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

MEMORANDUM DATE: May 27, 2004

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF HOMELAND SECURITY, BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION
WASHINGTON, D.C.

Respondent

and Case No. WA-CA-02-0811

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 t he above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

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

U.S. DEPARTMENT OF HOMELAND SECURITY, BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. WA-CA-02-0811

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 **June 28, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

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PAUL B. LANG
Administrative Law Judge

Dated: May 27, 2004

Washington, DC

OALJ 04-30

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

U.S. DEPARTMENT OF HOMELAND SECURITY, BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. WA-CA-02-0811

Alfred Gordon
For the General Counsel

Philip Carpio
For the Respondent

Deborah S. Wagner
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On August 30, 2002, the American Federation of Government Employees, National Border Patrol Council, AFL-CIO (Union or Council) filed an unfair labor practice charge against the U.S. Department of Justice, Immigration and

Naturalization Service (Respondent).[1] On July 17, 2003, the Acting Regional Director of the Washington Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (5) the Federal Service Labor-Management Relations Statute (Statute) by implementing changes in its policy regarding the types of authorized personally owned handguns that employees could use and the number of hours of remedial training to which employees were entitled after failing to complete firearms qualification. It was also alleged that the Respondent committed an unfair labor practice in violation of the same provisions of the Statute by repudiating a memorandum of understating (MOU) with the Union.

On September 16, 2003, the Regional Director of the Washington Regional Office issued an order transferring the case to the Boston Regional Office.

On November 28, 2003, the Respondent filed a motion for summary judgment which was denied.

A hearing was held in Washington, DC on January 22, 2004. Both parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Preliminary Issue

The General Counsel has filed a motion to strike portions of the Respondent's post-hearing brief which refer to a ruling by a judge of the Merit Systems Protection Board (MSPB) and to the Respondent's rationale in making the disputed changes to its firearms policy. The General Counsel's motion is based upon the proposition that the Respondent is referring to factual matters which are not in evidence. The Respondent has opposed the motion.

The General Counsel seeks to have stricken certain references by the Respondent to a ruling by an MSPB judge in an appeal initiated by an Other Than Permanent Employee who

[1] Subsequent to the filing of the unfair labor practice charge the Immigration and Naturalization Service became a part of the newly created Department of Homeland Security. The Respondent's present designation is shown in the case caption.

was not in the bargaining unit represented by the Union. The MSPB judge had upheld the employee's termination by the Respondent, stating that the provision for the purported increase in remedial firearms training from 8 to 80 hours was a typographical error upon which the employee was not entitled to rely.

Although the Respondent did not cite its Exhibit 3 in its post-hearing brief, the fourth and fifth unnumbered pages of that document generally refer to the MSPB ruling. That reference is sufficient to bring the ruling into evidence. Accordingly, the Respondent is entitled to refer to it in its post-hearing brief.

The statement of the Respondent's rationale in changing its firearms policy is reflected in GC Exhibit 6 (incorrectly cited in the Respondent's post-hearing memorandum). Therefore, the Respondent is also entitled to rely on that portion of the evidence.

The General Counsel's motion to strike is denied.

Positions of the Parties

The General Counsel maintains that the Respondent improperly implemented changes in its policy regarding the weapons that certain of its employees are authorized to carry without affording the Union the opportunity to request bargaining prior to implementation. The Respondent similarly failed to meet its obligations under the Statute by effecting a change in the allowance of remedial firearms training from 80 to 8 hours without giving the Union prior notice and an opportunity to engage in pre-implementation bargaining.[2]

The General Counsel further maintains that Respondent's policy changes have a foreseeable impact on the working conditions of bargaining unit employees that is greater than *de minimis*.

The General Counsel also argues that the Respondent's actions constitute a repudiation of an MOU which obligates the Respondent to negotiate with the Union prior to the implementation of any change in the Firearms Policy. The

[2] The General Counsel acknowledges that the change in the firearms carrying policy was an exercise of management rights under §7106 of the Statute, but maintains that the change in the allowable hours of remedial firearms training is not an exercise of management rights and, consequently, is substantively negotiable.

Respondent's repudiation of the MOU is an unfair labor practice in view of the fact that the breach was clear and patent and that the repudiation goes to the heart of the parties' agreement.

Finally, the General Counsel maintains that the circumstances of this case justify the imposition of a *status quo ante* remedy.

The Respondent

The Respondent maintains that the Union waived its right to bargain over the policy changes when it failed to request bargaining within thirty days of its receipt of notice as required by the collective bargaining agreement. The Union received adequate pre-implementation notice by virtue of the fact that its Executive Vice President was a voting member of the Firearms and Force Board which was responsible for developing the policy changes.

The Respondent also maintains that the unfair labor practice charge was not filed within six months of the alleged commission of the unfair labor practices as is required by §7118(a)(4)(A) of the Statute.

In addition, the Respondent argues that it did not violate or repudiate the MOU.

Alternatively, the Respondent maintains that, regardless of whether it provided the Union with adequate notice of the changes, it is not obligated to bargain substantively over the provisions of its policy regarding authorized weapons and remedial training time. Furthermore, those provisions are not subject to impact and implementation bargaining since neither the Union nor the General Counsel have identified any proposals which are legitimately negotiable and it is the position of the Respondent that no such proposals exist.

