prior to the Union being afforded an opportunity to negotiate I&I; (b) demanded to bargain; and (c) made 7 non-inclusive proposals (G.C. Exh. 5; Tr. 38-39).

Mr. Tuffly stated that he had at least two conversations with Mr. Benzenhoefer in which Mr. Benzenhoefer,

" . . . made clear to me that the change was in place, that it -- basically, he had been ordered to comply with the change and he had no choice and that there would be no negotiations." (Tr. 41).

Prior to this change, Casa Grande would have been responsible for processing its apprehensions (Tr. 42). The processing of Casa Grande apprehensions is continuing (Tr. 41, 171).

6. Mr. Carlos M. Hernandez, Senior Patrol Agent, now Steward, and Chief Steward from April, 2001, until August, 2002 (Tr. 119-120), received reports of poor paperwork from Casa Grande for aliens transferred to Tucson and called Mr. John Fitzpatrick, Special Operations Supervisor at Tucson Station (Tr. 133). On June 13, 2002, Mr. Fitzpatrick sent an e-mail to Mr. Hernandez which he had received from Mr. Donald M. Norris, a supervisor at Casa Grande (Tr. 144), in which Mr. Norris set forth his message to his Casa Grande Agents instructing them to get their paperwork up to par (G.C. Exh. 9). However, on June 18, 2002, Ms. Isabel Fuentes, a Steward at Tucson Station (Tr. 145), sent Mr. Hernandez an e-mail in which she indicated that Casa Grande paperwork had not improved (G.C. Exh. 10; Tr. 146).

7. Mr. Benzenhoefer stated that when the Tucson Station becomes overloaded, Tucson Station declines to take any more people until the backlog is cleared out. There then are two options: (1) tell Casa Grande that they will have to process the people at their Station; or (2) have them transported to the Nogales Station (Tr. 174).

CONCLUSIONS

The record shows without dispute that before March, 2002, a condition of employment had been that each Station process the aliens it arrested. This was the policy and the practice. When, in March, 2002, Mr. David Aguilar, Chief of the Tucson Section (Tr. 171), directed that aliens apprehended by Casa Grande be transported to the Tucson Station for processing, Respondent changed a condition of employment of Tucson Station employees. This was no token or sporadic movement but was an ongoing transfer of a very substantial workload to Tucson Station, in six months, April through September, 2002, more than 19,000 aliens were transferred to the Tucson Station to be processed, and was ongoing at the time of the hearing in February, 2003.

The decision to transfer aliens apprehended by Casa Grande was a reserved right of management under §§ 6(a)(1) and (2)(B) of the Statute. If deemed within § 6(b)(1) of the Statute, Respondent, nevertheless, did not agree to bargain about the decision. Although the change in working conditions was outside the duty to bargain, Respondent was required by §§ 6(b)(2) and (3) to give the Union notice and bargain over the impact and implementation of the change if the effect of the change was more than de minimis. Social Security Administration, Malden District Office, Malden, Massachusetts, 54 FLRA 531, 536 (1998)

1. Effect of change of conditions of employment was more than de minimis

The record shows that Respondent readily agreed to the Union's request to make an earnest effort to get volunteers from other Stations (G.C. Exh. 4); beginning in April, 2002, Respondent brought thirty Agents each month from the Nogales Station to augment the Tucson Station workforce which, notwithstanding the additional processing workload, made five or six more Agents available for field duty than before April, 2002; and when the Tucson Station became overloaded it required Casa Grande to process aliens it apprehended or transfer them to the Nogales Station until the backlog at Tucson was cleared.

Nevertheless, the magnitude of the processing work imposed on the Tucson Station was more than de minimis. The processing of each alien is a time consuming operation: the alien must be questioned; name, identifying marks ascertained; be fingerprinted; enter data into computer to determine prior arrests, criminal record; if any; prepare an "A" file if the alien does not already have one or get the "A" file if the alien already has one; determine whether the alien is to be returned to Mexico or held for deportation hearing; record all data as to where apprehended, by whom,

date; etc. Mr. Tuffly said it would average about two hours if an "A" file had to be prepared (Tr. 33), less if an "A" file already exists (id.). Mr. Hernandez said "an hour-and-a-half, two hours" (Tr. 127), but smuggling cases take a lot longer (Tr. 127-128).

