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

MEMORANDUM DATE: May 11, 2005

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

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

Respondent

and Case No. SF-CA-04-0577

NATIONAL ASSOCIATION OF
AGRICULTURE EMPLOYEES (NAAE)

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

DEPARTMENT OF HOMELAND SECURITY U.S. CUSTOMS AND BORDER PROTECTION WASHINGTON, D.C. Respondent	
and NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES (NAAE) Charging Party	Case No. SF-CA-04-0577

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 13, 2005**, 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: May 11, 2005
Washington, DC

OALJ 05-28

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

DEPARTMENT OF HOMELAND SECURITY U.S. CUSTOMS AND BORDER PROTECTION WASHINGTON, D.C. Respondent	
and NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES (NAAE) Charging Party	Case No. SF-CA-04-0577

Stefanie Arthur
For the General Counsel

Philip Carpio
For the Respondent

Michael Randall
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On August 5, 2004, the National Association of Agriculture Employees (Union or NAAE) filed an unfair labor practice charge against the U.S. Department of Homeland Security, U.S. Customs and Border Protection, Washington, DC (Respondent or CBP). On October 29, 2004, the Regional Director of the San Francisco 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) of the Federal Service Labor-Management Relations Statute (Statute) by applying the provisions of the Customs Officer Pay Reform Act, 19 U.S.C. §267 (COPRA) and the Respondent's National Inspectional Assignment Policy (NIAP) to certain employees represented by the Union without bargaining with the Union

concerning the resulting changes to the conditions of employment of those employees.

A hearing was held in San Francisco, California on February 1, 2005. The parties were present at the hearing with counsel and were afforded the opportunity to submit 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.

Pending Motions

The following motions were submitted subsequent to the hearing and are still pending:[1]

General Counsel's Motion to Correct Hearing Transcript

This motion, which was unopposed, refers to a number of typographical errors in the transcript. Accordingly, the motion is granted.

General Counsel's Motion to Strike Portions of Respondent's Closing Brief

The General Counsel has moved to strike portions of the Respondent's post-hearing brief in which the Respondent maintains that, pursuant to §7117(a) of the Statute, it was entitled to implement NIAP without bargaining because of a "compelling need". The General Counsel argues that the Respondent has waived the right to assert this affirmative defense inasmuch as it has raised the issue for the first time in its post-hearing brief. The General Counsel also asserts that, pursuant to *FLRA v. Aberdeen Proving Ground*, 485 U.S. 409, 412, 99 L.Ed.2d 470 (1988) (*Aberdeen Proving Ground*), the issue of the existence of a compelling need can only be addressed by the Authority in a separate proceeding and not in an unfair labor practice case.

In opposition to the General Counsel's motion, the Respondent argues that, in both its pre-hearing statement and supplement to its pre-hearing statement, it put the General Counsel on notice that it was raising the defense of a compelling need. The Respondent also relies on *Aberdeen Proving Ground* in support of the proposition that an Administrative Law Judge can take no action with regard to a defense of compelling need. Furthermore, the General Counsel lacks standing to raise this issue since, in

[1] The General Counsel's motion to reopen the record has already been denied.

accordance with §7117(b)(3) of the Statute, the General Counsel cannot be a party to the separate proceeding before the Authority itself which is required to determine the existence of a compelling need.

It may be, as the General Counsel contends, that the Respondent has waived the defense of a compelling need. However, the Authority has made it clear that, in light of *Aberdeen Proving Ground*, "the Authority may not make compelling need determinations in unfair labor practice proceedings", *Federal Emergency Management Agency*, 32 FLRA 502, 505 (1988) (*FEMA*). Therefore, all aspects of the compelling need defense, including the issue of waiver, lie exclusively within the purview of the Authority.[2] Therefore, the General Counsel's motion to strike is denied.

Respondent's Motion to Strike Portion of General Counsel's Closing Brief

The Respondent has moved to strike the portion of the General Counsel's post-hearing brief in which the General Counsel argues that NIAP was not necessary to implement COPRA because COPRA was enacted eleven years ago while NIAP has only been in effect since 2001. According to the Respondent, that portion of the General Counsel's brief is based upon an incorrect factual assertion which is not supported by the record or by Authority precedent. According to the Respondent, the Authority has noted in prior decisions that the current NIAP replaced one which had been negotiated and implemented in 1995.

The Respondent also argues that there is nothing in the record to support the General Counsel's assertion that COPRA and NIAP were not necessary because the Respondent could have hired more Agriculture Specialists.[3] In this regard, the Respondent requests that I take official notice of an article in The Washington Post which allegedly indicates that the Respondent was operating under a hiring freeze at all times pertinent to this case.

