

UNITED STATES OF AMERICA  
FEDERAL LABOR RELATIONS AUTHORITY  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20424

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UNITED STATES DEPARTMENT OF  
JUSTICE, UNITED STATES  
IMMIGRATION AND NATURALIZATION  
SERVICE, EL PASO DISTRICT  
OFFICE

Respondent

and

Case No. 6-CA-70213

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
AFL-CIO, LOCAL 1210

Charging Party

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Shirley A. Epperson  
For Respondent

Lawrence Augustine  
For Charging Party

Joseph T. Merlie, Esq.  
John M. Bates, Esq.  
For General Counsel of the FLRA

Before: SAMUEL A. CHAITOVITZ  
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-  
Management Relations Statute, Chapter 71 of Title 5 of the  
U.S. Code, 5 U.S.C. § 7101, et seq. 92 Stat. 1191 (herein-  
after referred to as the Statute), and the Rules and  
Regulations of the Federal Labor Relations Authority (FLRA),  
5 C.F.R. Chapter XIV § 2410 et seq.

Pursuant to a charge filed by American Federation of Government Employees, AFL-CIO, Local 1210, hereinafter called AFGE Local 1210 1/ against the United States Department of Justice, United States Immigration and Naturalization Service, El Paso District, (hereinafter called INS El Paso District), 2/ the General Counsel of the FLRA, by the Regional Director of Region VI of the FLRA issued a Complaint and Notice of Hearing alleging that INS El Paso District violated section 7116(a)(1) and (5) of the Statute by implementing some 15 memoranda on or about February 23, 1987 without providing AFGE Local 1210 with notice and an opportunity to negotiate over the decisions, procedures to be observed in implementing the changes and appropriate arrangements for adversely affected employees. INS El Paso District filed an Answer denying it had violated the Statute.

A hearing was conducted before the undersigned in El Paso, Texas. INS El Paso District, AFGE Local 1210 and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Post hearing briefs were filed and have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and my evaluation of the evidence, I make the following:

#### Findings of Fact

At all times material herein INS has recognized AFGE, National Immigration and Naturalization Service Council, (hereinafter called the Council), as the collective bargaining representative for a nationwide unit of employees of the INS, including special agents assigned to the INS El Paso District Office, except for certain employees, not here relevant. Also at all times relevant herein the Council and INS have been parties to a collective bargaining agreement. AFGE Local 1210 has been the representative of the Council for the INS El Paso District for the purpose of collective bargaining, representation of employees in the unit, administration of the collective bargaining agreement and dealing with INS El Paso District and its agents.

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1/ American Federation of Government Employees, AFL-CIO will hereinafter be called AFGE.

2/ United States Immigration and Naturalization Service will hereinafter be referred to as INS.

On February 23, 1987, a meeting for special agents was called by James T. Pastor, Assistant Director for Investigations. The meeting was held in the conference room of the District Director. INS El Paso District management was represented by Pastor and Supervisory Special Agent Robert Mellado. Pastor distributed 12 memoranda to each special agent present at the meeting and required each special agent to sign a master copy of each memorandum to acknowledge notification. As he passed out each memorandum, Pastor threatened to fire any special agent who failed to comply with the memorandum.

1. Memorandum Jt. 2: 3/

This memorandum, dated February 20, 1988, 4/ was titled "Morning Meetings" and stated:

"All agents will report to the District Office Investigations section each morning at 0800 am for a daily meeting effective Monday, February 23, 1987. Any reason for failure to attend meetings must be in writing to your supervisor."

Prior to the February 23 meeting, morning meetings were held as necessary, averaging once a month. Agents were notified of such meetings by their supervisors or a notice of the meetings would be posted on a bulletin board. These meetings were to discuss topics of general interest to the agents, for training, to view videos or films and to make award presentations.

