

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

PORTSMOUTH NAVAL SHIPYARD
PORTSMOUTH, NEW HAMPSHIRE

Respondent

and

PORTSMOUTH FEDERAL EMPLOYEES
METAL TRADES COUNCIL

Charging Party

Case Nos. 1-CA-10493
BN-CA-20137

Mr. Charles H. Cummings, Jr.
For the Respondent

Peter F. Dow, Esquire
For the General Counsel

Mr. Robert Burleigh
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.^{1/}, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns alleged § 16(a)(1), (2), (4) and (5) violations based on whether Respondent lawfully changed unilaterally a practice of issuing incidental licenses to motor vehicle operators, whether Respondent properly revoked the incidental motor vehicle licenses of two motor vehicle operators, and whether a supervisor made a disparaging statement.

^{1/} For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(a)(5) will be referred to, simply, as, "§ 16(a)(5)".

This case was initiated by a charge filed in Case No. 1-CA-10493 on September 26, 1991 (G.C. Exh. 1(A)) and by a charge filed in Case No. BN-CA-20137 on November 5, 1991 (G.C. Exh. 1(B)). The Consolidated Complaint and Notice of Hearing issued on May 21, 1992 (G.C. Exh. 1(E)) and set the matter for a settlement call on July 6, 1992. By Notices dated August 31, 1992 (G.C. Exhs. 1(G) and (H)), the hearing was set for October 23, 1992, at a place to be determined; by Notices dated September 17, 1992 (G.C. Exhs. 1(I) and (J)) the place of hearing was fixed; and on October 13, 1992, General Counsel moved, and the other parties did not object, that the hearing in this and other cases be rescheduled for October 22, 1992 (G.C. Exh. 1(K)), pursuant to which a hearing was duly held on October 22, 1992, in Portsmouth, New Hampshire, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, November 23, 1992, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, on motion of Respondent, to which the other parties did not object, for good cause shown, to January 22, 1993. Respondent and General Counsel each timely mailed a brief, received on, or before, January 27, 1993, which have been carefully considered. Upon the basis of the entire record,^{2/} including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings of Fact

1. The Portsmouth Federal Employees Metal Trades Council (hereinafter, "Union") is the certified exclusive representative of a unit of employees appropriate for collective bargaining at the Portsmouth Naval Shipyard, Portsmouth, New Hampshire (hereinafter, "Respondent").

2. It is conceded, and the record shows without contradiction, that for many years prior to 1991 Respondent issued incidental government motor vehicle identification cards (OF-346) to employees who were full-time motor vehicle

^{2/} Motion of General Counsel, to which there was no objection, to substitute amended General Counsel Exhibit 1 for General Counsel Exhibit 1 received at the hearing (G.C. Exh. 1(A) through 1(G)) is granted and the amended General Counsel Exhibit 1(A) through 1(K) is hereby received and substituted. The amended exhibit adds four items (G.C. Exhs. 1(H) - (K)) which were inadvertently omitted from the formal documents.

operators. An incidental government motor vehicle identification card permits an employee to operate designated classifications, or types, of motor vehicles, solely on government premises, for which the employee does not hold a state license. Thus, Ms. Donna Lee Miller, who had a Class B (Light Commercial) New Hampshire driver's license (Tr. 163), was hired in about 1977 as a Motor Vehicle Operator (Tr. 162). She had an incidental identification card from the time she started (Tr. 164) and in about 1987, her incidental identification card was endorsed to permit operation, on the base, of tractor trailers (Tr. 164, 165). In like manner, Mr. Donald J. Roy, who has a Maine Class B drivers license (G.C. Exh. 6), and who became a Motor Vehicle Operator in May, 1980 (Tr. 70), in about 1988 was issued an incidental identification card endorsed to permit operation, on the base, of tractor trailers (Tr. 81, 82). And Mr. Guy L. Lavoie, who has a Class C Maine operator's license (G.C. Exh. 17), became a Motor Vehicle Operator in April, 1990, and on April 24, 1990, was issued an incidental identification card which was endorsed to permit him to operate, on the base, a 5 ton dump truck (G.C. Exh. 15) which exceeded the size vehicle for which he was licensed by the State of Maine (Tr. 126).^{3/}

3/ Actually, Mr. Lavoie's April 24, 1990, OF-346 (incidental identification card endorsement) did not authorize operation of any equipment for which he did not hold a valid state license, as the license specifically stated,

"Void unless accompanied by a valid state license for the type and size of equipment being operated" (G.C. Exh. 15).

Strictly speaking, Mr. Lavoie's revised OF-346, issued in April, 1992 (Tr. 129), which deleted equipment over 2 tons (G.C. Exh. 16), was no more restrictive than his April 24, 1990, OF-346 since each specifically stated that the OF-346 was void unless accompanied by a valid state license for the type and size of equipment being operated. (The record does not show whether Ms. Miller's 1987 OF-346 or Mr. Roy's 1988 OF-346 bore the same qualification. Assuming they did, the comments as to Mr. Lavoie's OF-346 would apply equally to their's).

Notwithstanding the limitation on the OF-346, Respondent directed Mr. Lavoie to operate the 5 ton dump truck until April 1, 1992 (Tr. 128), which was the date stated in implementing regulations for the Commercial Motor Vehicle Safety Act of 1986 (Res. Exh. 4), 49 C.F.R. § 383.23, as
(continued...)

3. Mr. Robert Joseph Landry, now Foreman, Motor Vehicle Operations (Tr. 28), from December, 1982, until December, 1990, had been in charge of Respondent's training and licensing of motor vehicle operators (Tr. 28-29) and he continued to issue incidental identification cards to motor vehicle operators (MVO) for operation, on base, of equipment for which they had no state license, after issuance of the Naval Facilities Engineering Command manual entitled "Management of Transportation Equipment", identified as "NAVFAC P-300", and dated June 1989 (Cover sheet, Res. Exh. 9; pertinent text, G.C. Exh. 3) (hereinafter, "P.300"). The June, 1989, edition is the most recent edition of P.300 and was in effect at Respondent's shipyard at all times after its issuance (Tr. 31-32, 50, 205).