[2] In *The Adjutant General, Massachusetts National Guard, Boston, Massachusetts*, 36 FLRA 312, 318 (1990) (*Adjutant General*) the Authority held that it would be more appropriate to delay consideration of whether a compelling need defense had been timely raised until a case where the issue is crucial to the resolution of an unfair labor practice charge.

[3] As will be shown, the bargaining unit employees affected by the Respondent's allegedly unlawful implementation of COPRA and NIAP were classified as Agriculture Specialists.

The General Counsel has stated his opposition to the Respondent's motion in the form of his opposition to the Respondent's request for official notice. The General Counsel argues that, while there was a prior version of NIAP, the current version, unlike its predecessor, eliminated bargaining over virtually all assignment changes. The General Counsel also argues that there is no evidence that the Respondent could not have hired more Agriculture Specialists and that, therefore, he was entitled to raise the point in opposition to the Respondent's contention that COPRA and NIAP were necessary. Finally, the General Counsel asserts that a newspaper article is not a proper subject of official notice.

The Rules and Regulations of the Authority make no provision for motions to strike. However, §2423.33 provides that reply briefs are not to be filed without the permission of the Administrative Law Judge. The Respondent's motion is no more than a rebuttal to the General Counsel's post-hearing brief and is, in effect, a reply brief that has been filed without permission. Such permission would not have been granted even if requested. The parties may be assured that I will weigh all of their arguments in light of the evidence and the applicable law. Accordingly, the Respondent's motion to strike is denied.

The Respondent's request that I take official notice of a newspaper article is denied. Even if the request had been made before the record was closed, a newspaper article is not a proper subject for official notice when, as in this instance, the Respondent seeks to have it admitted for the truth of its contents.

Positions of the Parties

The General Counsel

The General Counsel maintains that the Respondent unlawfully implemented both COPRA and NIAP without affording the Union the opportunity to bargain over their impact and

implementation.[4] The General Counsel challenges the Respondent's assertion that the immediate implementation of COPRA and NIAP was crucial to the necessary functioning of CBP and contends that the Respondent has not made a sufficient showing of the necessity of refusing to engage in pre-implementation bargaining.

The General Counsel further maintains that the Respondent's emphasis on the necessity of adhering to the overtime pay cap in COPRA is not worthy of credence because the Respondent never mentioned the cap to the Union as justification for its refusal to delay implementation of NIAP until the completion of negotiations. Furthermore, according to the General Counsel, the Respondent has not explained why it did not seek to alleviate the effect of the overtime cap by hiring additional Agriculture Specialists or by requesting a waiver of the cap.

The General Counsel also argues that, even if the Respondent were to establish the necessity of immediate implementation of COPRA, it does not follow that it was justified in unilaterally implementing NIAP since NIAP contains provisions which go beyond new procedures for the assignment of overtime. NIAP also allows managers to change employees' work schedules, including tours of duty, days off, work locations and reassignments to other facilities.

[4] In its post-hearing brief the General Counsel states that he:

> . . . has never disputed Respondent's right to implement COPRA and NIAP as part of its "One Face to the Border" initiative, and has never disputed Respondent's claims that "these changes . . . are necessary to CBP's continued success in meeting its primary mission . . . . General Counsel does not question Respondent's claim that COPRA is the better overtime system or that the overtime provisions of NIAP permit a more fiscally responsible allocation of overtime resources. At issue is Respondent's claim that "the critical nature of these changes" permitted CBP to . . . refuse to bargain with NAAE and to implement the changes unilaterally.
>
> (GC brief, pp. 12, 13)

Such changes may be made without the necessity of bargaining or consultation.

The General Counsel also challenges the Respondent's assertion that the Union effectively waived the right to negotiate by insisting on the Respondent's acceptance of groundrules which the Union had negotiated with the Department of Agriculture. According to the General Counsel the Union did not establish an unlawful precondition to bargaining but merely presented a proposal on what is a mandatory subject of bargaining.

The General Counsel has altered his position with regard to a remedy and no longer seeks *status quo ante* (SQA) relief for both COPRA and NIAP. Rather, the General Counsel now seeks SQA relief for NIAP only and a retroactive bargaining order with regard to COPRA. The General Counsel also seeks an award of back pay to compensate bargaining unit employees for financial losses arising out of the improper implementation of COPRA and/or NIAP. The General Counsel argues that a back pay award would be appropriate even if a SQA remedy is not granted.