The Respondent also maintains that the provisions at issue are nonnegotiable because there is no action or foreseeable impact on conditions of employment that would be greater than *de minimis*. In fact, the purported change from 80 to 8 remedial training hours is not a change at all, but merely a correction of a typographical error which was not preceded by any bargaining.

Finally, the Respondent argues that a *status quo ante* remedy would be contrary to law inasmuch as it would directly and substantially interfere with the Respondent's exercise of its management rights. Furthermore, such a

remedy would be meaningless since it would result in the restoration of the provision for 8 remedial training hours such as was in effect prior to the occurrence of the typographical error.

Findings of Fact

The Respondent is an agency as defined in §7103(a)(3) of the Statute. The Union is a labor organization as defined in §7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining.

Pertinent Agreements

At all times pertinent to this case the Union and the Respondent were parties to a collective bargaining agreement (CBA) (Jt. Ex. 1).[3] Article 3A of the CBA provides that, within 30 calendar days of notification of proposed changes to rules, regulations and practices at the national level, the Union is to serve notice to the Respondent of its intent to negotiate.[4] The Union will then present its written proposals within 10 calendar days and negotiations will commence during the following calendar week. The agreement further provides that, "In the absence of timely Union proposals Management will have no obligation to enter into negotiations." (Jt. Ex. 1 at 4)

On April 4, 1996, the parties[5] executed a MOU (Jt. Ex. 7). The MOU was to remain in effect for the life of the Respondent's Firearms Policy (Jt. Ex. 8) which had been modified on the same date. The MOU provides, in pertinent part, that:

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[3] The CBA went into effect on February 6, 1995, and identified the Respondent by its former name. It is undisputed that the parties continue to operate under the CBA in spite of the fact that it has expired.

[4] The Union has 15 days to request bargaining on changes at the regional level and 10 days for changes at the sector level. It is undisputed that the changes at issue in this case were at the national level.

[5] The National Immigration & Naturalization Service Council, another labor organization with which the Respondent bargains, is also party to the MOU.

> The Union Councils shall be notified in accordance with the provisions of their respective Collective Bargaining Agreements and provided an opportunity to bargain to the fullest extent allowable under law and Executive Order(s) prior to the implementation of:
>
> * * * * *
>
> (3) any changes in the types of Service-approved personally-owned handguns;
>
> * * * * *
>
> (11) any changes in the Service Firearms Policy.

The Firearms and Force Board

On December 27, 2000, the Respondent, by its Acting Commissioner, issued the Charter of the Firearms and Force Board (Board) (Jt. Ex. 2). The Board was given the responsibility of:

> conduct[ing] analysis and mak[ing] recommendations concerning:
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> - development and oversight of the INS firearms and force program;
> - policy on the use of firearms or the use of deadly and non-deadly force by INS officers;
> - selection and acquisition of specific firearms for use or carry by INS officers;
> - training and qualification requirements and standards for the use of firearms by INS officers;
> - training and qualification requirements and standards for the use of deadly and non-deadly force by INS officers; and
> - clarification of issues relating to the use of firearms or the use of deadly and non-deadly force by INS officers.

The charter further provided that:

> The Board is a recommending body to oversee the development of all policy for firearms and use of force within the INS. All Board recommendations

> should be achieved through consensus among members. When consensus cannot be reached, the Board will present each specific option for consideration. The Board member(s) presenting an option for consideration shall provide their option in the form of a recommendation to the Board Chair.
>
> When there is consensus, the Board Chair on behalf of the Board will prepare a formal recommendation memorandum, presenting the Board's recommendation (s). This recommendation memorandum will be sent to the Executive Associate Commissioner (EAC) or management team member who is responsible for implementation of the recommendation. The responsible INS executive will coordinate the proposed recommendation(s) with the Firearms and Force Executive Committee (the Committee) using this memorandum. The Committee includes the Executive Associate Commissioners (EACs), the Director of Internal Audit, the Chief of the Border Patrol, and the General Counsel, or their permanent designee(s).
>
> * * * * * *
>
> All approved actions [by the Committee] will be sent to the Deputy Commissioner for concurrence prior to implementation. The Board Chair will prepare the concurrence memorandum. A copy of each decision memorandum, with the Deputy Commissioner's concurrence, will be maintained by the Board Chair and copies forwarded to each member of the Committee.

The Chief of Firearms and Force Policy, Office of Programs, was designated as the Chair of the Board. If that position were vacant, the Executive Associate Commissioner for Programs, or his or her designee, would act as the Chair. The Board itself was to consist of one member from each of 11 programs or offices, each of which was to perform a specific function. One of the members was to be a representative of the Office of Labor-Management Relations whose function was "Union and Contract." In addition,

> Consistent with the purpose and intent of partnership, the National INS Council and the National Border Patrol Council will each be invited to designate one representative to attend each meeting of the Board.

Although the charter does not define the status of the union representatives, they were allowed to vote and to fully participate in the activities of the Board as if they were members. In addition, the union representatives were on the distribution list for all communications to Board members.

At all times pertinent to this case the Union was represented on the Board by Richard Pierce, its Executive Vice President. Pierce represented the Union on the Board for about two years, after which the Union withdrew its participation. According to Pierce, the Union withdrew because of its feeling that the Respondent was using the Union's participation in an attempt to circumvent the requirement of formal notice of proposed changes to the Firearms Policy.