4. Mr. Landry was succeeded by Mr. Robert C. Seavey as the head of Respondent's training and licensing of motor vehicle operators. Mr. Seavey took over on March 2, 1991 (Tr. 271) and sometime after his arrival made an audit (Tr. 256-257) of the MVO's 346's and found that two MVO's had been issued an endorsement^{4/} permitting operation on the base

3/ (...continued)
follows:

"383.23 Commercial driver's license.

"(a) General rule. (1) Effective April 1, 1992, no person shall operate a commercial motor vehicle unless such person has taken and passed written and driving tests . . . for the commercial motor vehicle that person operates or expects to operate.

"(2) Effective April 1, 1992 . . . no person shall operate a commercial motor vehicle unless such person possesses a CDL . . . issued by his/her State or jurisdiction of domicile." (49 C.F.R. § 383.23(a)(1) and (2), Res. Exh. 5)
(Emphasis supplied).

4/ I am fully aware that the OF-346 is not a license, but is, rather, an identification card. (G.C. Exh. 3, p. 129, Figure 3-6). Compare: NAVFAC 11260/2, "Construction Equipment Operator License", Figure 3-7, id.

(continued...)

of tractor trailers. Because he believed the practice to be in violation of P.300 he so informed his superior, Mr. Jeffrey G. Tackett, Head of Training Operations Branch (Res. Exh. 8; Tr. 210, 211, 249). Mr. Tackett told Mr. Seavey to bring him a copy of P.300 and explain how Respondent was in violation and Mr. Seavey did so and, after Mr. Tackett reviewed the P.300 with Mr. Seavey, he asked Mr. Seavey to prepare a list of all MVOs and to identify their state CDL license qualification in comparison with their 346's, which he also did (Res. Exh. 11; Tr. 258).^{5/} Mr. Tackett further instructed Mr. Seavey to contact other Naval Facilities to find out what they were doing (Tr. 229, 261) and his survey, set forth on Respondent Exhibit 12, showed that each was complying strictly with P.300 (Tr. 262). After reviewing everything, including Mr. Tackett's survey (Tr. 263), Mr. Tackett on July 24, 1991, advised the Superintendent of Transportation, Mr. Emery Clough (Tr. 72), in part, as follows:

"1. During a recent record review of Class A licensed operators it was discovered that two Shop 02 employees, D. Miller . . . and D. Roy . . . were not in compliance with government and shipyard licensing requirements. . . .

"2. Code 980 has no record that D. Miller or D. Roy possess a valid Class A state license. It is requested that upon receipt of this memo that both individuals surrender their Class A government licenses . . . After obtaining a valid Class A state operators license, Code 980 will retest and reissue a Class A government license. . . ." (Res. Exh. 7).

4/ (...continued)

Nevertheless, the parties and the witnesses have treated the endorsements on the OF-346 as a "license" and for the sake of consistency I shall do likewise.

5/ A Class "A" CDL is required to operate a tractor-trailer; and a Class "B" CDL is required to operate a 5-ton dump truck. Ms. Miller and Mr. Roy, each of whom had Class B CDL's, were the two identified as not in compliance with P.300 (Tr. 225, 257). Mr. Lavoie on Respondent Exhibit 11 is shown to have had a Class "B" CDL and Mr. Seavey testified, ". . . I took what was in his record out and that's what come out of his record." (Tr. 278); but we know that as of September 28, 1992, Mr. Lavoie held only a Class "C" Maine CDL, and he testified that in 1990, when he first was issued his 346, he had only a Maine "basic license", then called a Class 3 license (Tr. 125).

5. Mr. Richard Draper, First Vice President of the Union, testified that at a labor-management meeting with Mr. Jack Clines, Group Superintendent of Public Works, in July, 1991, Mr. Clines told him that Mr. Roy and Ms. Miller had "an incidental license for tractor trailer and that he had been told that that was in violation of the P.300. . . ." (Tr. 59) and that they were probably going to have to pull them.^{6/} Mr. Draper stated that he responded,

" . . . I says, well, I didn't see where it needed to be done. I didn't feel it was in violation of the P.300 and they'd been doing it for the 17 years that I'd been in that shop." (Tr. 60).

Mr. Draper testified that Mr. Clines then stated that,

" . . . he wasn't in full agreement with that at that time and that he was going to go back and look and see if he did in fact have to do that and that he would get back to me." (Tr. 60).

Mr. Draper further testified that Mr. Clines never got back to him, nor did Respondent ever notify the Council [Union] that it intended to cease the practice of issuing incidental motor vehicle operator licenses to motor vehicle operators (Tr. 60).

6. Mr. Roy testified that in mid-August, 1991, Mr. Clines told him, ". . . that there was a possibility that I would have to give up my incidental driver's license." (Tr. 105); that Mr. Clines gave him General Counsel's Exhibit 3, excerpts from the P.300 (Tr. 106); and that Mr. Clines, ". . . said that this [P.300] was the reason why I was in the process of having my incidental tractor trailer driver's license removed." (Tr. 106-107).

7. Mr. Roy testified that on September 3, 1991, his incidental license to drive a tractor trailer was revoked (Tr. 107-108) and he was issued a new OF-346 (G.C. Exh. 14) which does not contain, "the incidental license" that he had

^{6/} Mr. Tackett's memorandum of July 24, 1991, was sent to various offices, identified only by Code. It is possible, indeed probable, that a copy went to Mr. Clines; but Mr. Draper stated that Mr. Clines said he had been informed by a Mr. Richard Knight, a supervisor in the "training code, instructor's Code" (Tr. 59), presumably, the supervisor under Mr. Tackett, responsible, after May, 1991, for the monitoring of motor vehicle qualifications and licensing requirements (Tr. 206-207, 242).

held up to that point to operate a tractor-trailer (Tr. 113). Mr. Roy stated that Mr. Seavey told him the reason was the P.300, ". . . that was what is restricting me from operating a tractor trailer in the Navy Yard." (Tr. 108).