Mr. Benzenhoefer said that overloading of facilities at Tucson Station ". . . happens on a regular basis." (Tr. 174) Obviously, filling facilities, much less overloading facilities on a regular basis, creates sanitary concerns, safety concerns and health concerns both for detainees and for employees exposed to it. While I agree with Respondent that it has sought volunteers from other Stations (Respondent's Brief, p. 4) and that overtime is covered by the Agreement of the parties (G.C. Exh. 2, Article 27; Respondent's Brief, p. 6-7), use of the thirty Agents each month from Nogales was also a matter for I&I bargaining. In U.S. Department of Justice, Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California, 35 FLRA 1039 (1990), assigning collateral intelligence duties to designated collateral intelligence officers, who were trained for about 3½ hours on their new intelligence duties, was held by the Authority to have had more than a de minimis effect. By contrast, the change of conditions of employment here, whereby huge numbers of aliens arrested by Casa Grande Agents were transferred to Tucson Station for processing, whereas, prior to March, 2002, each Station processed the aliens it arrested, affected the entire Tucson Station by imposing an enormous new workload on the Tucson Station. Respondent gave no notice to the Union prior to implementation of the change in conditions of employment on, or about March 21, 2002, until mid-April or on April 25, 2002, and when the Union, on April 25, 2002, requested to bargain the impact and implementation, i.e., pursuant to § 6(b)(2) and (3) of the Statute, Respondent refused to bargain and thereby violated §§ 16(a)(5) and (1) of the Statute. Having found that Respondent violated the Statute, it is recommended that the Authority adopt the following:

ORDER3

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(c), and § 18 of the Statute, 5 U.S.C. § 7118, the Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs

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General Counsel did not seek a status quo ante remedy. I fully agree with General Counsel that this Order be signed by the Chief Patrol Agent, Tucson Sector, and that it be posted in each Station in the Tucson Sector.

and Border Protection, Tucson Sector, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Implementing changes in conditions of employment of employees represented exclusively by the American Federation of Government Employees, Local 2544, (hereinafter, "Union") without first giving the Union notice and an opportunity to negotiate concerning the changes to the full extent required by the Statute.

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

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

(a) Upon request of the Union, negotiate the impact and implementation, i.e., pursuant to § 6(b)(2) and (3) of the Statute, concerning the transfer of aliens apprehended by the Casa Grande Station to the Tucson Station for processing which was unilaterally implemented on, or about, March 21, 2002.

(b) Post at its facilities in each Station within the Tucson Sector 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 Border Patrol Agent, Bureau of Customs and Border Protection, Tucson Sector, Tucson, Arizona, and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees customarily are posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director of the Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, in writing, within 30 days of what steps have been taken to comply.

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WILLIAM B. DEVANEY

Administrative Law Judge

Dated: December 19, 2003
Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Tucson Sector, Tucson, Arizona, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and to abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement changes in conditions of employment of our employees who are represented exclusively by the American Federation of Government Employees, Local 2544 (hereinafter, "Union") without first giving the Union notice and an opportunity to negotiate concerning the changes to the full extent required by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the Union, negotiate the impact and implementation, i.e., pursuant to § 6(b)(2) and (3) of the Statute, concerning the transfer of aliens apprehended by the Casa Grande Station to the Tucson Station for processing which was unilaterally implemented on, or about, March 21, 2002.

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

(Agency)

Dated: _____ 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, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer

Boulevard, Suite 100, Denver, Colorado 80204-3581, and whose telephone number is: 303-844-5226.

CERTIFICATE OF SERVICE

I hereby certify that copies of this Decision issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. DE-CA-02-0428 were sent to the following parties in the manner indicated:

—

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

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3284

7000 1670 0000 1175

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REGULAR MAIL:

President
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Dated: December 19, 2003
Washington, DC