Changes to the Firearms Carry Policy

The following is a chronology of developments which led to a change to the Respondent's policy concerning personally-owned handguns:

April 27, 2001 - the Executive Committee (Committee) directed the Board to recommend changes to the firearms carry policy.

May 9, 2001 - the Board discussed the possibility of the elimination of the SIG-Sauer handgun as an authorized personally-owned weapon which could be carried by uniformed officers while in a duty status.[6] There was a consensus that no new approvals would be granted for the SIG-Sauer, but that current approvals would remain in effect.

May 10, 2001 - Board members received a draft of a proposed recommendation to the Committee (Resp. Ex. 12).

May 12, 2001 - Pierce informed Michael Sheehan, the Board Chair, and the other Board members by e-mail (Resp. Ex. 13, 14) that the Union would agree to a cessation of new authorizations for the SIG-Sauer if the H&K USP40 handgun (H&K) were authorized for use as a personally-owned weapon.

May 15, 2001 - the Committee made recommendations to the Acting Commissioner which included the termination of the SIG-Sauer as an approved handgun for personal purchase.

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At all times pertinent to this case the Beretta was the standard issue handgun. However, uniformed officers had the option of carrying a personally-owned SIG-Sauer while on duty with the approval of the appropriate supervisors.

Individual authorizations currently approved would terminate as of June 30, 2003. The Committee also directed the Board to submit additional recommendations (Resp. Ex. 15 at 4, 5).

May 31, 2001 - Sheehan distributed to Board members copies of the Committee's determinations by e-mail (Resp. Ex. 15).

June 6, 2001 - the Board met to discuss the Committee's determinations and to recommend certain changes. Pierce attended the meeting and stated that the Union expected to receive notice and an opportunity to bargain over proposed changes to the Respondent's Firearms Policy.

June 7, 2001 - Sheehan sent an e-mail to Board members along with the Board's recommended modification of the Committee's determinations (Resp. Ex. 18). The Committee did not modify the provision for the termination of authorizations for the SIG-Sauer.

July 13, 2001 - the Committee issued a determination that certain policies be recommended for approval by the Acting Commissioner. Among the Committee's recommendations were:

> The SIG-Sauer P229 handgun will no longer be a Service-approved handgun authorized for personal purchase. The individual authorizations currently approved will terminate in CY 2003 on a date to be determined after the Service completes its bargaining obligations with the Councils.

(Resp. Ex. 19 at 4)

August 22, 2001 - the Board reviewed the Committee's determination of July 13, 2001.

On February 25, 2002, Sheehan forwarded to Board members, including Pierce, by e-mail a copy of Appendix 1B to the Respondent's Firearms Policy (GC Ex. 6). The document had been approved by Deputy Commissioner Mike Becraft on February 14, 2002, to be effective as of the same date. Paragraph B states that:

> The SIG-Sauer P229 Double-Action-Only handgun is no longer authorized for personal purchase. As of the effective date of this Appendix 1B, no additional SIG-Sauer P229 Double-Action-Only handgun will be authorized. The individual

approved authorizations in effect prior to this Appendix 1B will terminate in Calendar Year 2003.7

The change was to go into effect "as soon as possible."8

Changes to the Remedial Firearms Training Allowance

The following is the chronology of events leading to the alleged change of hours of remedial firearms training for Basic Trainee Officers:9

January 18, 2001 - during the course of a Board meeting Sheehan presented a written proposal that the INS Firearms Policy (Policy) be modified to provide for 8 hours of remedial firearms training (GC Ex. 2).10 The proposal reflected the Respondent's contention that the purported change from 8 to 80 hours was the result of a typographical

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Appendix 1B was submitted to the Acting Deputy Commissioner as an attachment to a memorandum dated December 20, 2001, from Michael D. Cronin, the Respondent's Acting Executive Associate Commissioner, Office of Programs. The memorandum had been issued "through" the Committee. Its stated purpose was to, "Revise the carry policy for Service-authorized handguns and . . . to clearly define the handguns INS officers may carry on-duty and off-duty."

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Pierce testified that he assumed that the Respondent would provide Bonner with a written notice of the proposed change. He did not state that he expressed this assumption to a representative of the Respondent.

9
The alleged change at issue applies only to Basic Trainee Officers who have not passed the required firearms course during their initial training. All further references to remedial firearms training pertain only to the training allowance for those employees.

10
The provision for 80 hours of remedial instruction appeared, whether or not for the first time, in the 1996 revision to the Policy (Jt. Ex. 8 at 35).

error.11 Pierce stated that the allowance of 80 hours of remedial training had been negotiated by the Union and the Respondent and could not be changed without additional negotiations.

T.J. Bonner, the President of the Union, testified without challenge that the change from 8 to 80 remedial training hours occurred after extensive bargaining over the better portion of a week. He also testified that, after the bargaining had been completed, he was approached by Doug Calvert (presumably a management representative of the Respondent) who told him that, "our bosses have a problem" with the increase to 80 hours. Bonner told Calvert that the Union would not revisit the issue (Tr. 36-41).

June 6, 2001 - Sheehan allegedly informed the Board that the Commissioner had approved the "correction" to the remedial training allotment and that it had gone into effect on May 5, 2001.

Both Pierce and Bonner testified that they did not receive notice of the Commissioner's approval of the change until shortly before the hearing. Sheehan testified that copies of the approved change were distributed to Board members, including Pierce, at the meeting.