Ms. Miller testified that her incidental license to operate a tractor-trailer was taken away "August-September of '91. . . ." and that Mr. Seavey told her, ". . . that in the P.300 it stated that if you didn't have a valid state license to drive the classification you couldn't have a government license for that class" (Tr. 166). On the basis of the Complaint, the Answer and the testimony, I find, for the purpose of this proceeding, that Mr. Roy's and Ms. Miller's incidental government licenses to operate, on base, a tractor trailer were revoked on September 3, 1991, and I further find, for the purpose of this proceeding, that on September 3, 1991, Respondent ceased issuing incidental motor vehicle operator licenses to MVO's.

8. The pertinent provisions of Law and Regulations consist, inter alia, of the following:

The Commercial Motor Vehicle Safety Act of 1986, P.L. 99-570, Title XII, § 12002, et seq., 100 Stat. 3207-170, et seq., may be found at 49 U.S.C.A. App. § 2701, et seq. (Res. Exh. 4):

§ 2701. "Limitation on number of driver's licenses

"Effective July 1, 1987, no person who operates a commercial motor vehicle shall at any time have more than one driver's license. . . ."

§ 2704. "Testing of operators

"(a) Establishment of minimum federal standards

"Not later than July 15, 1988, the Secretary shall issue regulations to establish minimum Federal standards for testing and ensuring the fitness of persons who operate commercial motor vehicles. Such regulations -

"(1) shall establish minimum Federal standards for written tests and driving tests of persons who operate such vehicles;

"(2) shall require a driving test of each person who operates or will operate a commercial motor vehicle in a vehicle which is

representative of the type of vehicle such person operates or will operate;

.. . .
"(b) Requirement for operation of CMV

"(1) **General Rule**

". . . no person may operate a commercial motor vehicle unless such person has taken and passed a written and driving test to operate such vehicle which meets the minimum Federal standards established by the Secretary under subsection (a) of this section.

.. . .
"(3) **Effective date**

"Paragraph (1) shall take effect on such date as the Secretary shall establish by regulation. Such date shall be as soon as practicable after October 27, 1986, but not later than April 1, 1992.

.. . .
"2715. **Regulations**

"(a) **Authority to issue**

"The Secretary may issue such regulations as may be necessary to carry out this Chapter.

.. . .
"2716. **Definitions**

"For purposes of this chapter -

.. . .
"(2) **Driver's license**

"The term "driver's license" means a license issued by a State to an individual which authorizes the individual to operate a motor vehicle on highways.

. . . .

"(4) Commercial driver's license

"The term "commercial driver's license" means a license issued by a State to an individual which authorizes the individual to operate a class of commercial motor vehicle.

"(5) Motor vehicle

"The term "motor vehicle" means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power used on highways, except that such term does not include a vehicle, machine, tractor, trailer, or semitrailer operated exclusively on a rail or custom harvesting farm machinery.

"(6) Commercial motor vehicle

"The term "commercial motor vehicle" means a motor vehicle used in commerce to transport passengers or property -

(A) if the vehicle has a gross vehicle weight rating of 26,001 or more pounds or such a lesser gross vehicle weight as the Secretary determines appropriate by regulation but not less than a gross vehicle weight of 10,001 pounds;

. . . .

"(8) Employee

"The term "employee" means an operator of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle) who is employed by an employer.

"(9) Employer

"The term "employer" means any person (including the United States, a State, or a political subdivision of a State) who owns or leases a commercial motor vehicle or assigns employees to operate such a vehicle.

"(13) Secretary

"The term "Secretary" means the Secretary of Transportation." (Res. Exh. 4, 49 U.S.C.A. App. § 2701, et seq.)^{7/}

7/ The operation of motor vehicles is now governed by the Commercial Motor Vehicle Safety Act of 1986 and the Secretary of Transportation has been authorized and designated as the person to issue regulations to carry out the Act. Neither the Department of Defense Regulation, DOD 4500.36-R, issued July, 1981 (Res. Exh. 14) nor 5 C.F.R. Part 930, Subpart A - Motor Vehicle Operators, issued in 1985, and/or the Federal Personnel Manual, Chapter 930 (Res. Exh. 13) (issued in 1985) are regulations issued under the Commercial Motor Vehicle Safety Act of 1986, which is now the governing statute, and their validity is wholly tangential to the Commercial Motor Vehicle Safety Act of 1986 and the regulations issued thereunder, 49 C.F.R. §§ 383.1, et seq. (Res. Exh. 5), and, accordingly and have not been set forth. For example, §§ 930.104 and .114 are fully applicable. These sections provide as follows:

§ 930.104 Objectives.

"This subpart requires that agencies
(a) establish an efficient and effective system to identify those Federal employees who are qualified and authorized to operate Government-owned or -leased motor vehicles while on official Government business; and (b) periodically review the competence and physical qualifications of these Federal employees to operate such vehicles safely."
(5 C.F.R. § 930.104)

§ 930.114 Reports required.

"An agency will submit to OPM, on request (a) a copy of agency orders and directives issued in compliance with this subpart; and (b) such other reports as OPM may require for adequate administration and evaluation of the motor vehicle operator program." (5 C.F.R. § 930.114).

(continued...)

The regulations appear at 49 C.F.R. Part 383 (Res. Exh. 5):

§ 383.5 Definitions.

"As used in this part:

. . . .