The subject memorandum required all agents to attend a meeting each morning and these meetings lasted from 20 minutes to one and one half hours and this was apparently considered investigative time. The agents were not advised whether their work plan, which required the completion of a particular number of cases during certain time frames, would be adjusted to compensate for the amount of time spent at these meetings.

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3/ Each memorandum will be referred to by its exhibit number assigned at the hearing.

4/ This memorandum had been distributed on Friday, February 20, 1987 in order to ensure all the agents would attend the Monday, February 23, 1987 meeting.

Apparently these morning meetings are now held on a weekly basis.

2. Memorandum Jt. 3:

This memorandum, dated February 23, 1987, was titled "Lockup Information Sheet" and stated:

"The attached lockup sheet will be completed on each alien placed in the holding cells at the Federal Building. Failure on your part to complete this form will lead to disciplinary action."

A sample of the new lockup information sheet was also distributed to the agents. Prior to the implementation of this memorandum no lockup sheet had been used by the special agents. The lockup sheet had been prepared in late 1986 or early 1987 by the Deportation Section, which had control over the lockup. The memorandum was issued because the agents had not been filling out the lockup sheet.

The policy required all agents locking up an illegal alien to fill in this new form, including taking a thumb print of the alien on the form.

Prior to this memorandum fingerprinting was only required when locking up illegal aliens in connection with deportation or prosecution under criminal Statutes.

3. Memorandum Jt. 5:

This memorandum, dated February 23, 1987, titled "Maintenance of Vehicles, housekeeping, general attitude of disregard for government property," stated:

"Some vehicles are still not being maintained. You have been instructed in the past that vehicles are to be kept clean and in good working condition. That responsibility is yours, not a clerk. This is a typical all around attitude many of you have displayed, not just in housekeeping (security), also in your case work and reports. Any of the aforementioned not properly maintained will constitute reasons for management to institute disciplinary actions."

Instructions for the proper maintenance of vehicles were contained in INS Administrative Manual and had been discussed with agents at prior meetings.

4. Memorandum Jt. 6:

This Memorandum, dated February 23, 1987 and titled "Presentation of daily reports," stated:

"On a daily basis at our morning meeting, you are to present completed forms G-22.12.1, G-205 with gas receipts, vehicle signout log. Failure to comply with these instructions will lead to disciplinary action."

Prior to the implementation of this memorandum the two forms mentioned in the memo existed, but were not required to be presented on a daily basis. Form G-22.12.1, "Investigative Time Report," had been completed and was reviewed by a supervisor on a monthly basis, along with the agent's time and attendance reports.<sup>5/</sup> Form G-205, "Government Vehicle Maintenance Record," had been submitted on a monthly basis. The third form, the vehicle signout log, did not exist prior to the issuance of the memo.

After the memorandum was issued these three forms had to be presented daily at the morning meetings.

5. Memorandum Jt. 10:

This memorandum dated February 23, 1987, and titled "Defaming talk, rumors and gossip," stated:

"Defaming talk, rumors and gossip about this Service unit or specific persons in this office will no longer be tolerated [sic]. Calling outside this District to advise other Districts or Regional offices what actions management is taking will not be tolerated [sic]. Taking surveys to ascertain whether management is correct will not be tolerated [sic]. Those involved with this type of activity will have disciplinary action taken against them."

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<sup>5/</sup> Respondent submitted a document that indicated the Form G-22.12.1 had to be completed daily. This document is undated and there was no evidence as to when it became effective. The testimony established that in fact it had not, in practice been completed on a daily basis, and was only submitted on a monthly basis.

The INS Officers' Handbook has had, at all times material, a section entitled "Cooperative Spirit and Loyalty to the Service" which provides, in part, "Rumors about other employees should never be repeated. Critical or personal remarks should be avoided which might tend to cause ill feelings or rumors about other employees, the Service, our Government, the President of the United States or the recognized political parties. Officers must refrain from criticizing to the public, the laws which they are required to enforce . . ." The Justice Department Schedule of disciplinary Offences and Penalties provided, at all times material, that "Disrespectful conduct; use of insulting, abusive or obscene language to or about others" could result in, from an official reprimand to removal.