The Respondent

The Respondent maintains that neither COPRA nor NIAP is subject to impact and implementation bargaining.[5] In support of this position the Respondent asserts that COPRA is a government-wide statute which applies to all customs officers and that Agriculture Specialists were designated as customs officers by an agency-wide regulation, 69 F.R. 35229 (Jt. Ex. 7)[6] for which there is a compelling need within the meaning of §7117(a) of the Statute. According to the Respondent, NIAP is an agency-wide policy for which there is also a compelling need, *i.e.*, the maintenance of adequate staffing levels and adherence to the requirements of COPRA.

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[5] This position is seemingly at odds with certain language in the letter of July 23, 2004, from Dennis K. Reischl, Labor Relations Specialist for the Respondent, to Michael Randall, the President of the Union (GC Ex. 13). The letter indicates that the Respondent was prepared to negotiate over COPRA and NIAP after they had been implemented.

[6] The General Counsel has not challenged the implementation of this regulation. There is no evidence as to whether the Union ever requested bargaining over the regulation or, if so, whether such bargaining occurred.

The Respondent further maintains that, after having been given ample notice of the impending implementation of COPRA and NIAP, the Union pre-conditioned its bargaining request on the Respondent's acceptance of groundrules which it had negotiated with the Department of Agriculture.[7] The Union thereby waived whatever bargaining rights it might have had.

With regard to remedy, the Respondent argues that a SQA remedy would not be appropriate since it would be harmful and prejudicial to the performance of its mission. Additionally, the Respondent argues that there is no basis for a back pay award inasmuch as bargaining unit employees have not suffered financial losses because of the implementation of COPRA and NIAP.

Findings of Fact

I hereby adopt the Stipulation of Facts (Jt. Ex. 1), which is attached as an appendix to this Decision, and make additional factual findings as set forth below.

The Respondent is an agency within the meaning of §7103 (a)(3) of the Statute. The Union is a labor organization within the meaning of §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.

The Implementation of COPRA and NIAP

By letter of June 22, 2004[8], from Tonia A. Brown for Sheila H. Brown, Respondent's Director of Labor Relations, to Randall (GC Ex. 11) the Union was informed of the Respondent's intention of applying both COPRA and NIAP as well as the CBP Annuity Integrity Policy to Agriculture Specialists as of July 25. She further stated that it was necessary to immediately implement the changes in order for CBP to fulfill its mission and that the Respondent was providing the Union with notice of the changes prior to their publication in the Federal Register. With regard to future bargaining, the letter states:

> In addition, CBP stands ready to meet and [*sic*] with you regarding the impact and implementation

[7] The Agriculture Specialists were employed by the Department of Agriculture prior to the creation of the Department of Homeland Security.

[8] All subsequently cited dates are in 2004 unless otherwise indicated.

of these changes immediately, and will continue to do so, upon request, on a post-implementation basis.

Randall replied to Brown's letter on July 11 (GC Ex. 12). In the letter, the subject of which was "Customs Officers Pay Reform Act Regulations", Randall stated:

> NAAE is requesting bargaining over implementation of this agencywide regulation, as well as any change to overtime assignment procedures, namely the National Inspection Assignment Policy.
>
> NAAE insists CBP not implement any change to the overtime pay system or to any national or local overtime assignment procedures until full negotiations have occurred and come to a conclusion by impasse proceedings or final agreement.

The Union, through Randall, also submitted "initial proposals" which consisted of:

a. The maintenance of the *status quo* until the completion of negotiations.

b. The exclusion of commuted travel time from the computation of the overtime cap or, in the alternative, computation of commuted travel time in accordance with the provisions of 7 CFR §354.

c. The preservation of the provisions for foreign language awards and annuity integrity as negotiated by CBP with NTEU.

d. Legacy-Agriculture Technicians (another name for Agriculture Specialists) to be included in COPRA until CBP "decides what to do" with them.[9]

e. The cap to be fixed at $30,000 for fiscal year 2004.

f. All negotiations to be governed by the NAAE National Interim Groundrules.

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[9] This proposal appears to be inconsistent with the proposal that the Respondent delay the implementation of COPRA and NIAP until the completion of negotiations.

Finally, Randall stated that post-implementation bargaining was not satisfactory and that the Respondent's position was inconsistent with the Statute, the collective bargaining agreement[10] and the National Groundrules. Randall further stated that the Union would file an unfair labor practice charge if the Respondent implemented the regulations as planned.

By letter of July 23 from Dennis K. Reischl, Labor Relations Specialist, to Randall (GC Ex. 13) the Respondent reiterated its position that the implementation of the regulations was an integral part of the creation of the CBP Officer position. Furthermore, the creation of the position was an essential element in the development of its "One Face at the Border" objective which is, in turn, part of the necessary functioning of CBP. Reischl again stated that the Respondent was ready to negotiate with the Union following implementation. Reischl also stated that the Respondent declined to accept the groundrules which the Union had negotiated with the Department of Agriculture but was prepared to negotiate new groundrules.

