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

MEMORANDUM DATE:
December 5, 2006

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION

Respondent

and Case No. WA-CA-05-0194

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 117

Charging Party

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

Enclosures

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AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 117
Charging Party

NOTICE OF TRANSMITTAL OF DECISION

Pursuant to ∋2423.26 of the Authority=s Rules and Regulations, the above-entitled case was stipulated to the undersigned Administrative Law Judge. 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 8, 2007**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

_____

PAUL B. LANG

Administrative Law Judge

Dated: December 5, 2006
Washington, DC

OALJ 07-07

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

U.S. DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION

Respondent

and Case No. WA-CA-05-0194

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 117

Charging Party

Sharmar R. Cowan, Esquire
For the General Counsel

Mark R. Tallarico, Esquire
For the Respondent

Bridgette Rodriguez
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On January 20, 2006, the 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 U.S. Department of Homeland Security,

Customs and Border Protection, Washington, D.C. (Respondent or CBP) committed unfair labor practices in violation of ∋7116 (a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by failing to respond to a request by the American Federation of Government Employees, Council 117 (Union) to bargain and by failing to bargain with the Union as requested. On January 25, 2006, the General Counsel issued a First Amended Complaint and Notice of Hearing in

which the same unfair labor practices were alleged. By Order of March 30, 2006, motions for summary judgment by the General Counsel and the Respondent were denied.[1]

On June 16, 2006, the parties filed a joint motion to decide the case on stipulated facts without a hearing; a Stipulation of Facts was attached to the motion. By Order of the same date, the hearing was indefinitely postponed and the parties were directed to submit briefs by July 17, 2006. The Respondent has submitted a timely brief, but the General Counsel has not done so.

The Chief Administrative Law Judge has assigned this case to me for disposition of the joint motion and, if appropriate, the issuance of a Decision. Upon consideration of the stipulation of facts, the Respondent=s brief and the applicable law, I have determined, in accordance with ∋2423.26 of the Rules and Regulations of the Authority, that the joint motion should be granted and that a Decision should be issued.[2]

Findings of Fact

The parties have stipulated to the following facts:

1. Prior to March 2003, the American Federation of Government Employees, AFL-CIO ("AFGE") was the exclusive representative of three bargaining units of employees employed by the Department of Justice, Immigration and Naturalization Service ("INS"): a unit composed of Border Patrol agents, a unit of professional employees outside the National Border Patrol, and a unit of nonprofessional employees outside the National Border.

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[1]/ The Respondent also filed a motion to dismiss which it later withdrew.

[2]/ The Respondent has styled its brief as ARespondent=s Closing Brief for Summary Judgment@. A second motion for summary judgment by the Respondent would be inconsistent with the joint motion and would unnecessarily prolong the proceedings. Therefore, consistent with the granting of the joint motion, the Respondent=s brief will be considered as a brief in support of judgment based upon the Stipulation of Facts.

2. In March 2203, pursuant to the Homeland Security Act of 2002, Pub. No. 107-296, 116 Stat. 2136 ("HAS"), some employees in all three of the bargaining units described in paragraph 1 were transferred to the Department of Homeland Security, Bureau of Customs and Border Protection ("CBP").

3. Pursuant to the HAS and section 2422.34 of the Regulation of the Federal Labor Relations Authority, 5 CFR §2422.34, AFGE maintained its status as the exclusive representative of three units described in paragraph 1 with respect to the employees who transferred to CBP, and still maintains that status. An election is being conducted by Authority to determine whether AFGE, the National Treasury Employees Union, or neither labor organization, in the future will represent the employees in last two bargaining units identified in paragraph 1 who were transferred to CBP.

4. AFGE Counsel 117 ("Council") was designated by AFGE to represent it in dealings with CBP with respect to the last two bargaining units described in paragraph 1.

5. In a letter dated December 3, 2004, addressed to Commissioner Robert Bonner, who then was the head of CBP, Chuck Showalter, the President of the Council, demanded to bargain over the following subjects for employees in the last two bargaining units described in paragraph 1: employee-requested port transfers, job-swap transfers, voluntary relocation program transfers, humanitarian/medical transfers and spousal transfers. A copy of the demand to bargain is attached to Respondent's Response To General Counsel's Motion for Summary Judgment as Exhibit 1.

6. The letter described in paragraph 5 was addressed to Commissioner Bonner, but also indicated that it was sent to the Attention of Sheila H. Brown, who was then and still is the Director, Labor Relations for CBP.

