UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D.C. 20036

UNITED STATES DEPARTMENT OF JUSTICE,
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE

Agency/Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, NATIONAL
BORDER PATROL COUNCIL

Charging Party/Intervenor

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2455,

Charging Party

and

INTERNATIONAL BROTHERHOOD OF
POLICE OFFICERS

Petitioner

Case No. 6-CA-48
6-CA-49
63-CA-565
63-RO-6

Richard T. Linnemann, Esquire
For the Agency/Respondent

Mark D. Roth, Esquire
For the Charging Party/Intervenor

Michael J. Grealy, Esquire
For the Petitioner

Susan E. Jelen, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

TABLE OF CONTENTS

Topic	Page
I. INTRODUCTION	273
A. General Statement of the Case	273
B. Summary	276
II. Alleged Unfair Labor Practices	276
A. Case No. 6-CA-48	276
1. Statement of the Case	276
2. Findings of Fact	276
3. Conclusions	282
B. Case No. 6-CA-49	287
1. Statement of the Case	287
2. Findings of Fact	287
3. Conclusions	289
C. Case No. 63-CA-565	290
1. Statement of the Case	290
2. Findings of Fact	290
3. Conclusions	293
III. Objections to the Election	293
A. Laredo, Texas Allegations	293
1. Coffee Break Change	293
a. Findings of Fact	293
b. Conclusions	293
2. Change in 1977 Local Agreement	294
a. Findings of Fact	294
b. Conclusions	294
3. Supervisors Signing IBPO Petition	295
a. Findings of Fact	295
b. Conclusions	296

Topic	Page
4. IBPO Use of Management Bulletin Board	297
a. Findings of Fact	297
b. Conclusions	299
B. Yuma, Arizona Allegations	300
1. Circulation of IBPO Petition	300
a. Findings of Fact	300
b. Conclusions	300
2. IBPO Campaign Activity	301
a. Findings of Fact	301
b. Conclusions	301
C. Chula Vista, California Allegations	301
1. Unilateral Change in Grooming Standards	301
a. Findings of Fact	301
b. Conclusions	304
2. Alleged Management Announcement	305
a. Findings of Fact	305
b. Conclusions	305
3. Circulation of IBPO Petition	305
a. Findings of Fact	305
b. Conclusions	306
D. San Clemente, California Allegations	306
1. Shift Briefing and Circulation of Petition by IBPO	306
a. Findings of Fact	306
b. Conclusions	307
E. El Centro, California Allegations	307

Topic	Page
F. Instructor Support of IBPO at Border Patrol Academy, Glynco, Georgia	307
1. Findings of Fact	307
2. Conclusions	308
G. Change Concerning Use of Personally Owned Vehicles in Northern Region	309
1. Findings of Fact	309
2. Conclusions	310
H. Assault Form Implementation	310
1. Findings of Fact	310
2. Conclusions	314
IV. Conclusion	314

I. Introduction

A. General Statement of the Case

This proceeding arose pursuant to the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101 et seq., (the Statute). It involves three unfair labor practice proceedings against the agency and a representation proceeding involving objections to an election. The objections to the election include the allegations in the unfair labor practice complaints and numerous other objections.

All of the relevant events took place in late 1978 through June 1979. In late 1978 the International Brotherhood of Police Officers (IBPO) began an effort to replace the American Federation of Government Employees, AFL-CIO, National Border Patrol Council (AFGE) as the exclusive representative of members of the Border Patrol bargaining unit.1/

The IBPO filed its petition on January 19, 1979. Pursuant to an Agreement for Consent or Directed Election, signed by the parties on March 20, 1979, an election by secret ballot was conducted by mail. Ballots were mailed April 24, 1979 to be returned for counting by noon, June 1, 1979.

Upon conclusion of the election, the parties were timely served with a copy of the Tally of Ballots reflecting the election results as follows:

Appropriate number of eligible voters	2,303
Void ballots	9
Votes cast for Intervenor	476
Votes cast for Petitioner	779
Votes cast against exclusive recognition	58
Valid votes counted	1,313
Challenged ballots	8
Valid votes counted plus challenged ballots	1,321
Challenges are not sufficient in number to affect the results of the election.	

The Intervenor, AFGE, timely filed objections alleging conduct affecting the results of the election. The Regional Director, Sixth Region, found that the objections raised substantial and material factual issues. He ordered that a hearing be held in Case No. 63-RO-6 for the

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1/ This unit basically includes all nonsupervisory and non-professional employees assigned to Border Patrol Sectors of the United States Department of Justice, Immigration and Naturalization Service (INS). There are approximately 2,300 employees in the bargaining unit assigned to 22 Border Patrol sectors and approximately 110 Border Patrol stations.

purpose of deciding issues raised by the objections. Since some of the allegations were the same as those contained in unfair labor practice cases, Case No. 6-CA-48, 6-CA-49 and 63-CA-565, he ordered that Case No. 63-RO-6 be consolidated with the unfair labor practice cases for hearing, ruling, and decision.