Although the evidence is not absolutely clear on this point, I find as a fact that Pierce did not receive a copy of the approved change on June 6, 2001, nor was he orally notified of the change on that date. The basis for this finding is that the approval of the change by the Commissioner does not appear either on the written agenda that Sheehan distributed prior to the meeting of the Board (Resp. Ex. 15 at 3) or in Sheehan's handwritten notes which he made during and after the meeting (Resp. Ex. 16 at 2). I find it significant that Sheehan made a note that, "PepperBall Pilot test approved by Acting Commissioner 6/4/01." Since Sheehan made a note of that approval by the Acting Commissioner, it is likely that he would have made a similar note if there had been any discussion of the

11 A finding to that effect had purportedly been made by a MSPB judge in a decision which upheld the Respondent's termination of an employee who was not in the bargaining unit. That decision has been accorded no weight other than with regard to the Respondent's motivation in making the change. While the MSPB has an important role in the administration of the federal personnel system, its responsibilities do not include the resolution of issues pertaining to labor relations which are governed by the Statute.

approval of a change in the Firearms Policy. Furthermore, Sheehan acknowledged during cross-examination that he might not have e-mailed a copy of the revision in question to the Union (Tr. 236).

The Respondent's Promulgation of the Changes

On March 1, 2002, the Respondent formally issued the Policy (Jt. Ex. 3). The revised policy contained all changes that had occurred since the issuance of the 1996 policy, including the change of remedial firearms training time from 80 to 8 hours and the phase-out of the SIG-Sauer as an authorized personal-purchase weapon as set forth in Appendix 1B. There is no evidence either as to how the revised Policy was distributed or as to the Respondent's standard procedure in promulgating changes to its policies.

On April 3, 2002, the Policy was distributed to Board members. At that time, Pierce stated that it would be necessary to negotiate concerning the changes contained in the Policy. He apparently did not state that he was not authorized to receive notice of the change on behalf of the Union.

By letter dated April 26, 2002 (Jt. Ex. 4), Robert S. Sherman, Respondent's Chief of Labor and Employee Relations, Policy Section, provided Bonner with a copy of the revised Policy along with a purported summary of the changes. In his summary, Sherman included the following reference to Section 23(C)(2)(b):

> Provides that individual basic trainee officers who fail in one of the Academies to qualify with a handgun will be provided eight additional hours of remedial training.

The summary also refers to Appendix 1B with the statement, "Lists all approved firearms."

In his letter Sherman also stated that the Union, through its representation on the Board, had received adequate advance notice of the changes and had not made a timely request to bargain on any of the proposed changes. Therefore, according to Sherman, the Union had waived its right to bargain.

Sherman's letter was stamped as received on May 18, 2002, along with a notation of a certified receipt number.

The Respondent has not challenged the accuracy of the stamped date of receipt.

By letter dated June 17, 2002, (exactly 30 days from the Union's receipt of Sherman's letter) from Bonner to Catherine J. Kasch, Assistant Commissioner, Human Resources and Development (Jt. Ex. 5), the Union acknowledged receipt of Sherman's letter. Bonner expressed strong opposition to the Respondent's position. He stated that the Union had not received adequate notice of the policy changes and demanded that the Union be afforded the opportunity to bargain to the fullest extent allowable by law. Bonner's letter also set forth proposals for the modification of the Policy, a request for a copy of Chapter 15 of the INS Personal Property Operations Handbook and a demand that the Policy be rescinded pending the completion of bargaining.

By letter of July 29, 2002, from Margie Aira for C. Rick Hastings, Acting Assistant Commissioner, Human Resources and Development, to Bonner (Jt. Ex. 6), the Respondent provided a copy of the requested document, but reiterated its rejection of the Union's demand for the recission of the Policy and for bargaining.

The Impact of the Changes

The impact of the elimination of the SIG-Sauer as an authorized personally owned weapon is obvious. Employees who, for whatever reason, chose to expend personal funds for the weapon are no longer authorized to carry it and must either purchase another weapon or carry the Beretta which is the standard issue handgun. There is no evidence as to how many employees had purchased the SIG-Sauer. Regardless of the number, there can be little doubt that at least some employees considered the SIG-Sauer to be sufficiently superior to the Beretta to justify the cost. Furthermore, the fact that, even after the elimination of the SIG-Sauer, employees are allowed to purchase certain handguns for use in lieu of the standard issue weapon indicates that the parties recognize that the exercise of personal choice in weapons, however limited, is a matter of importance to at least some employees.

The impact of the reduction of remedial training hours is somewhat speculative. There is no evidence that any employee has yet required the full 80 hours of remedial training, nor is there any evidence as to whether any employee has required more than 8 hours of remedial training. However, it is undisputed that a Basic Trainee Officer who does not eventually qualify in firearms

proficiency, after whatever amount of remedial training is authorized, is subject to termination.

In view of Bonner's undisputed testimony as to the bargaining that led to the increase of remedial training hours from 8 to 80, I find as a fact that the provision for 80 hours in the 1996 Firearms Policy was not a typographical error and that the subsequent reduction back to 8 hours was a substantive change. This finding is further supported by the fact that the Respondent made no effort to correct the alleged error until after the ruling by the MSPB judge approximately three years later.