7. The letter described in paragraph 5 and 6 was received by CBP.

8. CBP, including Commissioner Bonner, Ms. Brown, or any other representative of CBP, did not respond to the demand to bargain contained in the letter described in paragraphs 5 and 6.

9. No negotiated agreement, currently in effect or expired, that applied or applies to the employees in the last two units described in paragraph 1 addresses the subjects of employee-requested port transfers, job-swap transfers, voluntary relocation program transfers, humanitarian/medical transfers and spousal transfers.

In paragraph 5 of the stipulation of facts the parties have incorporated by reference a letter dated December 3, 2004, from Bridgette Rodriguez for Charles Showalter, the President of the Union, to the Respondent through Commissioner Bonner and Sheila H. Brown, a labor relations representative of the Respondent. The letter is entitled A**Demand to Bargain; Relating 5 USC 7114(b)(4) Information Request**≅ and states, in pertinent part:

> This document constitutes a Council Demand to Bargain . . . filed on behalf of Council 117, which represents the legacy INS [Immigration and Naturalization Service] bargaining unit employees within CBP, nationwide.
>
> * * *
>
> **Demand to Bargain - Interim Union Proposals**
>
> Pursuant to law, regulation, our CBA (Article 9) and past practice, the Council hereby moves to bargain and submits this Demand to Bargain, along with Interim Union Proposals (which are subject to change/will be finalized after the agency-provided information is received):
>
> (1) The agency shall engage in bargaining with AFGE Council 117 on employee-requested port transfers, job-swap transfers, voluntary relocation program transfers, humanitarian/medical transfers and

spousal transfers for *legacy INS*[3] bargaining unit CBP Officers and CBP employees. (We are always willing to come to the bargaining table with the NTEU and NAAE.)[4]

(2) In the interim, while (1) is being accomplished, the agency shall immediately implement the same employee transfer/relocation program(s) and policy (ies) for *legacy INS* bargaining unit CBPO=s/ employees as it does for *legacy Customs* bargaining unit.

(3) DHS CBP will inform *legacy INS* bargaining unit CBPO=s/employees in writing of the agency decision on any employee request for transfer by NLT six (6) months after said request was officially submitted by the *legacy INS* CBPO/employee.

(4) DHS CBP will form a national committee of management and union representatives (which will include the AFGE/Council) who will meet every January, and more often at the call of the Chair of the Committee, in order to review CBP employee transfer/relocation programs, as well as information/data concerning the number, date, types of requests, agency decisions and other relevant info, in order to report to and make recommendations to management.

* * *

I look forward to your provision of . . . further contact regarding our Demand to Bargain. . . .

The letter cites an attachment which is not part of the record.

Although paragraph 9 of the Stipulation of Facts is somewhat vague as to whether a collective bargaining agreement

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3 / The Immigration and Naturalization Service (INS) is one of a number of organizations whose employees were transferred to the Department of Homeland Security. They are commonly referred to as legacy employees.

4 / The National Treasury Employees Union (NTEU) and the National Association of Agriculture Employees (NAAE) are labor organizations representing other legacy employees of the Respondent.

(CBA) was in effect at any time relevant to this case, the Respondent has acknowledged in its brief that the CBA between the former INS and the Union expired in June of 2003[5] and that there were no negotiations for a new CBA (Resp. Brief, p.3).

Based upon an examination of the stipulated facts, I further find that the Respondent is an agency as defined in ∋7103(a)(3) of the Statute and that the Union is a labor organization within the meaning of ∋7103(a)(4) of the Statute. At all times pertinent to this case, the Union was the exclusive representative of a unit of the Respondent=s employees which is appropriate for collective bargaining.

Discussion and Analysis

The Duty to Bargain

When a CBA has expired either party may seek to renegotiate its terms, *United States Border Patrol, Livermore Sector, Dublin, California*, 58 FLRA 231, 233 (2002) (*Livermore*). The duty to bargain requires, at the very least, a response to a demand to bargain and a explanation of the reason for a refusal to consider a proposal, *Army and Air Force Exchange Service, McClellan Base Exchange, McClellan Air Force Base, California*, 35 FLRA 764, 769 (1990). Thus, the Respondent=s duty to negotiate did not preclude it from challenging the negotiability of any or all of the Union=s proposals or from refusing to acquiesce to the proposals.[6] In the face of such a response by the Respondent the Union would have had the option of either amending its proposals or initiating negotiability proceedings pursuant to Part 2424 of the Rules and Regulations of the Authority. The Respondent acted at its peril when it refused to bargain altogether because of a

[5]/ Regardless of the expiration date, the Respondent would not have been bound by the CBA between INS and the Union in the absence of an agreement to that effect. As a successor employer to INS the Respondent only assumed the duty to bargain with the Union, N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272, 282, 32 L.Ed.2d 61 (1972); Ideal Chevrolet, Inc., 198 NLRB 280 (1972). For the purpose of this Decision, it is of no consequence whether the CBA expired or was never in effect.