The unfair labor complaints allege, in substance, that Respondent INS unilaterally changed existing terms and conditions of employment, in the Laredo, Texas sector or station, concerning traffic check points, uniforms, and coffee breaks, and, in the Northern Region, concerning the use of personal vehicles for travel.

The AFGE also asserts these alleged unilateral changes as objections to the election. In addition, AFGE alleges that INS made unilateral changes in local grooming standards and required that a controversial assault form be implemented nationwide. The AFGE alleges that all of these changes made the incumbent AFGE appear powerless and turned employees to the IBPO.

Other objections to the election by AFGE concern alleged overt support of IBPO by INS. These include allegedly placing IBPO literature on a management bulletin board in Laredo, Texas, announcing an IBPO rally at a shift briefing in Chula Vista, California, and allowing an instructor at the Border Patrol Academy, Glynco, Georgia to make unlawful election statements. AFGE also alleged that IBPO was granted unlawful assistance from INS in obtaining signatures on its representation petition in Laredo, Texas, San Clemente, California, Chula Vista, California, Yuma, Arizona, and El Centro, California.

INS denies that it committed unfair labor practices or improperly interfered in the election. IBPO claims that there was significant voter dissatisfaction with the AFGE; that management's actions did not affect the election; and, as the clear winner of the election, it must be certified as the exclusive representative of the Border Patrol.

A hearing was held in this matter during the period October 14-24, 1980 in Laredo, Texas, San Diego, California, and Seattle, Washington. All parties were represented by able and efficient counsel and were afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Briefs were filed by all parties on December 8, 1980.

Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the findings of fact, conclusions, and, where appropriate, recommendations set out below. For

clarity and ease of reference, the findings of fact and conclusions have been separated by subject matter. However, to the extent findings, discussions, or conclusions are relevant to more that one subject, they have been appropriately considered, but generally not repeated.

B. Summary

It has been found that the allegations of the unfair labor practice complaints are supported by a preponderance of the evidence, and that a preponderance of the evidence supports these and certain other objections to the election.[2] It is recommended herein that other objections, relating to the implementation of an assault form, IBPO use of a management bulletin board, and statements by an instructor at the Border Patrol Academy be sustained. It is recommended that other objections, relating to, among others, alleged unilateral changes in grooming standards, announcement of an IBPO rally at a shift briefing, and management assistance for the IBPO petition at various locations be overruled.

2/ The General Counsel has the burden of proving the allegations of the unfair labor practice complaints by a preponderance of the evidence. 5 C.F.R. §2423.18. The party filing objections to the election has the burden of proving all matters alleged in its objections by a preponderance of the evidence. 5 C.F.R. §2422.20(h).

II. Alleged Unfair Labor Practices

A. Case No. 6-CA-48

1. Statement of the Case

The amended complaint alleges that Respondent violated sections 7116(a)(1) and (5) of the Statute on or about March 16, 1979 by unilaterally changing existing conditions of employment concerning traffic checkpoints and uniforms without furnishing the Union an opportunity to bargain over the changes or to bargain concerning the impact and implementation of such changes. (General Counsel's Ex. 1(cc).)

2. Findings of Fact

As noted above, the American Federation of Government Employees, AFl-CIO, National Border Patrol Council (AFGE) has been the exclusive representative of an appropriate nationwide unit of Border Patrol employees since 1967. (Tr. 206). INS and AFGE have been parties to a series of collective bargaining agreements, the most recent effective from September 30, 1976 until January 29, 1979. (Joint Ex. 1; Tr. 207-208 .) Although the agreement expired, the parties expressed the intention of following the provisions of the contract by keeping existing personnel policies, practices, and matters affecting working conditions in place in accordance with the law. (Tr. 208, 275).

Article 5C. of the agreement provides as follows:

> 5c. This Agreement is not intended to abolish, solely by exclusion herefrom, any local or regional understandings or agreements which have been mutally acceptable at the local level, or regional level. (Joint Ex. 1).

Article 3E and 3G of the agreement provides as follows:

> 3E. Representatives of the Agency and the Union at the Sector or District level shall have the opportunity to meet monthly or at any time at the request of either party for the settlement of local problems and for the improvement of communications, understanding, and cooperation between the Agency and constituent units of the Union. Any understanding reached at these meetings shall be recorded, signed by the parties involved, and copies forwarded to the local president, or designated

representative and the Regional Commissioner. Such understanding will remain in effect until amended or rescinded by mutual agreement.