The Past Practice as to Notice

Bonner testified that, although the CBA is silent as to the form of notice, there is a longstanding practice whereby the Respondent has provided the President of the Union with written notice of proposed changes. According to Bonner, this practice predates his tenure in office of fifteen years. During that time no other Union representative has been designated to receive notice of changes at the national level, nor has the Union ever acquiesced to any other method of notice (Tr. 26, 27).

On cross-examination, Bonner acknowledged that the local president in San Diego had forwarded to him a notice from the Respondent that involved a change to the national non-deadly force policy which involved the so-called "Pepperball pilot program". Bonner responded to the notice (Tr. 58, 59; Resp. Ex. 5 at 2). Although Bonner characterized the notice as misdirected and intended by the Respondent as involving a local change, there is no evidence that he protested the form of the notice or that he took any action to prevent another such "misdirection".[12]

Robert Stamerra, a Labor Relations Advisor for the Respondent and a member of the Board since March of 2002, testified that his office would customarily send notices on national issues in writing to Bonner. Stamerra also testified that he had no experience with "specially chartered organizations" other than the Board and that his experience did not include the transmittal of notices via an organization such as the Board. On the contrary, his

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There is no evidence that the Union had ever rejected a notice or informed the Respondent that it considered a notice to have been inadequate.

experience was limited to "routine notices from Headquarters" (Tr. 141-146).[13]

In considering the evidence as a whole, it appears likely that, while most of the notices regarding national issues might have been directed in writing to Bonner, there was no hard and fast rule to that effect, especially as to matters within the purview of the Board. Furthermore, the evidence shows that subordinate Union officials, including Pierce and the local president in San Diego, kept Bonner informed of proposed changes which they felt should be negotiated at the national level.[14]

Discussion and Analysis

The Respondent Did Not Raise Its Limitations Defense In A Timely Manner

In *U.S. Army Armament Research, Development and Engineering Center, Picatinny Arsenal, New Jersey*, 52 FLRA 527, 534 (1996) the Authority held that §7118(a)(4) of the Statute[15] is the equivalent of a statute of limitations. As such, it is an affirmative defense which must be raised prior to the close of the hearing. The Respondent failed to raise its limitations defense either in its Answer to the Complaint, its motion for summary judgment or its opening statement at the hearing (Tr. 17-19). As such, Respondent is barred from raising the limitations defense for the first time in its post-hearing brief.

The Changes Affected Conditions of Employment

In *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986) the Authority held that, in determining whether a matter involves a condition of employment, it will consider (a) whether it pertains to bargaining unit employees, and

[13] It is unclear whether the Respondent had ever before given notice to the Union with regard to issues involving firearms.

[14] Bonner testified that Pierce kept him informed of major developments at the Board (Tr. 55). Pierce testified that he would advise Bonner of developments after every meeting of the Board by e-mail and telephone conference (Tr. 125).

[15] The cited portion of the Statute provides that, ". . . no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority."

(b) whether there is a direct connection between the matter and the work situation of those employees. It is undisputed that the elimination of the SIG-Sauer as an authorized weapon pertains to bargaining unit employees, thus satisfying the first of the *Antilles* criteria.

As to the second criterion, it is clear that proficiency in the use of an authorized handgun is an essential job skill of bargaining unit employees. This is borne out by the fact that employees are required to demonstrate the required proficiency, both at the end of their initial training and periodically throughout their careers.16 That fact, plus the possibility that employees might find themselves in life-threatening situations, supports the proposition that the choice of weapons has a direct connection to the work situation of bargaining unit employees.

The Union does not challenge the right of the Respondent to maintain a list of firearms which are approved for the use of its employees. However, that is not to say that bargaining unit employees are not legitimately concerned with the choice of weapons available to them. Bonner testified that an employee's choice of a weapon might be influenced by such factors as the fit of the weapon in his or her hand, the smoothness and length of the trigger pull, the recoil and the way the slide mechanism recoils (Tr. 48). Contrary to the Respondent's assertions, consideration of those factors are more than "mere idiosyncracies." There is, as the Respondent maintains, no evidence as to the actual differences, if any, between the SIG-Sauer and the authorized weapons. Such evidence, if offered, would be irrelevant since it is not for the Authority to assess the merits of the bargaining positions of the respective parties. The fact that some employees are willing to spend personal funds as an alternative to using the issued weapon indicates that the effect of the choice of weapons is real and that it is greater than *de minimis*. Therefore, the elimination of the SIG-Sauer also satisfies the second of the *Antilles* criteria.

The Respondent does not challenge the proposition that the reduction in remedial firearms training hours affects bargaining unit employees, thereby satisfying the first of the *Antilles* criteria. While the Respondent does not deny that the possibility of involuntary termination affects the work situation of bargaining unit employees, it argues that

16
Both the 1996 and the 2002 Firearms Policies contain detailed provisions for the maintenance of proficiency in the use of various firearms.

no employee has ever used the full 80 hours and that Bonner could not identify the employee who allegedly needed more than 8 hours of remedial training to qualify. Therefore, according to the Respondent, the reduction of remedial training hours has no effect, or a *de minimis* effect, on working conditions.