Prior to the implementation of these changes there were no restrictions on making telephone calls outside the district to advise other offices of actions management was taking and there were no restrictions on survey taking. On February 26, 1987 Special Agent Gary Moore received a written verbal admonishment for failure to comply with Memorandum Jt. 10 because, on February 23, Moore was issued a memorandum regarding a security violation and a few minutes later he was observed handing that security violation memorandum to special agent Silva.

6. Memorandum Jt. 12:

This memorandum dated February 23, 1987 and titled "Use of official channels," states:

"Under no circumstances will any agent contact a line officer in an attempt to by-pass any alien, C.I. (confidential informat) or agent working under cover through a Border Patrol Check Point or through the Port of Entry. You are to make such request through the Assistant District Director for Investigation who will review the request and make the arrangements through proper channels. Failure on your part to comply with these outstanding instructions will lead to disciplinary action."

Prior to the implementation of this memorandum of February 23, 1987, in the event time was a factor in handling a case and precluded the notification of a supervisor, agents desiring to by-pass an alien could go

directly to the Border Patrol line officers to arrange the by-pass. The change requires the review of every intended by-pass by the Assistant District Director. Witness Augustine testified that during this 21 years as an investigator he had not encountered such a situation.

7. Memorandum Jt. 13:

This memorandum dated February 23, 1987 and titled "Supervisory review," stated:

"All information, requests, payment to informants, etc. will require supervisory review and initials prior to leaving this office. Management has instructed that without the proper review nothing will be processed through their offices. Failure on your part to comply with these outstanding instructions will lead to disciplinary action."

Prior to the implementation of this memorandum agents merely contacted informants, asked the informant to secure the desired information or the informant advised the agent of whatever information the informant knew. When questioning an informant the surrounding circumstances may be such as to preclude the special agent from quickly communicating with management, e.g. the questioning may be taking place in a bar or restaurant. Pursuant to the new procedure it is reasonably foreseeable that if an unanticipated situation arises, the matter would have to be handled differently from the practice that existed before the issuance of this memorandum.

8. Memorandum Jt. 14:

This memorandum dated February 23, 1987 and titled "Concealment of facts," stated:

"Any concealing of facts in a case in this office from Management, Supervision or the U.S. Attorney are grounds for disciplinary action."

Prior to the implementation of this memorandum only the concealment of material facts was prohibited, as specified in INS' Standard Schedule of Disciplinary Offenses.

9. Memorandum Jt. 15.

This memorandum dated February 23, 1987 and titled "Working relationships," stated:

"You are required to work with everyone in this working unit. Breaking off into small clicks [sic] will not be tolerated [sic]. If necessary you will be ordered to work with fellow officers. The fact that you feel that you can not trust a specific agent is no reason to avoid that agent. If you feel strongly that you cannot work with an Agent you must submit a memorandum specifying the nature of any action which might have caused you to desire to work with that agent."

Prior to the implementation of this memorandum any reasons for not wishing to work with another agent could be expressed orally, no memorandum setting forth the reasons was required. The INS' Officers' Handbook states under "Cooperative Spirit and Loyalty to the Service" that every employee should give aid to associates and there should "exist a spirit of mutual helpfulness among all employees . . ."

10. Memoranda Jt. 16 and Jt. 17:

Memorandum Jt. 16 dated February 23, 1987 and titled "Informants," stated:

"Under no circumstances will you bring an informant into this Service office. You are to arrange to meet the informant at a neutral location outside the Federal Building. If your informant is discovered being involved in any criminal activity you are to immediately contact supervision by memorandum specifying exactly what type of activities the informant is involved in.

Under no circumstances will you attempt or appear to attempt to obstruct an investigation by this Service or any other enforcement agency.