3G. The parties recognize that from time to time during the life of the agreement, the need will arise requiring the change of existing Agency regulations covering personnel policies, practices and/or working conditions not covered by this agreement. The Agency shall present the changes it wishes to make to existing rules, regulations and existing practices to the Union in writing. The Union will present its views (which must be responsive to either the proposed change or the impact of the proposed change) to the Agency within 30 calendar days of receipt of the proposed change. Reasonable extensions to this time limit may be granted on request. Changes in national policy shall be referred to the President of each national council if such changes impact on either of the National Councils.

If disagreement exists, either Agency or the Union may serve notice on the other of its interest to enter into formal negotiations on the subject matter. Such negotiations must begin within 30 calendar days of the date the Agency receives notice from the union that it does not agree with proposed changes.

Agreed upon changes will be appended to this agreement and will be subject to Article 38. (Joint Ex. 1).

In June 1977 AFGE and INS entered into a memorandum of understanding with respect to INS' obligation to negotiate at the regional, district, and sector level under Article 3G of the agreement. The memorandum provided, in relevant part, as follows:

2. Districts and Sectors. When Districts or Sectors have decided to take actions which will change personnel policies, practices and/or working conditions, the authorized Union Local (or, in the absence of an authorized Local, the appropriate Regional Vice-President for the INS and/or Border Patrol Council) will be given 15 calendar days advance notice which will normally occur during the monthly meeting between the Union and Management. The parties may discuss such changes during such

meetings and management should give maximum consideration to Union comments and suggestions on relevant matters. If the Union representatives so elect, they may request negotiations on the changes and/or the impact of the changes as appropriate. Such negotiations will be requested within 15 calendar days of notification of a planned change. Such negotiations will commence within one week of receipt of a request for negotiations from the Union representative. Agreements reached at such negotiations will be recorded in a memorandum of understanding to be signed by the Union representative and the District Director or Chief Patrol Agent. (Respondent's Ex. 4; Tr. 273-274).

AFGE Local 2455 has represented all Laredo Border Patrol employees throughout the relevant time period.

On August 18, 1977, William R. Sabin, Chief, Laredo Sector, other members of management, and officers of AFGE Local 2455 met to discuss and settle local problems at the Laredo station. They signed a memorandum concerning the proposals made and the agreements reached, in pertinent part, as follows:

A. <u>TRAFFIC CHECKPOINTS IH 35 AND US 59</u>

1. Traffic checkpoints will not be set up during the hours of darkness or bad weather.

   Chief Patrol Agent agreed that these traffic checkpoints will not be held or set up during wet or inclement weather and that if a traffic checkpoint is torn down it will not be re-set up during hours of darkness because of the safety hazards involved.

2. Traffic checkpoint shall not be held in hours of darkness without sufficient lighting.

   Chief Patrol Agent agreed that these checkpoints will not be held in hours of darkness without sufficient lighting. These checkpoints now have sufficient lighting.

3. Traffic checkpoints will have a back-up unit assigned during the hours of darkness. This back-up unit will work in the vicinity of the checkpoint where if an emergency situation developes this unit can be at the checkpoint site within a matter of minutes to assist the checkpoint crew.

Chief Patrol Agent agreed that during hours of darkness these checkpoints will have a back-up unit assigned within the vicinity of the checkpoint where if an emergency situation developes, this unit could be at the checkpoint site in a matter of minutes to assist the checkpoint crew.

4. The traffic checkpoints during the 8 a.m. to 4 p.m. and 4 p.m. to 12 mn. will have three men assigned them during week-ends and holidays because of the heavy traffic during these days.

   Not discussed.

B. UNIFORMS

1. While observing traffic the rough duty uniform will be worn because of having to work other related line watch duties along with observing traffic.

   Chief Patrol Agent agreed that while observing traffic the rough duty uniform will be worn because this unit is often required to work other related line watch duties along with observing traffic.

2. Except in special assignments or emergency situations the dress uniform will not be worn in any line watch operation.

   Not discussed.

3. If a unit is assigned to work city patrol or transportation check this unit shall be permitted to work in plain clothes to do the job more effectively.

   Chief Patrol Agent agreed that the city patrol team will wear plain clothes and the transportation check team will wear uniform.