In determining whether a change in procedure has more than a *de minimis* effect on conditions of employment, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change, *United States Department of the Air Force, Air Force Materiel Command*, 54 FLRA 914, 919 (1998). It is undisputed that the failure of a Basic Trainee Officer to complete firearms qualification may lead to his or her termination. Furthermore, there is evidence that a nonmember of the bargaining unit has been terminated because of his failure to qualify after 8 hours of remedial firearms training (Resp. Ex. 17; Tr. 69). That evidence leads to the conclusion that the reduction of remedial firearms training is above the *de minimis* level in its foreseeable effect on the work situation of bargaining unit employees and that the second of the *Antilles* criteria has been satisfied.[17] Therefore, the reduction in remedial firearms training is a change in conditions of employment.

The Union First Received Notice of the Elimination of the SIG-Sauer on February 25, 2002

A union=s receipt of adequate notice of a proposed change in working conditions triggers its responsibility to request bargaining. In order to be deemed adequate the notice must give the union information as to the scope and nature of proposed change, the certainty of the change and the planned timing, *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82 (1997)(*Corps of Engineers*).

The Authority has also held that the obligation of an agency to give notice of proposed changes to a union includes the requirement that the notice be directed to the individual designated by the union, *United States Department*

[17] While the number of employees actually or potentially affected by either of the policy changes is unclear, that is not a controlling factor in the application of the *de minimis* test. Rather, it will be applied to expand rather than limit the number of situations where bargaining will be required, *Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 407 (1986).

of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pennsylvania, 57 FLRA 852, 855 (2002) (*Willow Grove*). However, in this case the Union did not inform the Respondent that notices of proposed changes should be in writing and directed exclusively to Bonner. Furthermore, as shown above, the evidence does not support the General Counsel's contention that there was a binding past practice to that effect. Pierce was selected by the Union to be its representative on the Board and, by Bonner's own testimony, he used Pierce to communicate the Union's position to the other Board members. Therefore, even if Pierce was not actually authorized to receive notice on behalf of the Union, his position with relation to the Board, and the fact that he was the Executive Vice President of the Union, indicates that he at least had apparent authority to receive notice with regard to matters which were within the purview of the Board.[18]

On February 25, 2002, Sheehan provided Board members, including Pierce, with copies of Appendix 1B to the Firearms Policy, thereby informing them that the document had been approved by the Respondent through the Deputy Commissioner on February 14, 2002. Although there was no specific date on which the revision was to be implemented, it was indicated that the change, which included the elimination of the SIG-Sauer handgun, would go into effect as soon as possible. Therefore, the Union, through Pierce and Bonner, could have had no legitimate doubt concerning the action which it had to take to preserve its right to bargain.

This is not to say that Pierce's knowledge of the recommendations of either the Board or the Committee constituted notice to the Union. In this case, however, Pierce was informed of a final decision by the Respondent and his knowledge was binding on the Union.

The Union First Received Notice of the Reduction in Remedial Training Time on April 3, 2002

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[18] Under the doctrine of apparent authority a principal (the Union) is bound by the actions and knowledge of a representative (Pierce) when the principal places the representative in a position which leads a third party (the Respondent) to believe that the representative has the necessary authority. The doctrine was applied by the Authority in *U.S. Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, Region II*, 38 FLRA 193, 197 (1990).

The Respondent correctly asserts that the central issue of when the Union received notice of policy changes does not hinge on whether the deliberations of the Board constituted collective bargaining. Nevertheless, an examination of the Board's operations is relevant to a determination of the earliest date on which the Union received adequate notice so as to trigger its obligation to request bargaining and to submit proposals.19

Both the charter of the Board and the evidence of its deliberations indicates that its intended and actual purpose was to make recommendations to the Respondent as to possible changes in its policies regarding firearms and nonlethal force. The Union had no contractual or statutory right to participate in the Board's activities, but was invited by the Respondent to send a representative, presumably in the hope of forestalling requests to bargain over changes in policy arising out of the Board's recommendations. Therefore, in the absence of notice that a policy had been finally approved by the Respondent (such as occurred on February 25, 2002, with regard to Appendix 1B), the Union, through Pierce's membership on the Board, could only have been advised of the possibility, or at the most the likelihood, that a change would be proposed by the Respondent. Such information falls short of the standards for adequate notice as set forth in *Corps of Engineers* and its progeny. Even if the Board's recommendations were eventually approved by the Committee and then the Commissioner or his designee, the Union would not have been advised either of the certainty or the expected timing of the change until such final approval had occurred.

It was not until April 3, 2002, that the revised Policy was distributed to the Board along with notice that it had gone into effect on March 1, 2002. The Respondent is correct in its assertion that the Policy incorporated changes that had previously gone into effect. However, unlike the revocation of the authorization for the SIG-Sauer, the Union had not received prior notice of the reduction of remedial training hours.

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The Authority has recognized that the Statute does not prescribe any particular method by which collective bargaining may occur and that consideration of the totality of circumstances is necessary to determine whether a party has fulfilled its bargaining obligations, *U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 317, 319 (1997).

The Union Waived Its Right to Bargain Over the Elimination of the SIG-Sauer

A union=s receipt of adequate notice of a proposed change in working conditions triggers its responsibility to request bargaining, *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82 (1997). Moreover, the Authority has recognized the validity of contractually imposed time limits on the exercise of rights conferred by the Statute, *Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 51 FLRA 1532, 1536 (1996).

The Union received notice of the elimination of the SIG-Sauer on February 25, 2002, which was before the change was implemented. In spite of that notice the Union did not request bargaining or submit proposals until June 17, 2002. Since that request occurred more than 30 days after the receipt of adequate notice, the Union is considered to have waived its right to bargain over the change.[20]

Sherman's letter to Bonner of April 26, 2002, was, in effect, a "second notice" or a confirmation of the Respondent's position. It does not detract from the significance of the prior notices of February 25 and April 3, 2002.