You are required to read chapter 2-3 of your investigator handbook. You are to submit a memorandum to me by Feb. 27, 1987, stating that you have read the contents of Chapter 2-3 and will comply.

Failure on your part to comply with these instructions will lead to disciplinary action."



By Memorandum Jt. 17 dated February 27, 1987 and titled "Informants--change in policy" INS El Paso District amended Memorandum Jt. 16. Memorandum Jt. 17 stated:

"I am amending my memorandum dated Feb. 23, 1987 titled "INFORMANTS" (first sentence) to read, The only time an informant will be brought into the Federal Building will be when you first receive approval from the Assistant District Director for Investigations. You must explain in writing the circumstances which requires such a need and explain how you will guarantee confidentiality."

Prior to the implementation of Memorandum Jt. 16 and the amended change on February 27, there was no requirement for the agents to write a memo and receive approval from the Assistant District prior to questioning an informant in the Service office. In the past, informants could be brought into the building, and frequently were, without a written explanation of how the agent would guarantee confidentiality. With regards to the second paragraph of Memorandum Jt. 16 there had been no policy prohibiting an agent from appearing to obstruct an investigation. Apparently Agents are now in violation of this policy change and subject to disciplinary action if they appear to obstruct an investigation. Agents may be assigned to work in a capacity wherein they appear to obstruct an investigation but actually are not, such as an undercover assignment. With regards to the last paragraph of Memorandum Jt. 16, no requirement had existed to write a memo, prior to this instruction. Agents have always been expected to be familiar with the Investigator's Handbook, however, prior to this change, agents were never required to submit memos stating that they had read contents of the handbook.

On March 12, 1987, special agent Ann Estrada was given a written verbal admonishment for failure to comply with this change. Estrada's admonishment stated:

"By memorandum dated February 24, 1987, you were instructed to read chapter 2-3 of the Investigator's Handbook and to submit a memorandum to the ADDI by February 27, 1987, stating you had complied with those instructions.

You have failed to comply with those instructions, you were verbally admonished for such failure on this date, and you are directed to comply with the instructions as cited."

The Standard Schedule of Disciplinary Offenses and Penalties provides a minimum penalty of a written reprimand for a first offense of failure or delay in carrying out work assignments.

11. Memorandum Jt. 19:

This memorandum dated February 23, 1987 and titled "Official Channels," stated:

"Prior to visiting with the District Director or the Deputy District Director you are required to have an appointment. You may make an appointment by requesting your immediate supervisor or the ADDI to make one for you. You must specify the reason for such appointment. If you desire an appointment and wish to by-pass this procedure, you must send a memorandum to the District Director or the Deputy District Director specifying the reason for the appointment. In an emergency situation you may call directly to the front office, requesting the District Director's secretary to schedule an appointment. You must again specify the reason for your appointment.

Failure on your part to comply with these instructions will lead to disciplinary action."

Prior to the implementation of this memorandum an open door policy had existed for agents wanting to speak with the District Director. Agents would quite often go to the District Director's office any time the District Director wasn't busy or tied up with other affairs and talk to him directly without the need to make, or state the reason for, an appointment. After this memorandum was implemented any agent wanting to speak directly with the District Director must write a memo specifying the reason for the appointment.

12. Memorandum Jt. 20:

This memorandum dated February 23, 1987 and titled "unprofessional activities," stated:

"Pranks or games such as the one conducted recently on one of our Special Agents by pouring foul material on the telephone and desk will not be tolerated [sic]. Any damage to government or personal property will lead to criminal charges.

It is inconceivable that I must write this type of memorandum about this type of unprofessionalism which normally we would associate with grade school children instead of GS-11 or GS-12 'SPECIAL AGENTS'."