The agreement formalized what had previously been standard operating procedures for approximately four years. (Tr. 48, 98-99, 199, 203). They were reduced to writing to avoid occasional deviations by supervisors and ensure that the practices would be followed all of the time by all of the supervisors. (Tr. 98-99, 163-164). Agreement was reached on those provisions of the agreement which state "not discussed." The term "not discussed" meant merely that there was no disagreement with respect to these subjects since they were already in effect and were being followed. (Tr. 124, 200, 203, 382).

The practices outlined in the local agreement were of great concern both to the employees and the Chief because they impacted greatly on health and safety, particularly the provisions: (1) prohibiting traffic checkpoints being set up during hours of darkness or in bad weather; (2) prohibiting checkpoints conducted at night without sufficient lighting; and (3) requiring that a back-up man be assigned to the vicinity of the checkpoint at night for emergency assistance. (Tr. 48-49, 164-167, 199-201, 213, 246, 253, 393). For example, throughout the relevant time period, it was not unusual for speeding vehicles to skid uncontrollably through the checkpoints at night or in bad weather, hitting the traffic cones or physical objects. (Tr. 70, 122-123, 164-165, 166, 192, 393).

After signing the local agreement, Chief Sabin informed the Assistant Regional Commissioner for Management, Alfred Guigni, of it, and the two men went over the agreement point by point. The Region acknowledged Chief Sabin's authority to enter into the agreement; however, it had some concerns over providing a back-up unit and not setting up checkpoints during the hours of darkness, and subsequently instructed other chiefs in the region not to agree to such provisions. The Region decided not to take any action with regard to Chief Sabin's agreement until the national agreement was to expire. (Tr. 200-202, 409-414).

Roger Stout replaced William Sabin as Chief Patrol Agent, Laredo Sector in late December 1977. Mr. Stout, the Deputy Chief, and the Patrol Agent in Charge, Laredo Station, believed from the outset that the 1977 agreement presented operational problems including (1) the inability to set up checkpoints at night even though the largest number of alien smugglers operated at night and there was an increasing need for checkpoints, as opposed to roving patrols, as a result of Supreme Court decisions, (2) the occasional difficulty of providing back-up units at night due to manpower problems, and (3) the delay involved in emergency situations in not being able to assign officers to city patrol until they changed to plain clothes, and the occasional operational need for optional dress for city patrols. However, management concerns were not discussed with the Union prior to March 1979. (Tr. 307-310, 332, 342-345, 352, 395-396).

Laredo management, during the election campaign of January to May 1979, had been informed by its Regional Office that it was to operate under the expired national agreement in making any changes in working conditions during the pendency of the representation matter. (Tr. 360-361).

In March 1979 Chief Stout and Deputy Chief McMillan decided to change the 1977 agreement. Chief Stout understood that the national agreement had expired and felt that the local agreement was no longer valid. He believed that he could change the local agreement by notifying the Union and affording it an opportunity to negotiate on implementation. (Tr. 311,

335). Chief Stout cleared his proposed change with Regional management. He was aware that the changes would be unpopular with the employees. (Tr. 321-323). Deputy Chief McMillan took into consideration the increased smuggling of aliens and the fact that IBPO and AFGE were engaged in election turmoil. He testified that the change was not to hurt either Union, but the election turmoil could weaken the change and "was an opportune time for us to get rid of what we thought was a bad set of restrictions for the operations." "We wanted to get this finished and terminated as soon as possible." (Tr. 366-371; Joint Ex. 29).

On March 16, 1979 Local AFGE President Steven Young was called into the Laredo Station on his day off for a meeting with Chief Stout. Young had not been informed that he was being called in his role as union president, nor was he given notice of the purpose of the meeting. Chief Stout gave Mr. Young a letter which read, in pertient part, as follows:

> Pursuant to Article 3 of the Negotiated Agreement, the following items contained in the August 17th, 1977 memo between the Union and former Agency Manager Sabin, are hereby null and void fifteen (15) days after receipt of this letter.
>
> A. <u>Traffic Check Points, IH-35 and US-59</u>
>
> 1. and
>
> 2. Since these items were discussed, permanent check points have been established with permanent Caution and Stop Signs.
>
>   These items, as written in the Agreement, prevent my maintaining the efficiency of the Government operations entrusted to me, and prevents me from assigning personnel unless certain conditions exist.
>
> 3. Back-up units will be assigned at the discretion of the Supervisor, keeping in mind manpower restrictions and operational priorities.
>
>   This item, as written in the Agreement, prevents my maintaining the efficiency of the Government operations entrusted to me. Further, it interferes with the right of Management to assign and direct employees in the performance of their duties. It also affects the number of employees that the Agency might assign to particular work projects or tours of duty.