"*Commercial driver's license (CDL)* means a license issued by a State or other jurisdiction . . . to an individual which authorizes the individual to operate a class of a commercial vehicle.

. . . .

"*Commercial motor vehicle (CMV)* means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle -

"(a) Has a gross combination weight rating of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds; or

"(b) Has a gross vehicle weight rating of 26,001 or more pounds; or

7/ (...continued)

On the other hand, the definition of "Motor vehicle" in § 930.102 (5 C.F.R. § 930.102) is inconsistent with the definitions of "Motor vehicle" and "Commercial motor vehicle" both in the Statute, 49 U.S.C.A. App. § 2716 (5) and (6) and in the Regulations, 49 C.F.R. § 383.5, and no longer is of any effect, i.e., has been superseded and rendered null and void.

As a matter of interest, however, 5 C.F.R. § 930.102 made it unmistakable that a MVO was not an incidental operator,

"'Incidental operator' means an employee, other than one occupying a position officially classified as a motor vehicle operator, who is required to operate a Government-owned or - leased motor vehicle to properly carry out his or her assigned duties."
(5 C.F.R. § 930.102)

See, to like effect, FPM 1-2(7) (Res. Exh. 13).

. . . .

"*Driver's license* means a license issued by a State or other jurisdiction, to an individual which authorizes the individual to operate a motor vehicle on the highways.

. . . .

"*Employee* means any operator of a commercial motor vehicle, including full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent, owner-operator contractors (while in the course of operating a commercial motor vehicle) who are either directly employed by or under lease to an employer.

"*Employer* means any person (including the United States, a State, District of Columbia or a political subdivision of a State) who owns or leases a commercial motor vehicle or assigns employees to operate such a vehicle.

"*Endorsement* means an authorization to an individual's CDL required to permit the individual to operate certain types of commercial motor vehicles.

. . . .

"*Motor vehicle* means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power used on highways, except that such term does not include a vehicle, machine, tractor, trailer, semitrailer operated exclusively on a rail.

. . . .

"*Representative vehicle* means a motor vehicle which represents the type of motor vehicle that a driver applicant operates or expects to operate.

. . . .

"*State of domicile* means that State where a person has his/her true, fixed, and permanent home and principal residence and to which he/she has the intention of returning whenever he/she is absent.

. . ."

§ 383.21 Number of drivers' licenses.

"(a) No person who operates a commercial motor vehicle shall at any time have more than one driver's license.

§ 383.23 Commercial driver's license.

"(a) *General rule.* (1) Effective April 1, 1992, no person shall operate a commercial motor vehicle unless such person has taken and passed written and driving tests which meet the Federal standards . . . for the commercial motor vehicle that person operates or expects to operate.

"(2) Effective April 1, 1992 . . . no person shall operate a commercial motor vehicle unless such person possesses a CDL which meets the standards . . . issued by his/her State or jurisdiction of domicile.

. . ." (49 C.F.R. § 383.5,
et seq., Res. Exh. 5).

I take administrative notice of 49 C.F.R. § 390.3(b) which provides,

"(b) The rules in part 383, Commercial Driver's License Standards; Requirements and Penalties, are applicable to every person who operates a commercial motor vehicle, as defined in § 383.5 of this subchapter, in interstate or intrastate commerce and to all employees of such persons." (49 C.F.R. § 390.3(b)).

Naval Facilities Engineering Command's "Management of Transportation Equipment", P.300, was issued in June, 1989 (Cover Sheet, Res. Exh. 9; text, G.C. Exh. 3):

"3.8.2 Applicability. The policy and procedures set forth herein are applicable to all naval activities, afloat and ashore, including ships, and will include military and civilian operators of all motor vehicles and construction/weight handling equipment (WHE) . . . Commanding Officers of shore activities and ships have authority to issue U.S. Government Motor Vehicle Operator's Identification Card

(Optional Form 346) under the procedures prescribed herein

. . . .

"3.8.4 Motor Vehicle Operator's Testing and Licensing Procedures. The regulations issued by the U.S. Office of Personnel Management govern all agencies in authorizing their civilian employees to operate Government owned/leased vehicles for official purposes and are set forth in Chapter 930 of the Federal Personnel Manual. In addition, activities shall comply with the procedures prescribed herein for military and civilian operators, and with current regulations prescribed in the following publications as applicable to all affected vehicle operators.

a. Management, Acquisition and Use of Motor Vehicles (DOD 4500.36-R).

b. Commercial Motor Vehicle Safety Act of 1986 (PL 99-570).

c. Driver's Handbook, Ammunition, Explosives, and Dangerous Articles (NAVSEA OP-2239).

d. Navy Transportation Safety Handbook (NAVSEA OP-2165, Vol. I.).

e. U.S. Department of Transportation, Federal Highway Administration Motor Carrier Safety Regulation, 49 Code of Federal Regulations, Parts 300-999.

f. State and local laws and regulations.

g. Navy Driver's Handbook (NAVFAC MO-403).

"In addition to the foregoing publications and the regulations prescribed herein, Commanding Officers of activities or installations may prescribe more stringent or additional qualifications, requirements, examinations, or certifications as may be required in testing personnel for issuing the OF-346, or for suspending or revoking the OF-346. Suspension or revocation of the OF-346 for civilian operators, however, shall be consistent with the Federal Personnel Manual.

. . . .

"3.8.6 Operating Government-Owned/Leased Motor Vehicles on Official Business.

"a. Vehicles up to 10,000 Pounds GVW.
(Includes Truck Van/Carryall EC 0330)

(1) Civilian:

(a) Personnel required to operate a motor vehicle to carry out their assigned duties (Incidental Drivers) may operate a motor vehicle both on and off base when in possession of a valid state (or host nation, if applicable) license for the type and class of vehicle to be operated.