The Union Did Not Waive Its Right to Bargain Over the Reduction of Remedial Training Hours

In order for a notice to be considered adequate it must, in the absence of emergency conditions, be timely, that is, it must be given prior to the implementation of the proposed change. This requirement applies even when the proposed change is an exercise of a management right under §7106 of the Statute, *Willow Grove*, 57 FLRA at 855.

The cited language of the CBA and the MOU operates as a waiver of the right to bargain over national issues if the Union does not request bargaining within 30 days after the receipt of notice. However, it does not operate as a waiver of the Union's right to receive timely notice in the first place. Stated otherwise, a union's duty to request bargaining, whether or not defined by contractual language, is only triggered by receipt of adequate and timely notice, *Willow Grove*. The Respondent's failure to give the Union

[20] Although the Respondent acted at its peril when it implemented this change within 30 days of its notice to the Union, the fact remains that the Union did not make a timely request to bargain.

timely notice is, in itself, an unfair labor practice in violation of §7116(a)(1) and (5) of the Statute. The application of the Statute is not contingent upon a timely request to bargain. Since the Union did not receive timely pre-implementation notice of the reduction of remedial training hours, it was not required to request bargaining in the first place, *United States Department of Justice, Immigration and Naturalization Service, Southern Region, El Paso, Texas*, 11 FLRA 90, 101 (1983). Accordingly, it is of no consequence that the Union's request for bargaining was made beyond the 30 day time limit, nor is it necessary to address the issue of the negotiability of the Union's proposals.

The Reduction of Remedial Training Hours Was Not an Exercise of a Management Right

The General Counsel does not contest the proposition that the Respondent is not required to substantively negotiate the removal of the SIG-Sauer from the list of authorized handguns. However, the General Counsel maintains that the remedial training allowance is not a management right.

The Respondent relies upon *National Association of Government Employees, Local R1-203 and U.S. Department of the Interior, U.S. Fish and Wildlife Service, Hadley, Massachusetts*, 55 FLRA 1081 (1999) (*Interior*) in support of its argument that proposals to assign training to employees affect management's right to assign work within the meaning of §7106(a)(2)(B) of the Statute. A review of that case indicates that it is readily distinguishable from the circumstances of the instant case. In *Interior* the Authority considered the negotiability of a proposal that would have required the agency to select retrainable candidates for bargaining unit positions from lists of former bargaining unit employees. The Authority's rationale in finding the proposal nonnegotiable was that it would have interfered with the agency's right to assign work.

Unlike the situation in *Interior*, even a total restoration of the 80 hour remedial training allowance, much less some other adjustment to the time allotted, would only delay the *firing* of a Basic Trainee Officer until he or she has been given an additional opportunity to qualify in the use of the service-issued handgun.[21] The Respondent has not been asked to change the standards for qualification, to

[21] This statement should not be construed as limiting the right of either party to propose an arrangement that does not affect the number of remedial training hours.

hold jobs open or to retain employees who cannot meet the standards. Therefore, the amount of remedial firearms training available to Basic Trainee Officers is not a management right and is substantively negotiable.

Even if the establishment of a remedial training allocation were a management right, it should not be assumed before negotiations begin that the Union could not propose appropriate arrangements to alleviate the adverse impact of the policy on members of the bargaining unit.

The Respondent Repudiated the MOU

The Authority has long held that not every breach of a collective bargaining agreement[22] is a violation of the Statute, but that a repudiation of an agreement does violate the Statute. The Authority has adopted a two-prong test in this regard. First, is the violation of the agreement clear and patent and, secondly, does the violation go to the heart of the agreement? Even a single breach of an agreement may amount to an unfair labor practice if the relevant criteria are met, *Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 40 FLRA 1211, 1218 (1991) (*Warner Robins*).

In determining whether a breach is clear and patent, it is necessary to determine whether there was a violation of the agreement in the first place, and then to determine whether the violating party acted according to a reasonable interpretation of the agreement, *United States Department of the Air Force, Seymour Johnson Air Force Base*, 57 FLRA 772, 774 (2002). In agreeing to the MOU, the Respondent accepted the bargaining obligations which were already imposed on it by §7116(a)(1) and (5) of the Statute. Therefore, a violation of the Respondent's bargaining obligation under the Statute was a *per se* breach of the MOU. In not giving the Union advance notice of the reduction of remedial firearms training time, which had been incorporated into the revised Firearms Policy, the Respondent violated both the Statute and the MOU. While the Respondent might have sincerely believed that it was not obligated to bargain because of the expiration of the 30 day time limit and the ruling by the MSPB judge, that belief does not detract from the willful nature of its failure to meet its obligations under both the Statute and the MOU, *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 56 FLRA 9, 13 (2000). Therefore, the Respondent's breach of the MOU was clear and patent.

[22] In the context of this analysis there is no difference between an MOU and a term agreement.

The sole purpose of the MOU is to restate and reinforce the Respondent's bargaining obligation with regard to, among other subjects, changes to the Firearms Policy. Stated otherwise, the Respondent's obligation to bargain over changes to the Firearms Policy is at the heart of the MOU. Accordingly, the Respondent's failure to meet its bargaining obligation constitutes a repudiation of the MOU and is an independent breach of the Statute, *U.S. Department of Labor, Occupational Safety and Health Administration, Chicago, Illinois*, 19 FLRA 454, 467 (1985).