[6]/ As stated in '7103(a)(12) of the Statute, the duty to bargain does not Acompel either party to agree to a proposal or to make a concession.@

belief that none of the Union=s proposals were negotiable. If all of the Union=s proposals were non-negotiable, the Respondent would have had no duty to bargain. However, if any of the proposals were negotiable, the Respondent would have been required to bargain, *United States Department of Housing and Urban Development*, 58 FLRA 33, 34 (2002) (*HUD*).[7]

The Union=s Proposals

In view of the holding in *HUD*, it is not necessary to examine each of the Union=s proposals, but only to determine whether any of them is negotiable. The Union=s third proposal would require the Respondent to provide written notice to bargaining unit employees as to the disposition of their transfer requests within six months of the time of the submission of the requests. The transfers themselves involve the assignment of employees and are thus an exercise of a management right under ∋7106(a)(2)(A) and/or (B) of the Statute. However, the requirement of written notice and a deadline for the provision of such notice is a negotiable procedure within the meaning of ∋7106(b)(2) of the Statute. In order for such a proposal to be considered non-negotiable it must be shown that it directly interferes with management rights, *NTEU v. FLRA*, 810 F.2d 1224, 1225 (D.C. Cir. 1987), *cert. denied,* 455 U.S. 945, 71 L.Ed.2d 658 (1982). The Respondent has not made such a showing and there is nothing on the face of the proposal to suggest such interference. Since at least one of the Union=s proposals is negotiable, the Respondent was obligated to bargain.

Proposal 3 Does Not Lack Specificity

The Respondent maintains that the Union=s demand to bargain lacks specificity because it does not provide sufficient details to allow the Respondent to determine whether the proposals are negotiable. Again, in accordance with *HUD*, it is not necessary to address the Respondent=s allegations regarding each of the Union=s proposals.

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[7]/ In HUD the agency=s duty to bargain arose out of its proposed implementation of a change in conditions of employment. However, the holding is equally applicable to this case since, in the absence of contractual language limiting term negotiations or establishing a time limit for the submission of proposals for a successor contract, either party is obligated to bargain on demand.

Proposal 3 is clear and specific; it simply requires written notification of the action on transfer requests within six months of their submission. Contrary to the Respondent=s allegations, that proposal is not dependent on any other proposal. Proposal 3, if accepted, would not require the Respondent to adopt any particular method of evaluating transfer requests. Arguably, the proposal would not even require a final decision on a transfer request within six months, but only written notification of its status. During the course of negotiations the Respondent would be free to question the Union as to the intent of the proposal, to present alternative language or to reject the proposal altogether.[8]

The Respondent also argues that the Union=s bargaining demand is not subject to substantive bargaining because it concerns a management right. The simple answer to this argument is that proposal 3 does not call for substantive bargaining regarding management rights. Although the transfer process itself involves a management right as defined in ∋7106(a)(2) of the Statute, that fact does not relieve the Respondent of the duty to bargain as to its impact and implementation, *Livermore*. It is not necessary to examine the nature of each of the Union=s proposals since proposal 3 concerns the implementation of the Respondent=s transfer policy rather than the policy itself and is therefore negotiable.

Proposal 3 is a Procedure

In arguing that the Union=s proposals are not negotiable as procedures, the Respondent appears to be espousing the position that the proposals must be taken as a whole and, if not negotiable in their entirety, are not negotiable at all. This approach turns Authority precedent on its head. As set forth in *HUD*, if *any* of the Union=s proposals are negotiable, the Respondent has a duty to bargain. While proposal 1 is, as the Respondent states, no more than a general demand to bargain over certain types of transfers, proposal 3 is a classic example of a procedure regarding the Respondent=s implementation of its transfer policy, whatever that policy may be. The Respondent has correctly cited *U.S. Dept. of Justice, Immigration and Naturalization Service v. FLRA*, 975

[8]/ A finding that proposals are negotiable does not involve a judgment as to their merits, Colorado Nurses Association and Veterans Administration Medical Center, Ft. Lyons, Colorado, 25 FLRA 803, 823, n.5 (1987).