B. Uniforms

> 3. At the discretion of the Supervisor, the City Patrol Unit will wear plain clothes.
>
> Operational priorities may require duties where a uniform would be required.
>
> This item, as written in the Agreement, prevents my maintaining the efficiency and control of the Government operations entrusted to me. It not only inteferes with the rights of Management to assign and direct employees in the performance of their duties but further prescribes the assignment of specific duties to particular types of employees, and would prevent the assigning of such duties unless certain conditions exist. (Joint Ex. 3).

Mr. Young returned the letter to Mr. Stout, protesting that it was improper to call him in on his day off for such matters, and he was going to leave. Mr. Stout replied that he had been served with the letter, and the fifteen day period would begin to run. (Tr. 37-38, 72-73, 311-312, 347-348, 380).

Mr. Young next met with Chief Stout the following week on March 23, 1979. He was again given the March 16 letter. Young informed Chief Stout that an unfair labor practice charge would be filed. Mr. Young did not request to bargain over the March 16, 1979 letter, and Chief Stout did not say anything in addition to the letter concerning his willingness to negotiate this matter. However, other unrelated items were discussed at length during this meeting. (Tr. 39-41, 71, 312-313, 348-349; Respondent's Ex. 5).

The changes set forth in the March 16, 1979 letter went into effect at the end of the 15 day period. (Tr. 313, 348). Primarily, check points are set up during hours of darkness, back-up units are not provided if manpower is limited, and the uniform, instead of plain clothes, is used for city patrols whenever deemed necessary by management. (Tr. 102-103, 320-321, 380-381).

3. Conclusions

As noted, the amended complaint alleges that Respondent INS violated section 7116(a)(1) and (5) by unilaterally changing existing terms and conditions of employment concerning traffic checkpoints and uniforms without furnishing the Union an opportunity to bargain over the changes or to bargain over the impact and implementation of such changes. The General Counsel contends that under Article 3E of the national agreement,

which continued in effect, the local agreement remained in effect until amended or rescinded by mutual agreement; that under Article 5C, the local agreement had an independent existence; and that the AFGE local was not afforded the opportunity to engage in meaningful bargaining.

Respondent INS alleges that the AFGE local was provided proper notice of the proposed change pursuant to the procedures in the national agreement (June 1977 memo re Article 3G) and waived its right to bargain. In addition, Respondent, inter alia, asserts that the dispute involves arguable interpretation of negotiated agreements and should be resolved under the negotiated grievance procedure; that the changes involved management rights which were subject to termination upon expiration of the national agreement so long as the appropriate bargaining obligation was satisfied; and that AFGE had no right to object to meeting its continuing bargaining obligation during the pendency of the representation matter.

The changes in issue were made after the expiration of the negotiated agreement and during an election campaign period. With respect to the expiration of the negotiated agreement, the Authority has held that the purposes and policies of the Statute are best effectuated by a requirement that existing personnel policies, practices, and matters affecting working conditions continue, to the maximum extent possible, upon the expiration of a negotiated agreement, absent an express agreement to the contrary or unless modified in a manner consistent with the Statute. See U.S. Nuclear Regulatory Commission, 6 FLRA No. 9 (1981); Department of Defense, Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, 4 FLRA No. 100 (1980); and Department of the Air Force, 35th Combat Support Group (TAC), George Air Force Base, California, 4 FLRA No. 5 (1980).

Thus, the local agreement, which was sanctioned and incorporated into the national agreement by Article 3E of the national agreement, continued in effect upon the expiration of the national agreement, unless modified in a manner consistent with the Statute. The procedures followed by Respondent, pursuant to the June 1977 memorandum concerning Article 3G, on their face only applied to changes "not covered by this agreement." The Statute requires that an agency meet its obligation to negotiate prior to making changes in established conditions of employment by affording the exclusive representative notice of proposed changes and an opportunity to negotiate. Department of the Air Force Base, Scott Air Force Base, Illinois, 5 FLRA No. 2 (1981).

The Authority has not to date addressed the obligations of an agency under the Statute when making such changes in personnel policies and practices and matters affecting working conditions during the pendency of a representation proceeding. However, the Authority, in considering cases arising under Executive Order 11491, as amended, in reorganization situations, has followed decisions of the Federal Labor Relations Council in holding that it is a violation of section 19(a)(1) and (5) of the Order

for an agency to refuse to maintain appropriate recognition _and_ to adhere to terms of the prior agreement to the maximum extent possible until a representation matter is resolved. See _Department of the Navy, Naval Air Engineering Center, Lakehurst, New Jersey_, 3 FLRA No. 93 (1980); and _Department of Energy_, 2 FLRA No. 105 (1980). One of the Federal Labor Relations Council decisions relied upon by the Authority is _Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona_, 4 FLRC 484, FLRC No. 74A-52 (1976) which stated, in pertinent part, as follows:

> Therefore, following a reorganization and during the pendency of a representation petition, the obligation of an agency under the Order, with respect to personnel policies and practices and matters affecting working conditions of employees who are covered by the petition, is not to maintain the _status quo_ absent evidence of an overriding exigency, as held in the present case by the Assistant Secretary, but instead to maintain recognition and to adhere to terms of the prior agreement to the maximum extent possible until the representation matter is resolved.
>
> With respect to the precise nature of the obligation to maintain recognition and to adhere to the terms of the prior agreement to the maximum extent possible until the representation issue raised by the reorganization are resolved, this means that consistent with the circumstances of the reorganization and with the necessary functioning of the agency, an agency must continue to recognize the status of an incumbent labor organization as the exclusive representative of the employees; adhere to the terms of existing agreements; and otherwise maintain existing personnel policies and practices and matters affecting working conditions to the extent consistent with the bargaining obligation under section 11(a) of the Order. Where the agency, as a direct result of the reorganization and consistent with the necessary functioning of the agency, must make changes in otherwise negotiable working conditions, then the agency must notify the incumbent union or unions of those proposed changes and, upon request, negotiate on those matters covered by section 11(a) of the Order. Similarly, if work forces must be realigned as a result of a reorganization, the incumbent labor organization or organizations must be so advised and negotiations must be conducted, upon request, as to appropriate arrangements for employees adversely affected by the impact of such realignment, as expressly sanctioned in section 11(b) of the Order.

These requirements under the Order are intended carefully to balance the interests of the employees in continued representation during the critical period after a reorganization, when their conditions of employment will most likely be facing serious change, and the needs of the agency in fully adapting to the changed circumstances which ordinarily derive from an agency reorganization. Such bargaining obligation manifestly does not prevent changes by the agency in personnel policies and practices and matters affecting working conditions brought about by and flowing out of the reorganization, and necessary to the functioning of the agency, but merely requires negotiation by the parties before those changes are undertaken in conformity with the provisions of section 11(a). Moreover, such obligation will not impede, but rather will *implement*, the efforts of the agency in carrying out its mission, by reason of the substantial impact on the well-being of the employees which the Order recognized as vital to the efficient administration of the Government. Thus, this requirement best serves the interests of the employees, the union, and the agency, and most importantly, protects that paramount interest of the public.

We recognize that in AVSCOM the Council stated, and we affirm herein, that an agency should not be forced to violate its neutrality during the period in which the underlying representation question is pending; that is, risk committing an unfair labor practice, or, for that matter, risk improperly affecting the results of a representation election, because of its response to negotiating demands made by a labor organization whose continuing representational status has been called into question by the reorganization. Certainly, as the Council indicated in *AVSCOM*, an agency could decline to negotiate and execute a comprehensive new agreement with such a labor organization until the representational questions are resolved through the Assistant Secretary's procedures. However, balanced against this principle is the need, in circumstances where, during the pendency of the representational procedures, management concludes that it is not possible to maintain the personnel policies and practices and matters affecting working conditions, for the previously existing representative to speak for the employees with respect to the intended change and the impact of such change on the employees. Otherwise, during this critical period either no changes would be possible in personnel policies and practices and matters affecting working conditions thereby perhaps interfering with the necessary functioning

> of the agency, or changes could be made and the employees would lack a spokesperson when, as mentioned, their conditions of employment will most likely be facing serious change. Accordingly, an agency must meet the above-described negotiation obligation and, absent other circumstances such as bad faith, the meeting of such obligation shall not be a basis for a finding of an unfair labor practice or grounds for setting aside the election.
>
> Applying these considerations in the instant case, it is clear that, if NFFE was not informed of the agency's proposed change in competitive areas, or if NFFE was so informed but the agency, upon request, refused to bargain thereon with NFFE, the agency must be deemed to have violated its obligation to negotiate under the Order.
>
> However, the findings of the Assistant Secretary, which were based on principles held inapplicable to the present case, failed to address these critical and dispositive factors. Accordingly, we must remand the case to the Assistant Secretary for reconsideration and determination as to whether the agency violated its bargaining obligation as set forth herein.
>
> . . . .
>
> ....We remand the case to the Assistant Secretary to determine if in changing the competitive areas, the agency maintained the previously existing conditions to the maximum extent possible and met its obligation to negotiate with respect to any changes in competitive areas. Further, if an unfair labor practice is found, the Assistant Secretary shall direct a remedy consistent with the principles enunciated herein.