A *Status Quo Ante* Remedy is Warranted

When an agency unilaterally changes a condition of employment that is substantively negotiable, a *status quo ante* (SQA) remedy is appropriate in the absence of special circumstances, *General Services Administration, National Capitol Region, Federal Protective Service Division, Washington, DC*, 50 FLRA 728, 737 (1995). The Respondent maintains that an SQA remedy as to remedial training would impose a burden on management, but it does not specify what that burden would be. Furthermore, there is nothing in the record to suggest that a restoration of the 80 hour allowance for remedial firearms training would impose a hardship on the Respondent or interfere with its operations.

The Respondent further argues that the granting of an SQA remedy would amount to the "restoration" of the 8 hour remedial firearms training allowance because no employee has ever received more than 8 hours of remedial training. This argument misses the point. What the parties negotiated was an enhanced "safety net" for Basic Trainee Officers who fail to initially meet the Respondent's standards for firearms qualification. The issue of the necessity of the 80 hour allowance may be raised during the course of bargaining. However, a SQA remedy will prevent the Respondent from changing the allowance until the parties have completed bargaining.

This Decision should not be construed as prejudging issues of negotiability that may arise during the course of bargaining.

For the reasons set forth herein I have concluded that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Statute by failing to provide the Union with notice and an opportunity to bargain before implementing a reduction of the remedial firearms training allowance for Basic Trainee Officers. I have further concluded that the Respondent committed an

unfair labor practice in violation of §7116(a)(1) and (5) of the Statute by repudiating the MOU which the parties entered into on April 4, 1996.

Accordingly, I therefore recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41 of the Rules and Regulations of the Federal Labor Relations Authority (Authority) and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the U.S. Department of Homeland Security, Border and Transportation Directorate, Bureau of Customs and Border Protection, Washington, DC, shall:

1. Cease and desist from:

(a) Changing the working conditions of bargaining unit employees by making changes to the amount of remedial firearms training that Basic Trainee Officers may receive should they fail to qualify during Basic Marksmanship Instruction and Practical Pistol Courses.

(b) Repudiating the Memorandum of Understanding of April 4, 1996, by making changes to the Agency's Firearms Policy without first notifying the American Federation of Government Employees, National Border Patrol Council, AFL-CIO, and affording it the opportunity to bargain to the extent required by the Statute.

(c) In any like or related manner, interfering with, restraining or coercing bargaining unit employees in the exercise of their rights assured under the Statute.

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

(a) Rescind changes to the Agency's Firearms Policy by restoring to 80 hours as needed the amount of remedial firearms training that Basic Trainee Officers will receive should they fail to qualify during Basic Marksmanship Instruction and Practical Pistol Courses.

(b) Notify and, upon request, bargain with the American Federation of Government Employees, National Border Patrol Council, AFL-CIO, to the extent required by the Statute prior to implementing changes to the Agency's Firearms Policy.

(c) Post copies of the attached Notice at all facilities where bargaining unit employees are assigned on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Chief of the Border Patrol, or the highest equivalent agency official with direct authority over the Border Patrol, 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 with other material.

(d) Pursuant to §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Boston Region of the Authority, in writing within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, May 27, 2004.

_____

Paul B. Lang
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 U.S. Department of Homeland Security, Border and Transportation Directorate, Bureau of Customs and Border Protection, Washington, DC 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 change the working conditions of bargaining unit employees by making changes to the amount of remedial firearms training that Basic Trainee Officers may receive should they fail to qualify during Basic Marksmanship Instruction and Practical Pistol Courses.

WE WILL NOT repudiate the Memorandum of Understanding of April 4, 1996, by making changes to the Agency's Firearms Policy without first notifying the American Federation of Government Employees, National Border Patrol Council, AFL-CIO, and affording it the opportunity to bargain to the extent required by the Statute.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce bargaining unit employees in the exercise of their rights assured under the Statute.

WE WILL rescind changes to the Agency's Firearms Policy by restoring to 80 hours as needed the amount of remedial firearms training that Basic Trainee Officers will receive should they fail to qualify during Basic Marksmanship Instruction and Practical Pistol Courses.

WE WILL notify and, upon request, bargain with the American Federation of Government Employees, National Border Patrol Council, AFL-CIO, to the extent required by the Federal Service Labor-Management Relations Statute prior to implementing changes to the Agency's Firearms Policy.

_____

(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 its provisions, they may communicate directly with the Regional Director, Boston Regional Office, whose address is: Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, MA 02110-1200, and whose telephone number is: 617-424-5731.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CA-04-0811 were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT	**CERTIFIED NOS:**
Alfred Gordon, Esquire Counsel for the General Counsel Federal Labor Relations Authority Boston Region 99 Summer St., Suite 1500 Boston, MA 02110-1200	**7000 1670 0000 1175 3994**
Philip Carpio Bureau of Customs and Border Protection 1300 Pennsylvania Avenue, NW Room 4.4-B Washington, D.C. 20229	**7000 1670 0000 1175 3970**
Deborah S. Wagner 160 Copperwood Drive Buffalo Grove, IL 60089	**7000 1670 0000 1175 3987**

Dated: May 27, 2004
Washington, DC