There is no evidence of further communication between the parties, nor is there evidence that either party proposed post-implementation bargaining or that such bargaining occurred.

The Hale Memorandum and the Department of Agriculture CBA

On March 12, 2003, Janet Hale, the Under Secretary for Management of the Department of Homeland Security (DHS), issued a memorandum to the "DHS Management Team" on the subject of collective bargaining obligations (GC Ex. 3). The memorandum states, in pertinent part:

> As a reminder, all collective bargaining obligations that existed in the various components prior to the . . . transfer carry forward and are still active. The use of the term "collective bargaining obligations" includes but is not limited to:
>
> • issuing notices and proposals to the union when contemplating changes in conditions of employment (which includes shift hours and tour

[10] Presumably Randall was referring to the national agreement between the Union and the Department of Agriculture (GC Ex. 2)

coverage), and subsequent bargaining if the union seeks negotiations;

* * * *

• honoring negotiated agreements by following the language in those agreements; and

• observing principles of "good faith" bargaining.

* * * *

. . . Until new guidance is issued, all DHS managers are expected to honor contractual and statutory obligations that are in place.

The memorandum of March 12, 2003, (which became known as the "Hale memorandum") was introduced into evidence through the testimony of Randall. On cross-examination Randall acknowledged that the memorandum was addressed exclusively to management, that he did not negotiate it and that the Union was not a signatory. However, Randall also testified that he received a copy of the memorandum from Melissa Allen who was then a member of Hale's staff. Allen told him to use the memorandum if he encountered problems on either the national or local level (Tr. 97).

Immediately prior to the transfer of the Agriculture Specialists from the Department of Agriculture to DHS (Jt. Ex. 1, ¶¶1-3) and at all times pertinent to this case the Union and the Department of Agriculture were parties to a collective bargaining agreement (CBA) covering the bargaining unit in which the Agriculture Specialists were included while they were employed by the Department of Agriculture (GC Ex. 2; Tr. 22). The CBA does not contain groundrules and the groundrules are not otherwise in evidence.[11] Article VII of the CBA, entitled "Negotiations", does not refer to groundrules. However, it does establish time limits for the commencement of negotiations and provides for negotiating teams of six members each, such number to be negotiable. The CBA also states, in Section 4 of Article VII, that:

11
In his letter to Brown of July 11 (GC Ex. 12) Randall indicated that a copy of the groundrules was attached. However, that attachment was not offered into evidence as part of the letter.

> The Employer recognizes that providing official time for national contract preparation is mutually desirable and is negotiable.

The Effect of COPRA and NIAP on Conditions of Employment[12]

The stated purpose of NIAP (GC Ex. 11(c), ¶1)[13] is:

> . . . to revise and update the policy governing the assignment of Inspectional and Canine personnel. This policy is created to provide outstanding service at the least cost to the government and public; to enable Customs Service managers and supervisors to respond to mission and workload demands quickly and efficiently; to maximize the effective use of overtime; and to provide uniformity, efficiency, and fairness in the assignment of employees.

NIAP further states, in pertinent part:

> **2. BACKGROUND**
>
> The policies and procedures contained in this Handbook reflect the changes required by the provisions of the Omnibus Reconciliation Act of 1993, also known as the Customs Officer Pay Reform Act (COPRA).
>
> **3. PRECEDENCE AND FUNCTION**
>
> The policies and procedures contained in this Handbook take precedence over any and all other agreements, policies, or other documents or practices executed or applied by the parties previously, at either the national or local levels, concerning the matters covered within this Handbook.

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[12] Although the General Counsel has taken the position that the Respondent was obligated to negotiate over the impact and implementation of both COPRA and NIAP, it is apparent that the Union only sought to bargain over the implementation of NIAP. The distinction is not crucial since the purpose of NIAP is to implement COPRA.

[13] The attachments to GC Ex. 11 have been marked as 11(a) through (d).

> The policies and procedures contained in this Handbook reflect the parties' full and complete agreement on the matters contained and addressed herein.[14] No further obligation to consult, confer or negotiate, either upon the substance or impact and implementation of any decision or action, shall arise upon the exercise of any provision, procedure, right or responsibility addressed or contained within this Handbook.
>
> **4. SUPERSEDED MATERIAL**
>
> This Handbook supersedes and replaces NIAP Handbook Number HB 51200-02 dated June 1995[15], as well as all local agreements that address matters contained within this Handbook.