Prior to the implementation of this memorandum, agents could be subjected to disciplinary action only for malicious damage to government or personal property as specified in the Respondent's Standard Schedule of Disciplinary Offenses. Also prior to the implementation of this memorandum damage to government or personal property, whether malicious or not, would not automatically lead to criminal charges being brought against the individual involved. The memorandum states that any damage will lead to criminal charges.

On February 24, 1987 Pastor distributed three additional memoranda.

13. Memorandum Jt. 21.

This memorandum dated February 24, 1987 and titled "Case signout log," stated:

"Each time you leave this office, you are required to complete the signout log showing the case, destination, departure time and the approximate return time. This log will be kept on my secretary's desk (Jenny's desk). Failure to comply with these instructions will lead to disciplinary action."

Prior to the implementation of this memorandum agents would normally notify another investigator or supervisor within the office of their intention to leave the office, what they would be doing, and when they expected to return. This practice was a voluntary practice established primarily for the benefit of anyone trying to telephone an agent while they were out. Prior to the subject change, there was no requirement to sign a case signout log nor did such a log

exist. The new policy requires all agents to complete the new log form prior to leaving the office. The agent must record on the form his name, case, destination, departure time, approximate return time and remarks.

14. Memorandum Jt. 23:

This memorandum dated February 24, 1987 and titled "Daily time sheet -- Form G 435," stated:

"Effective this date you will be required to sign in on form G-435 when arriving at the office and after completion of your tour of duty (including overtime) sign out. Failure on your part to obey these instructions will lead to disciplinary action."

Prior to the implementation of this memorandum agents would sign in and out at the office if their duties for that particular day required them to be at the office. A form entitled "INV Personnel Daily Attendance Sheet" was used for this purpose and only required a check mark be placed under the 8:00 am or 1:00 pm column to account for the agents' attendance. On days when an agent was working very early in the morning, very late in the evening, or on a weekend, they would sign this form on the following day, or whenever they next arrived in the office. Agents could also call in to the office and ask another agent to check them out for the previous day. The agents were not required to return to the office at the end of each day to sign out on this form. The subject memorandum now required agents to return to the office for the purpose of signing in or out on Form G 435. Prior to the implementation of the Memorandum, Form G 435 was not used by the investigation section.

On March 10, 1987, special agent Simmons was given a written verbal admonishment for failing to comply with this change. Agent Simmons' admonishment stated:

"By memorandum dated February 24, 1987, all agents were required to sign in/out daily on form G-435. The memorandum further advised that failure to follow the stated instructions would lead to disciplinary action.

You failed to sign in and out on February 24 and 27, 1987. As a result you were on this date verbally admonished to follow the instructions concerning use of form G-435."

15. Memorandum Jt. 27:

This memorandum dated February 24, 1987 and titled "Vehicles," stated:

"You are to have your assigned government vehicle moved to the Federal Building by close of business on Feb 25, 1987. Vehicles will now be kept at the Federal Building."

Prior to the implementation of the memorandum at least eight agents would leave their residences in the morning and drive their privately owned vehicles to the Border Patrol facility on Montana Street. They would park their privately owned vehicle inside the facility and proceed to a government vehicle that was normally assigned to each agent and parked there at the end of the previous day. Agents were verbally given permission to park their assigned government vehicles and privately owned vehicles at the Border Patrol facility by Pastor sometime shortly after June 17, 1986. The next instruction given to the agents on this subject was the subject memorandum which changed that policy. The Border Patrol facility is a secure area with a fence along the perimeter. Since the Border Patrol facility is a federal facility the agents would leave their privately owned vehicles there while at work and there was no charge for parking. Once the agents got in their assigned government vehicles they would begin their work day.

After February 24, the agents were prohibited from parking their assigned government vehicles at the Border Patrol facility by the new policy. The agents had to come to the Federal Building to get the assigned cars. Those that drove to work were not provided with secure parking areas or free parking at the downtown Service office in the Federal Building, nor are the agents reimbursed for the cost of parking in commercial parking lots in the area. There was limited free, on street, parking available.