F.2d 218, 222 (5th Cir. 1992) as supporting the proposition that a procedure is negotiable as long as it does not unduly interfere with the exercise of a management right. However, the Respondent has not shown how the imposition of a six month deadline for providing written notice of its decision on a transfer request (whatever that decision might be) would interfere to any extent with the operation of the transfer policy.

Having found that the Union=s bargaining demand includes a procedure within the meaning of ∋7106(a)(2)(B) of the Statute, it is not necessary for me to address the Respondent=s argument that the Union=s bargaining demand is not an appropriate arrangement.

The Remedy

I take official notice that, as of the date of this Decision, there is still pending before the Authority a proceeding to determine the exclusive representative of a bargaining unit of the Respondent=s employees which will include the employees in the bargaining unit now represented by the Union. The Respondent maintains that, in view of the pending representation proceedings, the remedy, if any, should be limited to a posting. That argument is inconsistent with ∋2422.34(a) of the Rules and Regulations of the Authority which provides that the parties are required to A. . . fulfill all . . . representational and bargaining obligations under the Statute≅ during the pendency of representation proceedings. On the other hand, the Authority has held that an unfair labor practice case is rendered moot when the former exclusive representative is no longer recognized and, as in this case, no individual rights are involved, *Defense Mapping Agency, Hydrographic/Topographic Center, Louisville, Kentucky*, 51 FLRA 1751, 1754 (1996).

In an attempt to balance the enforcement of the Respondent=s duty to bargain with practical considerations arising out of the pending representation proceedings, I will recommend an Order by which the Respondent will be obligated to respond to the demand to bargain and to bargain upon demand with the Union so long as it remains the exclusive representative of an appropriate unit of its employees which includes the bargaining unit now represented by the Union.

This Decision should not be construed as foreclosing the options of either party during the course of negotiations. As has already been stated, the Respondent is free to challenge the negotiability of any of the Union=s proposals. It is, however, not entitled to refuse to participate in the process of negotiation.

In view of the foregoing, I have concluded that the Respondent committed unfair labor practices in violation of ∋7116(a)(1) and (5) of the Statute by failing to respond to the Union=s bargaining demand and in refusing to bargain with the Union over employee-requested port transfers, job-swap transfers, voluntary relocation program transfers, humanitarian/medical transfers and spousal transfers. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

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

1. Cease and desist from:

(a) Failing or refusing to respond to the demand to bargain by the American Federation of Government Employees, Council 117 (Union) dated December 3, 2004.

(b) Failing or refusing to negotiate upon demand, to the extent required by the Statute, with the Union over employee-requested port transfers, job-swap transfers, voluntary relocation program transfers, humanitarian/medical transfers and spousal transfers.

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

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

(a) Respond to the demand to bargain by the Union dated December 3, 2004.

(b) Negotiate upon demand, to the extent required by the Statute, with the Union over employee-requested port transfers, job-swap transfers, voluntary relocation program transfers, humanitarian/medical transfers and spousal transfers.

(c) Post at all of its facilities where its legacy INS employees are assigned copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commissioner of the Respondent 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 care shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(d) Pursuant to ∋2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Washington 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.

3. This Order will remain in effect only so long as the Union remains the exclusive representative of a unit of the Respondent's employees which includes its legacy INS employees.

Issued, Washington, DC, December 5, 2006.

Paul B. Lang
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority (Authority) has found that the U.S. Department of Homeland Security, Bureau of Customs and Border Protection violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to respond to the demand to bargain by the American Federation of Government Employees, Council 117 (Union) dated December 3, 2004.

WE WILL NOT fail or refuse to negotiate, to the extent required by the Statute, with the Union over employee-requested port transfers, job-swap transfers, voluntary relocation program transfers, humanitarian/medical transfers and spousal transfers.

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 Labor-Management Relations Statute.

WE WILL respond to the demand to bargain by the Union dated December 3, 2004.

WE WILL, upon demand, negotiate, to the extent required by the Statute, with the Union over employee-requested port transfers, job-swap transfers, voluntary relocation program transfers, humanitarian/medical transfers and spousal transfers.

This Notice will remain in effect only so long as the Union remains the exclusive representative of a unit of our employees which includes our legacy INS employees.

_____
(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, Washington Regional Office, whose address is: Federal Labor Relations Authority, 1400 K Street, NW, 2nd Floor, Washington, DC 20424-0001, and whose telephone number is: 202-357-6029.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CA-05-0194 were sent to the following parties:

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

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REGULAR MAIL

President
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Dated: December 5, 2006
Washington, DC