The revised NIAP, in Section 5A, also vests agency managers (presumably at the local level) with the authority to establish the length of the workweek, tours of duty, daily work hours, days off, general scheduling, staffing levels, the assignment of employees between facilities and the approval of shift swaps. Agency managers are also empowered to assign mandatory overtime, although they will normally seek to obtain volunteers. In subsection 5B2, entitled "Cap Compliance", NIAP states:

> The statutory overtime/premium limitation establishes the maximum allowable earnings for Customs Officers. It is necessary to apportion overtime and premium pay earnings in order to ensure the full range of numbers, types and grades of personnel required by the Service throughout the fiscal year. When a Customs Officer's actual earnings reach 50% of the statutory limitation on earnings (combined overtime and premium pay), the Officer's actual earnings will be reviewed and prorated bi-weekly thereafter. Prorated amounts not earned during one pay period will be carried over to the next pay period during the balance of the fiscal year.

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[14] In spite of this language, the Respondent does not contest the proposition that it did not engage in any bargaining with the Union either before or after the implementation of the current version of NIAP. There is no evidence as to whether the Respondent bargained over NIAP with other labor organizations.

[15] The prior version of NIAP (GC Ex. 11d, ¶1), like the revised version, has the stated purpose of administering COPRA.

> A Customs Officer will not be prevented from working an overtime assignment if at the time of the assignment the Officer is below his or her prorated pay limitation for the pay period, provided the assignment will not cause the Officer's overtime and premium pay earnings to exceed the statutory pay cap. The Officer's normal shift differential premium pay must be considered when projecting the Officer's cap earnings for the remainder of the fiscal year. The Officer's normal work schedule shall be adjusted to prevent the Officer's overtime and premium pay exceeding the cap.

The Respondent does not deny that the implementation of the revised version of NIAP and COPRA resulted in changes to the conditions of employment of Agriculture Specialists and that those changes had more than a *de minimis* effect.

Kathleen McKevitt, a Supervisory Program Officer at Respondent's headquarters, testified that the Department of Agriculture, under whose standards for the scheduling of overtime the Agriculture Specialists were working before the implementation of NIAP, did not track overtime and could not provide the Respondent with information as to the earnings of overtime and premium pay. It was therefore necessary to bring the Agriculture Specialists under NIAP in order to ensure that they would not reach the overtime and premium pay cap too early in the fiscal year, thus resulting in the Respondent's inability to assign overtime to the Agriculture Specialists for the remainder of the fiscal year. That situation would cause severe disruptions to the movement of travelers and goods through ports of entry into the United States (Tr. 184-188).

McKevitt also testified that the application of COPRA through NIAP to Agriculture Specialists in July of 2004 gave them a "whole new lease on life" with regard to overtime and premium pay. That was so because the Agriculture Specialists were able to earn up to $25,000 in overtime and premium pay during the period from July to the end of September (Tr. 188-190).[16] According to McKevitt, "COPRA basically tells us what we can pay, but NIAP allows us to manage it. . . . That is our assignment policy of how we assign our officers to overtime and scheduled work" (Tr. 190). McKevitt described how the revised assignment criteria under NIAP, as well as the tracking of overtime and

[16] Obviously this particular advantage was applicable only in the year in which NIAP was implemented.

premium earnings allow the Respondent to minimize the possibility of Agriculture Specialists becoming unavailable for overtime because they have exceeded the COPRA cap early in the year (Tr. 190-192). NIAP also enhances the ability of the Respondent to shift customs officers, including Agriculture Specialists, between locations so as to respond to the work load more efficiently and at the least cost to the government (Tr. 194, 195).

The parties have stipulated that:

> 9. Under NIAP, overtime is assigned using the low-earner and least-cost principles, which means that the lowest monetary earner in the participating group who will be paid the fewest number of hours will be assigned the overtime job. . . .
>
> 10. Prior to NIAP, overtime for Agriculture Inspectors [the job title for Agriculture Specialists before their transfer to the Respondent] was based on a voluntary system in which hours of overtime was used as the charging system, *i.e.*[,] overtime for Agriculture Inspectors was generally assigned based on fewest overtime hours worked (Jt. Ex. 1).

McKevitt stated that another function of NIAP is to implement the Annuity Integrity provision of COPRA. The annuity integrity language limits the inclusion of overtime pay in an employee's base salary calculation to no more than half of the cap. The purpose of this provision is to prevent employees who are within three years of retirement from "bulking up" their earnings with overtime pay so as to increase their retirement annuities (Tr. 192, 193).