(b) Incidental Drivers not possessing a valid state license may be issued an OF-346 to operate a motor vehicle on base only. The following notation shall appear on the OF-346; "VALID FOR USE ON BASE ONLY".

(c) When the requirement for employment or their primary responsibility is to operate motor vehicles (e.g., Motor Vehicle Operator (MVO)), they shall have in their possession a valid state (or host nation, if applicable) license for the type and class of vehicle to be operated either on or off base.

. . . .

"b. Vehicles Over 10,000 Pounds GVW; Buses Having a Capacity of more than 12 Seated Occupants; Emergency Service Vehicles; and Special Purpose Vehicles.

(1) Civilian:

. . . .

(b) All operators of motor vehicles (full-time regular and incidental), not restricted to on base only driving, shall have in their possession a valid state (or host nation, if applicable) license and a valid

OF-346 for the type and class of motor vehicle to be operated either on or off base. The following notation shall appear on the OF-346; "VOID UNLESS ACCOMPANIED WITH A VALID STATE OPERATOR'S LICENSE FOR CLASS OF VEHICLE BEING OPERATED."

. . . .

"c. Basic Summary of Licensing Requirements.

(1) Vehicles up to 10,000 lbs GVW. (Includes Truck Van/Carryall, EC 0330)

(a) Civilian Drivers

Incidental Drivers	On base	OF-346 ^{1/} or Valid state license
	Off base	Valid state license
Motor Vehicle Operators	On base	Valid state license
	Off base	Valid state license

"1/ When only an OF-346 is used for on base operation, the OF-346 shall be annotated 'VALID FOR USE ON BASE ONLY'. ""

. . . .

(2) Vehicles over 10, 000 lbs GVW; Buses having a capacity of more than 12 seated occupants; Emergency Service Vehicles; and Special Purpose Vehicles.

(a) Civilian Drivers

. . . .

Motor Vehicle Operators	On base	OF-346 ^{2/} <u>and</u> valid state license for the size and type vehicle being operated.
	Off base	OF-346 ^{2/} <u>and</u> valid

state license for
the size and type
vehicle being
operated.

"2/ OF-346 shall be annotated 'VOID UNLESS
ACCOMPANIED WITH A VALID STATE OPERATOR'S LICENSE
FOR CLASS OF VEHICLE BEING OPERATED' "

9. Mr. Roy had been Chief Steward in Local 156, Operating Engineers, since about April, 1990 (Tr. 70) and prior to that a Steward since about 1984 (Tr. 71). Mr. Robert N. Mikan has been his immediate supervisor for roughly six years, or sometime in 1986 (Tr. 71) or 1987 (Tr. 283). Mr. Roy became a MVO in May, 1980 (Tr. 70) as a WG-6 and on July 12, 1987, became a WG-7 MVO (Tr. 69); and in 1988 Mr. Landry issued him an incidental motor vehicle operator's license which entitled him to drive a tractor trailer on base (Tr. 81-82). Mr. Roy stated that for the last year he has spent full time, i.e., 40 hours per week, on official time (Tr. 91) and that prior to that, as Chief Steward for Local 156 for about a year and a half, he had spent about four hours per day on official time, i.e., about 20 hours per week (Tr. 91, 92). Mr. Roy has filed unfair labor practice charges (G.C. Exhs. 7, 8, 9 and 13) and a grievance (G.C. Exh. 10). Mr. Roy stated that about once a month after 1988, when he was issued his incidental license, he had been offered overtime to drive a tractor trailer on base but had never accepted (Tr. 88, 90).

10. Ms. Miller has been a member of the Union for 12 or 13 years (Tr. 163); Mr. Mikan is also her foreman (Tr. 163); and she filed a grievance in the summer of 1990 (Tr. 163). In December, 1990, she stated that she was given a temporary 30 day promotion to MVO WG-8^{8/} and during that period operated a tractor trailer on base daily (Tr. 165).

8/ The FPM, 1-10a. (2) provided.

"(2) Identification cards may be issued without regard to the qualification requirements in section 1-6 [inter alia, "the possession of a valid State license"], 1-7, and 1-8 in the following situations:

- To employees in operator positions under temporary employment or detail not exceeding 1 month." (Res. Exh. 13, 1-10a. (2))

11. When Mr. Landry left the job as head of Respondent's motor vehicle licensing, he was given as a departing gift a somewhat lewd and mildly obscene pencil holder which he has kept on his desk (G.C. Exh. 4; Tr. 42). Sometime, when Mr. Landry was on leave, someone wrote "Roy Boy" on the pencil holder (Tr. 43). Mr. Landry stated he did not know who had done it (Tr. 43); that he tried without success to remove the inscription; (Tr. 47); and that, from his point of view, it had no relation to Mr. Roy's status as Chief Steward (Tr. 46-47).

12. Mr. Thomas Wood, a WG-8 tractor trailer driver (Tr. 143), testified that on September 12, 1991, he overheard Mr. Mikan say that, "Don Roy shouldn't be promoted to a WG-8 position because he spent a lot of time up at the union hall and he didn't work any overtime and he never took any road trips." (Tr. 145) Mr. Wood further testified that he wrote a memorandum at 4:05 p.m. on September 12, 1991, concerning the incident (G.C. Exh. 17-A; Tr. 148-149).

Mr. Mikan testified that he never made such a statement on September 12, 1991, or on any other day (Tr. 283).

13. Mr. Roy had a Maine learner's permit to operate a tractor trailer (Tr. 281) and Mr. Seavey, for several weeks before Mr. Roy took the test in October, 1991, permitted Mr. Roy to practice on the weekends with a licensed tractor trailer driver (Tr. 265); Mr. Seavey took the tractor trailer Mr. Roy was going to use for the test to the shop and had it carefully gone over in Respondent's shop to make certain it would pass inspection; and Mr. Seavey personally went to Scarborough, Maine, with Mr. Roy for the test and permitted Mr. Roy to drive to get a feel for the truck and to give him highway driving experience (Tr. 268).