Prior to moving to the Federal Building, the agents were located in an office on Laurel Street. Upon moving to the Federal Building, Pastor permitted the agents to continue their practice of leaving vehicles at the Border Patrol facility with the purpose of improving case production.

This permission was granted after INS El Paso Districts' June 17, 1986 letter to AFGE Local 1210, described hereinafter. Upon concluding there was no improvement Pastor decided to issue the subject memorandum requiring the government vehicles be put in the Federal Building.

In regard to the foregoing, by letter dated June 17, 1986, AFGE Local 1210 was advised that with the opening of the new Federal Building government vehicles assigned to the Investigation section were to be parked at the Federal Building or at the parking lot at the Paso del Norte Bridge. AFGE Local 1210, in a letter dated January 12, 1987, proposed employees be reimbursed for parking.

At about 2:00 pm on February 23 or 24, following the morning meetings in which Pastor distributed the subject memoranda Lawrence Augustine, Special Agent, and at that time steward of AFGE Local 1210, approached Pastor and asked Pastor if he intended to negotiate these matters with the union. Augustine's position is that the AFGE Local 1210 had a right to negotiate over the impact and implementation of these changes in policy. Pastor stated that he did not intend to negotiate with AFGE Local 1210 because he had a management right to make the changes. It is undisputed that during February 1987 AFGE Local 1210 was never notified by INS El Paso District of its intent to implement the changes announced by Pastor on February 23 and 24, 1987.

#### Discussion and Conclusions of Law

In the Complaint the General Counsel of the FLRA alleges that INS El Paso District violated Section 7116(a)(1) and (5) of the Statute by unilaterally changing conditions of employment by implementing 15 policy changing memoranda without providing notice to or bargaining with AFGE Local 1210 over decisions, procedures to be observed and appropriate arrangements for adversely affected employees as a result of the changes. The General Counsel of the FLRA however is only urging a violation of the Statute with respect to the failure to provide notice to and bargaining with AFGE Local 1210 over procedures to be observed and appropriate arrangements for adversely affected employees,<sup>6/</sup> hereinafter referred to as

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<sup>6/</sup> Counsel for the General Counsel of the FLRA abandoned its contention that there was a violation of the Statute with respect to any failure to bargain about the decisions. See pages 22-23 of the Transcript of the hearing herein and pages 15 and 33 of the brief of General Counsel for FLRA.

impact and implementation. Section 7106(b)(2) and (3) of the Statute sets forth the obligation to engage in Impact and Implementation bargaining with respect to changes in working conditions affected by management exercising its rights. Section 7106(b)(2) and (3) of the Statute provides:

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating ---

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

The FLRA in interpreting this obligation has held that when exercising its management's rights in changing working conditions, an agency still must notify the collective bargaining representative of its employees and negotiate concerning the impact and implementation of such changes, where the changes may foreseeably adversely affect employees. See Department of Health and Human Services, Social Security Administration, New York Region, 24 FLRA 403 (1986), hereinafter referred to as the Social Security Case; and Department of the Navy, Philadelphia Naval Shipyard, 18 FLRA 902 (1983).

The Statute and the FLRA recognized an agency's right to make changes when exercising its management's rights, as set forth in section 7106 of the Statute, but in addition they recognize managements' obligation to bargain with the collective bargaining representative of its employees, over the impact and implementation of such changes.

In the subject case it is assumed, and there is no contention to the contrary, that INS El Paso District was privileged and permitted to issue the 15 memoranda in question and to require its employees to comply with the requirements set forth in the memoranda. However, to the extent that 15 memoranda constituted changes in the working conditions of the investigators and some investigators might, foreseeably, be adversely affected by the changes, AFGE Local 1210 was entitled to adequate notice before the changes and an opportunity to bargain about the impact and implementation of the changes. See the Social Security Case, supra and Department of the Navy, Philadelphia Naval Shipyard, supra.