The record demonstrates that in this case the AFGE local was given reasonable advance notice of the proposed changes to enable it to request and engage in meaningful negotiations prior to effectuation of the decision. Since the Union did not request such bargaining, the precise allowable scope of bargaining over Respondent's proposals need not be addressed. However, the record reflects that Respondent did not maintain the previously existing conditions to the maximum extent possible during the election period. Rather, the record reflects that the reasons for the changes were of long-standing origin and were merely desirable, rather than being essential or necessary to the functioning of the agency. Further, the record reflects that the changes were proposed during the election period because management felt that the election turmoil could weaken the Union's response to the change and, thus, allow the changes to

be implemented sooner than otherwise might be possible. It is concluded that Respondent's action in failing to adhere to the terms of the local agreement to the maximum extent possible during the election period violated section 7116(a)(1) and (5) of the Statute.

B. Case No. 6-CA-49

1. Statement of the Case

The amended complaint alleges that Respondent violated sections 7116(a)(1) and (5) of the Statute on or about February 5, 1979 by unilaterally changing existing conditions of employment by terminating coffee breaks without furnishing the Union an opportunity to bargain over the change or to bargain concerning the impact and implementation of such changes. (General Counsel's Ex. 1(cc).)

2. Findings of Fact

From at least 1970 to 1979, a practice existed in the Laredo Station whereby Border Patrol Agents (BPAs) employed by the U.S. Border Patrol, Immigration and Naturalization Service were permitted to take a coffee break at the beginning of their shifts. (Tr. 27-28, 96, 155-156, 212, 228, 257-258, 447).3/

It was the common practice that employees would report to the Station for five to fifteen minutes, receive their assignment, attend a muster/ unit meeting for their briefing, and check out their equipment. BPAs would then proceed to a coffee shop for a coffee break. (Tr. 28, 93, 156). BPAs are under very little direct supervision once they leave the station. (Tr. 305).

During their coffee break, employees kept in contact with the Station by walkie-talkie radios. It was not unusual for a BPA to be called off his break by the dispatcher and given an immediate assignment. (Tr. 29, 95, 157).

3/ Three management witnesses testified to the existence of a long term policy that prohibited coffee breaks at the beginning of the shift. They testified that such policy was also communicated to the agents. (Tr. 299, 339, 375). The patrol agent in charge testified that, when he would become aware of a practice violating this policy, he asked his supervisors to put a stop to it. (Tr. 388). In making the findings herein, however, I have, for the most part, credited the contrary testimony of six agents. Their testimony was consistent in essential aspects and convinced me that, even if there were an overall management policy as described by management witnesses, it was not effectively communicated to the agents and enforced by their first line supervisors.

Up to 75% of the work performed by BPAs at the Laredo Station is of such a nature as to not permit the employee to take a coffee break once the employee has started his off-station duties. For example, BPAs on traffic check or sign cutting assignments are unable to take a coffee break during the day. (Tr. 34, 157-158).

From 1970 to 1979, the frontline supervisors responsible for monitoring the whereabouts of the BPAs under them knew of the coffee break practice, understood that such breaks were taken at the beginning of the shift, and on occasion would even join the employees on their coffee break at the beginning of the shift. (Tr. 57-58, 158, 181, 257-258, 447).

Throughout this entire time period, at least several times a year, supervisors would inform employees that they were concerned that the agents were congregating in large numbers during their morning break. BPAs were requested not to congregate together in the same coffee shop because of the appearance it gave the public. Supervisors, on these occasions, never informed employees that they could no longer take their coffee break at the beginning of the shift. Rather, employees were just told that they should not congregate on this break. (Tr. 30, 45, 57, 64, 96, 123, 159, 227, 376).

During a unit muster meeting on February 5, 1979 BPAs were informed by their immediate supervisor, J.J. Fulcham, with patrol agent in charge Burget present, that there would be no more coffee breaks. (Tr. 31, 377). Stephen Young, local Union president, who was present as a BPA and not as Union president, protested that this had been a past practice. (Tr. 31, 377, 391). Mr. Burget replied, in effect, "Whatever it was, you can't do it." (Tr. 32, 391). Other Laredo BPAs were similarly advised by their supervisors at this time that there would be no more coffee breaks. (Tr. 160, 187).

The Union was not notified in advance that the coffee break was to be eliminated. (Tr. 32, 97). About one week later the local Union president, Mr. Young, met with Mr. Burget. Mr. Young asked for an explanation of why the agents could not have a coffee break anymore. Burget informed him that the reason was because of the congregation of agents at the coffee shops. Young attempted to resolve the situation, and suggested that at least the sign cutters and traffic check personnel should be allowed to take the break, because they would most likely not be able to return to a coffee shop for a break later in the day. Burget would not discuss letting anyone go for a break. (Tr. 34-35, 68). Young subsequently contacted Roger Stout, Chief BPA, Laredo Sector. Stout refused to overrule Burget's order and advised Young that sign cutters were to go directly to their assigned area. (Tr. 302-303).