14. Respondent's last MVO WG-8 vacancy was in 1989 and, to be eligible, required a state Class 1 or Class A license (Res. Exh. 16; Tr. 286, 287).

CONCLUSIONS

The issuance of incidental licenses to motor vehicle operators (MVOs), permitting the operation, on base only, of vehicles for which they held no state license, was a condition of employment which afforded overtime opportunities as well as operating experience which could lead to future advancement. The practice had existed for many years, was a long and well established condition of employment, and, ordinarily, there would be no doubt whatever that Respondent could not unilaterally change such established condition of employment;

but the practice had become unlawful. The Commercial Motor Vehicle Safety Act of 1986 (hereinafter, "Act") wrought far reaching changes in the licensing of commercial vehicle drivers. Thus, the Act, inter alia, specifically included the United States as an employer; excluded from the definition of "motor vehicle" only vehicles operated exclusively on a rail or custom harvesting farm machinery; further defined "commercial motor vehicle" by gross vehicle weight; provided for the establishment of minimum federal standards for testing by the states; provided that effective July 1, 1987, no person who operates a Commercial Motor Vehicle (CMV) may have more than one driver's license; provided that every person who operates a CMV must hold a state license to operate a class of motor vehicle; and authorized the Secretary of Transportation to issue regulations to carry out the provisions of the Act (49 U.S.C. App. § 2701, et seq.). The Secretary's regulations (49 C.F.R. Part 383, Res. Exh. 5) reflected the provisions of the Act and further provided that "endorsement" means an authorization to an individual's CDL required to permit the individual to operate certain types of commercial motor vehicles (49 C.F.R. § 383.5); prohibited any person who operates a CMV from having more than one driver's license (49 C.F.R. § 383.21); and provided that effective April 1, 1992, no person shall operate a CMV unless such person has taken and passed written and driving tests which meet the federal standards for the CMV that person operates or expects to operate (49 C.F.R. § 383.23). Finally, the Navy's P.300, issued in June, 1989, plainly rendered the prior practice unlawful.

Thus, P.300 specifically provides:

"a. Vehicles up to 10,000 Pounds GVW.

(1) Civilian:

. . . .

"(c) When the requirement for employment or their primary responsibility is to operate motor vehicles (e.g., Motor Vehicle Operator (MVO)), they shall have in their possession a valid state . . . license for the type and class of vehicle to be operated either on or off base." (P.300, § 3.8.6 a.(1)(c); G.C. Exh. 3)).

"b. Vehicles over 10,000 Pounds GVW

(1) Civilian:

. . . .

"(b) All operators of motor vehicles . . . not restricted to on base only driving, shall have in their possession a valid state . . . license and a valid OF-346 for the type and class of motor vehicle to be operated either on or off base. The following notation shall appear on the OF-346; 'VOID UNLESS ACCOMPANIED WITH A VALID STATE OPERATOR'S LICENSE FOR CLASS OF VEHICLE BEING OPERATED.'" (P.300, id., § 3.8.6 b.(1)(b); G.C. Exh. 3)).

General Counsel does not question that P.300 is a regulation; P.300 states that, "The policy and procedures set forth herein are applicable to all naval activities, afloat and ashore, including ships, and will include military and civilian operators of all motor vehicles . . ." (§ 3.8.2; G.C. Exh. 3) and that, ". . . In addition, activities shall comply with the procedures prescribed herein for military and civilian operators . . ." (§ 3.8.4); and § 3.8.4 specifically describes P.300 as "the regulations prescribed herein". Accordingly, I conclude that P.300 is a regulation of the Department of the Navy within the meaning of Article 1 of the Agreement of the parties (Res. Exh. 1, Art. 1, p. 2).

It is true, as General Counsel states (General Counsel's Brief, p. 17), 49 C.F.R. § 383.23 [Commercial driver's license (CDL)], was not effective until April 1, 1992; but other provisions of the DOT regulations were effective earlier. For example, § 383.21 was effective either when issued initially on July 21, 1988, when amended on May 23, 1989, or January 1, 1990, when an exception, not shown to have been applicable here, expired. Accordingly, at the very latest, beginning January 1, 1990, "No person who operates a commercial motor vehicle shall at any time have more than one driver's license." This rendered unlawful the practice of Respondent's MVOs having a state license for certain purposes and a government "license", i.e., OF-346, for other purposes. The Act's definition of "motor vehicle" (49 U.S.C.A. App. § 2716 (5)) and the definition in the implementing regulations (49 C.F.R. § 383.5) long prior to April 1, 1992 (i.e., either when issued on June 1, 1987, or amended on July 21, 1988, October 4, 1988, or October 3, 1989) had superseded the definition of "motor vehicle" in 5 C.F.R. § 930.102 which excluded, inter alia, a vehicle "(b) used principally within the confines of a regularly established post, camp, or depot" (Res. Exh. 3). The Department of the Navy was authorized by 5 C.F.R. Part 930, inter alia, subparts 103, 104, 110 (Res. Exh. 3) and by DOD 4500.36-R (Res. Exh. 14) to issue policies, procedures and regulations governing its employees operation of Government-owned or leased motor vehicles (cf. 49 C.F.R. § 390.9 with regard to state and local laws), and P.300 when issued in June 1989 (Res. Exh. 9) made it mandatory that MVOs,