Discussion and Analysis

The Legal Framework

It is well settled that agencies are required to provide advance notice to unions and to bargain upon request over all changes which have more than a *de minimis* effect on the conditions of employment of bargaining unit members, *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 715 (1999). The duty exists even if the proposed change falls within the definition of a management right as defined in §7106 of the Statute, *United States Department of the Air Force, 913th Air Wing, Willow Grove Reserve Station, Willow Grove, Pennsylvania*, 57 FLRA 852, 855 (2002). An agency is

entitled to implement changes without notice and bargaining only upon proof that a delay in implementation would impede the necessary functioning of the agency, *U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892, 904 (1999) (*INS*).

An exception to the duty to bargain has been established in §7117 of the Statute which provides, in pertinent part:

> [(a)](2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.
>
> (3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.[17]
>
> (b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

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[17] The parties have stipulated that the issues of the size of the bargaining unit and the identity of the representative labor organization(s) are now pending before the Authority in the form of petitions to consolidate the bargaining units represented by the Union and two other labor organizations (Jt. Ex. 1, ¶4).

> (2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if-
>
> > (A) the agency, or primary national subdivision, . . . informs the Authority in writing that a compelling need for the rule or regulation does not exist; or
> >
> > (B) the Authority determines that a compelling need . . . does not exist.

In construing this portion of the Statute, the Supreme Court has ruled that the issue of a compelling need may not be resolved in an unfair labor practice case, *Aberdeen Proving Ground*, 485 U.S. at 412. In *FEMA*, 32 FLRA at 505, the Authority interpreted *Aberdeen Proving Ground* to mean that, when an agency refuses to bargain over a specific proposal and alleges that the proposal conflicts with an agency regulation for which there is a compelling need, there is no duty to bargain until the Authority has determined that a compelling need does not exist. If the Authority has not yet made such a determination the Complaint should be dismissed. The dismissal is without prejudice to the right of the union to renew its proposal after the Authority has rejected the agency's compelling need defense and to pursue an unfair labor practice charge if the agency persists in its refusal to bargain. However, an agency's allegation of compelling need will not prevent an Administrative Law Judge from resolving an unfair labor practice charge if it is possible to do so on other grounds, *Adjutant General*, 36 FLRA at 318.[18]

The Duty to Engage in Pre-Implementation Bargaining Over COPRA

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[18] As a practical matter, this means that a complaint alleging a failure to bargain over a specific proposal may be dismissed for reasons other than compelling need. If the Administrative Law Judge finds that the disputed proposal is otherwise negotiable, then the compelling need issue becomes critical and the complaint must be dismissed pending the resolution of a negotiability appeal to the Authority. It may also be possible to resolve the charge if the case involves other proposals for which the compelling need defense has not been raised, *Professional Airways Systems Specialists, MEBA, AFL-CIO and Department of Transportation, Federal Aviation Administration*, 32 FLRA 517, 519 (1988) (*PASS*).

COPRA (Jt. Ex. 6), as its title indicates, governs overtime and premium pay for customs officers. The statute establishes premiums for overtime, "night work" from 3:00 p.m. to 3:30 a.m. and work on Sundays and holidays. Subsection (c)(1), entitled "Fiscal year cap", states that:

> The aggregate of overtime pay under subsection (a) of this section . . . and premium pay under subsection (b) of this section that a customs officer may be paid in any fiscal year may not exceed $25,000[19]; except that the Commissioner of Customs or his designee may waive this limitation in individual cases in order to prevent excessive costs or to meet emergency requirements of the Customs Service.

Subsection (c)(2) provides that:

> A customs officer who receives overtime pay under subsection (a) of this section or premium pay under subsection (b) of this section for time worked may not receive pay or other compensation for that work under any other provision of law.

Subsection (e)(1) defines "customs officer" as "an individual performing those functions specified by regulation by the Secretary of the Treasury for a customs inspector or canine enforcement officer."[20]

The language of COPRA is clearly mandatory and is, by definition, the result of action by Congress and the President rather than by the Respondent. Furthermore, the Union requested bargaining only with regard to NIAP, and the Respondent's answer to the request indicates that it understood that the Union was not seeking to bargain over COPRA. Therefore, the Respondent was under no duty to bargain over COPRA.

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19 Congress has since increased the cap to $35,000 per fiscal year (Tr. 183).

20 The parties have stipulated that Agriculture Specialists became customs officers on June 24 by virtue of regulations issued under the authority of the Secretary of the Department of Homeland Security (Jt. Ex. 1, ¶¶5, 6; Jt. Ex. 7). The implementation of those regulations is not at issue in this case.

The Duty to Engage in Pre-Implementation Bargaining Over NIAP

While it may be debatable whether the Respondent has raised a compelling need defense in a timely manner, there is no doubt that it has, by means of Reischl's letter to Randall of July 23, effectively raised the issue of whether the immediate implementation of NIAP was required for the necessary functioning of the agency.[21] Therefore, in accordance with the holding in *PASS*, and in an effort to avoid unnecessary delay in the disposition of the underlying issue in this case, I will examine the merits of the Respondent's "necessary functioning" defense.