It is undisputed that AFGE Local 1210 was not given any notice of the issuance of the 15 memoranda until the memoranda were distributed to the investigators and became effective on February 23 and 24, 1987. Similarly, it is undisputed that INS El Paso District refused AFGE Local 1210's request to bargain about the impact and implementation of the memoranda.

As discussed hereinafter, I conclude that the implementation of each of the 15 memoranda constituted a change in working conditions of the investigators which foreseeably would have an adverse impact upon the investigators, which impact was more than de minimis.

In making this conclusion I note that each memorandum involved a condition of employment and that Pastor threatened to fire any agent who did not comply with any of the 12 memoranda which were distributed and took effect on February 23. Such a threatened penalty would make the impact of any change set forth in the 12 memoranda more than de minimis. Further, in considering this case it must be noted that each special agent's performance is judged by the quantity and quality of cases he or she handles.

The practice and procedures set forth in memoranda Jt. 2, Jt. 3, Jt. 6, Jt. 12, Jt. 13, Jt. 16, Jt. 19, Jt. 21, Jt. 23 and Jt. 27 involved changes in procedures which would involve expenditures of time and which reasonably and foreseeably could affect the number of cases each investigator could handle and thereby could affect each investigator's job performance appraisal.

Memorandum Jt. 10 changed working conditions because, on its face, it might be reasonably read as to prevent officials of AFGE Local 1210 from taking surveys and calling outside the District to advise counterparts that changes in the INS El Paso District were taking place. Such a limitation on union activity could have a profound affect upon how effectively the union can function in its representative capacity.

Memorandum Jt. 14 made the special agents subject to discipline if they conceal any fact, presumably be it intentionally or unintentionally. Previously agents were only subject to discipline if they concealed a material fact. This change in working conditions clearly had the effect of making agents subject to discipline for conduct which, previously was permissible.

Memorandum Jt. 15 required any special agent to set forth in writing the reasons he did not wish to work with another agent. Previously management could express his reasons orally. The requirement of the reducing the reasons to writing could foreseeably have an adverse effect on the



employees, because it takes time to write such a memorandum, which would affect the time spent producing cases, but also, and more importantly, it is apparent that if such memorandum were not kept confidential it could adversely affect the work performance of both agents involved, especially if they did ultimately have to work together.

Memorandum Jt. 20 states any damage to government and personal property would lead to criminal charges. Previously only malicious damage to such property could lead to discipline, not necessarily criminal changes. Such a change could reasonably and foreseeably have a substantially adverse affect upon an employee who accidentally or insignificantly damaged some property.

Memorandum Jt. 19 requiring an appointment, etc. for meeting with the District Director or his Deputy could, again foreseeably affect the ease with which representatives of AFGE Local 1210 could resolve labor-relations problems. This memorandum does not make it clear that it does not apply to such situations. Accordingly, negotiations about the impact and implementation of this memorandum would have resolved any such confusion.

Memorandum Jt. 27 requiring the parking of government vehicles in the Federal Building, whereas previously they could be parked at the Border Patrol facility, required some agents, who drive to work, to pay for parking or to park in insecure and unsafe areas, sometimes at night. Previously the agents could keep their personal cars at the Border Patrol facility, which was both free, secure and well lit.

Memorandum Jt. 5 applies on its face not only to vehicles, but also refers to an attitude displayed by agents to case work and reports and subjects the agents to discipline. But the memorandum is vague and unclear as to what, precisely, the employees should or should not do and what will subject them to discipline. The issuance of such a memorandum clearly appears to be changing existing conditions to some new situation, but without any definiteness. In such a situation AFGE Local 1210 had a right to bargain about the impact and implementation of such a change.

In light of all the foregoing I conclude that the issuance and implementation of the memoranda issued on February 23, and 24, 1987 constituted unilateral changes in working conditions which foreseeably had adverse impacts on the special agents which impacts were more than de minimis.