such as Roy and Miller, have a valid state license for the type and class of vehicle to be operated either on or off base. Respondent was remiss in its failure to comply with P.300 forthwith; but old habits die hard and Mr. Landry, to the extent that he read P.300 at all (Tr. 37), obviously read it with a jaundiced view which blinded him to the quite specific language which precluded MVOs from being considered incidental drivers [as noted previously, at least as early as 1985, OPM also had made it clear that MVOs were not incidental operators 5 C.F.R. § 930.102, Res. Exh. 3; FPM 1-2. a. (7) and (9), Res. Exh. 13)]. However, P.300 now made it unlawful for a MVO to operate a motor vehicle without a valid state license for the type and class of vehicle to be operated either on or off base. Respondent, once it became aware of the illegality^{2/} of its practice, was obligated to comply with law and regulation. Accordingly, Respondent was under no obligation to negotiate over its decision to change its practice to conform with law and regulation; nevertheless, Respondent violated § 16(a)(5) and (1) of the Statute by its failure to notify the Union before making the change and affording the Union an opportunity to bargain, upon request, regarding the impact and implementation of such a change. Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana, 9 FLRA 543, 544-546 (1982); Department of the Air Force, Air Force Logistics Command, Ogden Air Logistics Center, Hill Air Force Base, Utah, 17 FLRA 394, 396 (1985); Health Care Financing Administration, 17 FLRA 650, 654 (1985); Department of the Navy, Philadelphia Naval Shipyard, 18 FLRA 902, 914 (1985); U.S. Department of Interior, Bureau of Reclamation, 20 FLRA

^{2/} I have given careful consideration to all of General Counsel's contentions that the practice of issuing incidental licenses to MVOs is lawful and have found them without merit. For example: (a) reliance on FHA's Interpretative Bulletin, Questions 6 and 7 (Res. Exh. 6), is misplaced. First, Question 6 and 7 each addresses a "person" not a MVO. Second, Questions 6 and 7 do not address the prohibition of the Act and regulations of a MVO, who is required to have a CDL, having more than one license. Third, P.300 mandates that, for Naval facilities, MVOs must hold a valid state license for the class and type vehicle operated on or off the base; (b) OPM's regulations (5 C.F.R. Part 930 (Res. Exh. 3), FPM Chapter 930 (Res. Exh. 13)), as already noted, pre-date the Act. Consequently, portions, such as the definition of "motor vehicle", have been supplanted by quite different definitions in the Act and regulations of the Secretary. Moreover, the Secretary of Transportation under the Act, not OPM, is authorized and directed to issue regulations.

587 (1985); Order Denying Request for General Ruling, 31 FLRA 1294, 1296-1297 (1988); National Weather Service Employees Organization, 37 FLRA 392, 395-396 (1990); see, also, U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., 44 FLRA 343, 353-354 (1992).

Termination of the practice of issuing incidental licenses to MVOs was part and parcel of the withdrawal of the incidental licenses issued in violation of P.300, the Act and DOT's regulations. Stated otherwise, the entire focus was on unlawful incidental licenses and their withdrawal and, thereby termination of the practice of issuing them to MVOs. Respondent notified the Union in July, 1991, that it was considering the withdrawal of the incidental licenses of Ms. Miller and Mr. Roy and promised to get back to the Union before taking any action (Tr. 60), but it did not do so. In like manner, Respondent told Mr. Roy in mid-August, 1991, that there was a possibility he would have to give up his incidental license (Tr. 105) and even that he [Roy] "was in the process of having my incidental tractor trailer driver's license removed" (Tr. 106-107) (Ms. Miller may have been told in August that her incidental license might be removed as she stated that it was taken away "August-September of '91" (Tr. 166)); but neither Mr. Roy nor Ms. Miller was told that the incidental license must be surrendered prior to September 3, 1991, when their OF-346s were revoked and new OF-346s were issued. Nor was the Union given any notice whatever that the incidental licenses of Roy and Miller to operate tractor trailers were to be revoked.

General Counsel has failed to make a prima facie showing that Mr. Roy's incidental license was revoked because of his engagement in protected activity. Such evidence as might, under other circumstances, have shown animus as a consideration, such as the pencil holder inscription or Mr. Roy's wanting to see the "book" on Mr. Seavey's running of a coffee pot (Tr. 274), was apropos of nothing (for reasons set forth hereinafter, I do not credit Mr. Wood's testimony; but, even if it were credited it was not shown to have any relevance whatever to Mr. Seavey and/or to his conclusion that issuance of incidental licenses to MVOs was unlawful). Thus, Mr. Tackett, who wrote the memorandum recommending surrender of the incidental licenses (Res. Exh. 7; Tr. 208-209), never saw the inscription on the pencil holder (Tr. 231-232); and the record is devoid of any evidence or testimony showing any relationship whatever between Mr. Seavey, who informed Mr. Tackett that he believed the issuance of incidental licenses to MVOs unlawful (Res. Exh. 8; Tr. 210, 211, 249), and the pencil holder. At most, Mr. Roy told Mr. Seavey he

would like to see the books (on the coffee) and Mr. Seavey told him ". . . the books are open any time. . . ." (Tr. 274); and as to Mr. Lavoie, Mr. Seavey credibly testified that from his record he believed Mr. Lavoie held a class "B" CDL (Tr. 278), but, in any event, the record is clear: (a) that Mr. Seavey told Mr. Lavoie in November, 1991, ". . . that in the P.300 you are required to be consistent with state -- state driver's licenses"; and (b) Mr. Lavoie's 1990 OF-346 specifically stated,

"Void unless accompanied by a valid state license for the type and size of equipment being operated."
(G.C. Exh. 15).