The difference between the concepts of compelling need and necessary functioning is far more than a matter of semantics. As stated above, a finding of compelling need may only be made by the Authority in a negotiability appeal with regard to specific proposals by a union. Necessary functioning, on the other hand, is a defense to a charge of failure to bargain in good faith by implementing a change in conditions of employment without affording the union notice and an opportunity to engage in pre-implementation bargaining. In order to maintain this defense an agency must present evidence to show that a delay in the implementation of the unilateral change in conditions of employment would have, in the words of the Authority, "impeded the agency's ability to effectively and efficiently carry out its mission", *INS*, 55 FLRA at 904.

The evidence indicates that the Respondent has carried its burden in maintaining the necessary functioning defense with regard to its implementation of NIAP. It is undisputed that the Respondent is required to screen and inspect all persons and material coming into the United States and that the presence of Agriculture Specialists is frequently required in order for the Respondent to fulfill its mission. It is also clear that, in order to function effectively, the Respondent must retain the flexibility to assign Agriculture Specialists, and indeed all customs officers, to shifts and locations as needed to respond to the flow of traffic. NIAP

[21] The General Counsel has emphasized the fact that Reischl's letter contains no specific reference to the overtime cap. However, the General Counsel has cited nothing in support of his implication that the issue of the overtime cap was an afterthought. Reischl's letter, when examined in the context of Brown's letter to Randall of June 22 (GC Ex. 11), could have left the Union with little doubt that the control of overtime was a major reason for the implementation of NIAP.

provides for that flexibility in such a way as to enable the Respondent to minimize the necessity of requesting waivers of the cap on overtime and premium pay.

The General Counsel argues that the current version of NIAP is not necessary for the Respondent to comply with COPRA because it was presumably able to do so before NIAP was amended. According to the General Counsel, the Respondent has not shown why it could not have requested further waivers of the overtime cap or simply hired more Agriculture Specialists. That argument misses the point. The Authority's holding in *INS* does not require that the Respondent prove that NIAP provided the only possible method for the effective implementation of COPRA or that it would have been impossible to implement COPRA without NIAP. It is sufficient that the Respondent has shown that NIAP corrected serious deficiencies in the assignment system which had been used by the Department of Agriculture. The improvements which the Respondent was able to achieve through NIAP are not in dispute (Jt. Ex. 1, ¶¶9, 10; footnote 4). Under COPRA waivers of the overtime cap may be granted to "prevent excessive costs or to meet emergency requirements of the Customs Service." That language cannot rationally be construed as absolving the Respondent of the obligation to effectively manage its workforce so as to minimize the necessity of exceeding the cap.

There can be no legitimate doubt that the provisions of COPRA are mandatory and that, once the Agriculture Specialists became customs officers, they became subject to COPRA. It is also clear that, whatever its other purposes, NIAP is designed to implement COPRA with regard to all customs officers, not merely the Agriculture Specialists.

The General Counsel maintains that the Respondent need not have implemented COPRA before bargaining. In support of that contention the General Counsel asserts that the appropriation legislation that established the overtime cap allows for a waiver of the cap if necessary to national security. However, the General Counsel has not explained how national security considerations would have justified a delay in implementing the cap so as to allow for the completion of bargaining.

The General Counsel also argues that portions of NIAP have nothing to do with the implementation of COPRA and, therefore, should not have been put into effect before the completion of bargaining. That argument runs counter to the proposition that the Authority will not substitute its own judgment for that of agency management in the exercise of

management rights[22], *U.S. Department of the Air Force, 315th Airlift Wing, Charleston Air Force Base, South Carolina*, 56 FLRA 927, 931 (2000). Furthermore, the portions of NIAP which are challenged by the General Counsel have a logical n exus to the control of overtime. Whatever the substantive merits of NIAP it is a single policy, all parts of which were implemented simultaneously. NIAP, in its present form, was in place before the Agriculture Specialists became customs officers. There is nothing in the record to suggest that the extension of NIAP to the Agriculture Specialists was a pretext to deprive them of their rights under the Statute.

The General Counsel also relies upon the Respondent's response to a question concerning the effective date of the regulation which caused Agriculture Specialists to become customs officers. In its response the Respondent stated that the conversion would take place as soon as possible after the effective date of the regulation "dependent on administrative contingencies" (Jt. Ex. 7, p.35231; GC brief, p. 6). The General Counsel apparently contends that the Respondent's obligation to engage in pre-implementation bargaining was such an administrative contingency and was, therefore, a tacit admission by the Respondent that it was not necessary to implement NIAP before the completion of bargaining.