See the Social Security Case, supra; and Department of the Air Force, Headquarters, Air Logistics Command, Wright-Patterson Air Force Base, Ohio, 25 FLRA 541 (1987).

INS El Paso District argues that management had a right to make the subject changes, but it apparently fails to recognize that it is precisely in such cases that it must bargain about the impact and implementation of such changes. Further, it argues the changes are good and efficient, again failing to recognize that it still must bargain about the impact and implementation of the changes.

Accordingly INS El Paso District was obligated by Section 7116(a)(1) and (5) of the Statute to provide adequate notice to AFGE Local 1210 of the changes and, upon request, to bargain with AFGE Local 1210 concerning the impact and implementation of the changes.<sup>7/</sup> INS El Paso District did not provide adequate notice and did not, when requested, bargain with AFGE Local 1210 and therefore INS El Paso District violated Section 7116(a)(1) and (5) of the Statute.

Finally with respect to the remedy, it is clear that INS El Paso District willfully refused AFGE Local 1210's request to bargain about the impact and implementation of the memoranda, which changes had a substantial impact on employees. Further there was no showing that a status quo ante remedy would disrupt or impair the efficiency of the agency. See Federal Correctional Institution, 8 FLRA 604 (1982). I therefore conclude that a status quo ante remedy is appropriate in this case.

Having found and concluded that INS El Paso District violated Section 7116(a)(1) and (5) of the Statute, I recommend that the FLRA issue the following:

#### ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby Orders that the Department of Justice, United States Immigration and Naturalization Service, El Paso District Office shall:

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<sup>7/</sup> I need not decide whether INS El Paso District was obliged to bargain concerning the substance of any of the changes.

1. Cease and desist from:

(a) Failing and refusing to bargain with American Federation of Government Employees, AFL-CIO, Local 1210, the collective bargaining representative of its employees, concerning the procedures to be observed in implementing the changes in conditions of employment set forth in 15 memoranda issued on February 23 and 24, 1987, or any other changes in conditions of employment, and appropriate arrangements for any employees adversely affected by such changes.

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

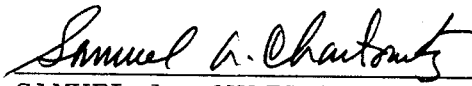
2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of American Federation of Government Employees, Local 1210, AFL-CIO, the collective bargaining representative of its employees, repeal the changes set forth in the 15 memoranda issued on February 23 and 24, 1987.

(b) Upon request bargain with American Federation of Government Employees, AFL-CIO, Local 1210, about the procedures to be observed in implementing any changes in conditions of employment, and appropriate arrangements for any employees adversely affected by any such changes.

(c) Post in its El Paso District Office facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official, 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 by any other materials.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.



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SAMUEL A. CHAITOVITZ  
Administrative Law Judge

Dated: June 15, 1988  
Washington, D.C.

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY  
AND TO EFFECTUATE THE POLICIES OF THE  
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to bargain with American Federation of Government Employees, AFL-CIO, Local 1210, the collective bargaining representative of our employees, concerning, the procedures to be observed in implementing the changes in conditions of employment set forth in 15 memorandum issued on February 23 and 24, 1987, or any other changes in conditions of employment, and appropriate arrangements for any employees adversely affected by such changes.

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

WE WILL upon request of American Federation of Government Employees, AFL-CIO, local 1210, the collective bargaining representative of our employees, repeal the changes in working conditions set forth in the 15 Memoranda issued on February 23 and 24, 1987.

WE WILL notify and upon request bargain with American Federation of Government Employees, AFL-CIO, Local 1210, concerning the procedures to be observed in implementing any changes in conditions of employment, and appropriate arrangements for any employees adversely affected by such changes.

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(Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VI, whose address is: Federal Office Building, 525 Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214) 767-4996.