On the other hand, the record affirmatively and overwhelmingly shows that Mr. Roy's protected activity was not a consideration in the withdrawal of his incidental license. Thus, the record shows, inter alia, that: (a) when Mr. Seavey informed Mr. Tackett of the problem no reference was made to the name of any individual (Res. Exh. 8; Tr. 257). Mr. Tackett asked Mr. Seavey to bring a copy of P.300 and explain how Respondent was in violation of P.300; (b) only after Mr. Tackett was convinced that the practice was in violation did he ask Mr. Seavey to prepare a list of all MVOs, and to compare their state CDL licenses with their OF-346s, which for the first time disclosed to Mr. Tackett the identity of Ms. Miller and Mr. Roy; (c) notwithstanding his conviction that Respondent's practice was in violation of P.300, Mr. Tackett instructed Mr. Seavey to survey the practice of other Naval installations before he wrote his memorandum of July 24, 1991, to the Superintendent of Transportation (Res. Exh. 7); (d) Mr. Clines, Respondent's Group Superintendent of Public Works, although he informed First Vice President Draper in July, 1991, that Respondent was probably going to have to pull the incidental licenses of Mr. Roy and Ms. Miller because he had been told they were in violation of P.300 (Tr. 59), was not fully persuaded and authorization to withdraw the incidental licenses was not given until on, or about, September 1, 1991; (e) in mid-August, Mr. Clines told Mr. Roy there was a possibility he would have to give up his incidental license to drive a tractor trailer because of P.300 and gave Mr. Roy a copy of P.300 (Tr. 105, 106-107); (f) before Mr. Roy was given notice of possible loss of his incidental license and continuing after its withdrawal on September 3, 1991, Respondent, through Mr. Seavey, demonstrated extraordinary consideration for Mr. Roy in preparing him for his state examination, by its advance examination of the truck he was to use to insure its compliance with Maine's requirements, and by Mr. Seavey's going to Scarborough, Maine, with Mr. Roy in October, 1991,

for his state examination, all of which is the absolute antithesis of animus toward Mr. Roy for any reason. Accordingly, because General Counsel has failed to make the required prima facie showing that Mr. Roy's engagement in protected activity was a motivating factor in the withdrawal of his incidental license to operate a tractor trailer, the violation alleged in Paragraphs 19, 20 and 23 of the Complaint must be dismissed. Letterkenny Army Depot, 35 FLRA 113, 118 (1990) (hereinafter, "Letterkenny"); U.S. Department of Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Service Center, Ogden, Utah, 41 FLRA 1212 (1991).

If, contrary to my finding that General Counsel did not make a prima facie showing that Mr. Roy's protected activity was a motivating factor in the withdrawal of his incidental license, it were deemed that engagement in protected activity was a motivating factor, nevertheless, the preponderance of the evidence shows that Respondent withdrew the incidental license of Mr. Roy to operate a tractor trailer, on base, because it had become unlawful for a MVO to hold an incidental license and that Respondent would have withdrawn the incidental license in absence of protected activity. Letterkenny supra, at 118, 119, 123. Accordingly, for these reasons as well, the violations alleged in Paragraphs 19, 20 and 23 of the Complaint must be dismissed.

Finally, as to the independent § 16(a)(1) violation alleged in Paragraphs 21 and 24 of the Complaint, I did not find Mr. Wood's testimony convincing. Mr. Mikan categorically denied any such statement. Although Mr. Wood asserted that he was in the dispatcher's office talking to him when he overheard Mr. Mikan's statement (Tr. 144), General Counsel did not call the dispatcher. On the other hand, Respondent did not call Mr. Landry, Mr. Poor or Mr. Deroccher, the latter being a MVO WG-8 trailer driver (Tr. 144), so we have only Mr. Wood's statement and Mr. Mikan's denial. As to the statement, it is wholly divorced from reality. More than a year later, October 22, 1992, there had been no MVO WG-8 vacancy since 1989 so, clearly, there was no WG-8 vacancy in 1991; but more important, if there had been, Mr. Roy would not have been eligible because he had no Class "A" or Class "1" state license, so, whether he worked overtime or took road trips was immaterial. Accordingly, because the statement appears contrived I do not credit Mr. Wood's testimony. I credit Mr. Mikan's testimony that he made no such statement. Accordingly, the allegations of Paragraphs 21 and 24 of the Complaint are also dismissed.

Having found that Respondent violated §§ 16(a)(5) and (1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, it is hereby ordered that the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, shall:

1. Cease and desist from:

(a) Failing and refusing to give the Portsmouth Federal Employees Metal Trades Council, the exclusive representative of its employees, notice of its intention to terminate a legally required change in issuing incidental licenses to motor vehicle operators and an opportunity to bargain, to the extent consonant with law and regulation, with respect to the impact and/or implementation of such legally required change.

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

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

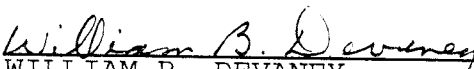
(a) Upon request by the Portsmouth Federal Employees Metal Trades Council, the employees' exclusive bargaining representative, bargain, to the extent consonant with law and regulation, with respect to the impact and/or implementation of the legally required change in the practice of issuing incidental licenses to motor vehicle operators.

(b) Post at its facilities at the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer of the Shipyard, 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 insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations 5 C.F.R. § 2423.30, notify the Regional Director of the Boston Region, Federal Labor Relations

Authority, 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

It is FURTHER ORDERED, pursuant to § 18(a)(8) of the Statute, 5 U.S.C. § 7118(a)(8), that paragraphs 19, 20, 21, 23 and 24 of the Complaint, alleging violation of §§ 16(a)(1), (2) and (4), be, and the same are hereby, dismissed.


WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 3, 1993
Washington, DC

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 HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to give the Portsmouth Federal Employees Metal Trades Council, the exclusive representative of our employees, notice of our intention to terminate a legally required change in issuing incidental licenses to motor vehicle operators and an opportunity to bargain, to the extent consonant with law and regulation, with respect to the impact and/or implementation of such legally required change.

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, bargain with the Portsmouth Federal Employees Metal Trades Council, the exclusive representative of our employees, to the extent consonant with law and regulation, with request to the impact and/or implementation of the legally required change in the practice of issuing incidental licenses to motor vehicle operators.

(Activity)

Date: _____ 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, Boston Region whose address is: 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, and whose telephone number is: (617) 424-5730.