The following language, which is immediately after that quoted by the General Counsel, indicates that his interpretation of the response has been taken out of context:

> In the interest of fairness and equity, the change will be implemented for all CBP Officers and CBP Agriculture Specialists at the same time. This implementation is an important step for the agency to move forward in unifying the workforce.

In view of this language it seems far more likely that the Respondent intended "administrative contingencies" to mean the completion of the details of putting COPRA into effect rather than the indefinite delay of its implementation for at least a portion of the workforce pending the completion of negotiations with the Union.

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The General Counsel challenges the necessity for the Respondent to have immediately implemented the portions of NIAP dealing with scheduling, staffing and reassignment to different shifts and work locations. All of those functions are management rights as defined in §7106(a)(2)(A) and (B) of the Statute.

It is significant to note that the Respondent did not disavow any duty to bargain over NIAP, but only the duty to engage in pre-implementation bargaining. Although the Respondent has alleged in its post-hearing brief that it was not obligated to bargain at all because of a compelling need, the Respondent also emphasizes its willingness to engage in post-implementation bargaining. Furthermore, Reischl's correspondence to the Union indicates that the Respondent was prepared to bargain after NIAP had gone into effect.

The Groundrules

The Respondent argues that the Union waived its right to bargain by its insistence on the Respondent's acceptance of the groundrules which the Union had negotiated with the Department of Agriculture. While the Respondent is correct in asserting that a party may waive its bargaining rights by its insistence upon unlawful conditions to bargaining, the evidence is insufficient to show that the Union did so in this case. It is not the Union's willingness to bargain that is at issue since it was the Respondent who rejected the Union's request for pre-implementation bargaining. Although the Union continued to press for the acceptance of the groundrules as part of its request to bargain (GC Ex. 12; Resp. Ex. 2), it did not condition its willingness to bargain on the Respondent's acceptance of that position. Moreover, the Respondent never indicated that it would have been willing to engage in pre-implementation bargaining if the Union had abandoned its position as to the groundrules.

Although the Union was entitled to press for the Respondent's acceptance of the groundrules which had been negotiated with the Department of Agriculture, the Respondent was under no obligation to do so. As a successor employer of the Agriculture Specialists, the Respondent was under a general duty to recognize the Union and to bargain when appropriate. However, it was not bound by the collective bargaining agreement between the Union and the

Department of Agriculture, *Ideal Chevrolet, Inc.*, 198 NLRB 280 (1972).[23]

The Significance of The Hale Memorandum

The General Counsel seems to suggest that the Hale memorandum obligates the Respondent to follow the collective bargaining agreement between the Union and the Department of Agriculture. The Respondent maintains that the Hale memorandum was a nonbinding and temporary statement of intent. In reality, the memorandum falls somewhere between the two positions. On the one hand the memorandum was not a negotiated agreement while, on the other hand, it was presented to the Union under circumstances that invited the Union's reliance on its contents.

The key language of the Hale memorandum is that, "Until new guidance is issued, all DHS managers are expected to honor contractual and statutory obligations that are in place." As indicated above, the Respondent, as a successor employer, has no contractual obligations to the Union. Its statutory obligations include the duty to bargain, but that duty is no greater than that which any agency owes to a labor organization which represents a bargaining unit of its employees. Regardless of whether the Hale memorandum imposed any duties on the Respondent, its language does not support the conclusion that the Respondent had forfeited its management rights under §7106 of the Statute or that it was obligated to engage in pre-implementation bargaining regardless of the circumstances. In any event, whatever else may be said of NIAP, it undoubtedly constitutes "new guidance" within the meaning of the Hale memorandum.

For the foregoing reasons I have concluded that the Respondent did not commit an unfair labor practice in violation of §7116(a)(1) and (5) of the Statute by implementing COPRA and NIAP without bargaining with the

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[23] *Ideal Chevrolet* was decided in reliance on *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 282, 32 L.Ed.2d 61 (1972) in which the Supreme Court reasoned that to hold a successor employer to the contractual obligations of its predecessor would be inconsistent with the language of the National Labor Relations Act which states that the obligation to bargain does not require the acceptance of specific proposals or the making of a concession. In view of the virtually identical provision in §7103(a)(12) of the Statute, there is no reason to suppose that the Court would not apply the same rationale to the federal sector.

Union. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

IT IS HEREBY ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, May 11, 2005.

PAUL B. LANG
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. SF-CA-04-0577 were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT	**CERTIFIED NOS:**
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Dated: May 11, 2005
Washington, DC