Initially, after the February meeting, coffee breaks were not permitted at all. (Tr. 161). BPAs were told that employees who did take

coffee breaks would be disciplined. (Tr. 36, 231, 240). Subsequently, breaks were permitted during the day, but not at the beginning of the shift. (Tr. 161). From the outset, some employees secretly violated management's orders not to take breaks. (Tr. 189-190, 231). Other BPAs complied until it soon became apparent, after three months or so, by May 1979, that there would be no enforcement, at which time coffee breaks were again openly taken by employees at the beginning of the shift. (Tr. 69, 97, 161-162).

3. Conclusions

In order to constitute the establishment by practice of a term and condition of employment the practice must be consistently exercised for an extended period of time with Respondent's knowledge and consent. Cf. Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA, No. 64 (1980). A preponderance of the evidence establishes the existence by practice of a term and condition of employment whereby employees consistently took coffee breaks, including coffee breaks at the beginning of their shifts, with Respondent's knowledge and without challenge by Respondent over an extended period of time. It is well established that terms and conditions of employment established by practice, like other established terms and conditions of employment, may not be altered by either party in the absence of agreement or impasse following good faith bargaining. Department of the Navy, supra.

The Respondent argues that management was entitled to terminate without notice the practice of employees taking coffee breaks at the beginning of their shifts, because such practice is contrary to law and decisions of the Comptroller General. The record establishes that the agents were informed that there would be no more coffee breaks, without specific reference to coffee breaks at the beginning of the shifts. (Tr. 31, 377). Moreover, even if it had been generally understood that such prohibition applied only to coffee breaks at the beginning of the shift, which it was not, such assertion would not be a defense to the allegation at issue herein, that is, that Respondent unilaterally eliminated a past practice. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 5 FLRA No. 48 (1981). Of course, any agreed upon practice must be consonant with appropriate law and regulation. Ibid. Respondent's defense that the change had no substantial impact is also rejected.

It is concluded that Respondent violated sections 7116(a)(1) and (5) by changing the coffee break practice without providing the Charging Party adequate notice of its decision so that the Union would have a meaningful opportunity to bargain, to the extent consonant with law and regulations, with regard to any proposed changes in such established practice.

C. Case No. 63-CA-565

1. Statement of the Case

The complaint alleges that on or about May 1, 1979 Respondent unilaterally changed existing conditions of employment concerning use of personal vehicles for travel without furnishing the Union an opportunity to bargain concerning the impact and implementation of such change.

2. Findings of Fact

Travel by border patrol agents between regions is directed by the central office in Washington, D.C. Approval of such travel is governed by the administrative manual which incorporates the Federal Travel Regulations. During the pertinent period, the Federal Travel Regulation provided, in pertinent part, as follows:

> 1-2.2. Methods of transportation.
>
> a. Authorized methods. Methods of transportation authorized for official travel include railroads, airlines, helicopter service, ships, buses, streetcars, subways, and taxicabs; Government-furnished and contract rental automobiles and airplanes; privately owned and rented automobiles and airplanes; and any other necessary means of conveyance.
>
> b. Selecting method of transportation to be used. Travel on official business shall be by the method of transportation which will result in the greatest advantage to the Government, cost and other factors considered. In selecting a particular method of transportation to be used, consideration shall be given to energy conservation and to the total cost to the Government, including costs of per diem, overtime, lost work time, and actual transportation costs. Additional factors to be considered are the total distance of travel, the number of points visited, and the number of travelers. 5 U.S.C. 5733 requires that, "The travel of an employee shall be by the most expeditious means of transportation practicable and shall be commensurate with the nature and purpose of the duties of the employee requiring such travel."
>
> c. Presumptions as to most advantageous method of transportation.
>
> (1) Common carrier. Since travel by common carrier (air, rail, or bus) will generally result in the most efficient use of energy resources and in the

least costly and most expeditious performance of travel, this method shall be used whenever it is reasonably available. Other methods of transportation may be authorized as advantageous only when the use of common carrier transportation would seriously interfere with the performance of official business or impose an undue hardship upon the traveler, or when the total cost by common carrier would exceed the cost by some other method of transportation. The determination that another method of transportation would be more advantageous to the Government than common carrier transportation shall not be made on the basis of personal preference or minor inconvenience to the traveler resulting from common carrier scheduling.

. . . .

(3) Privately owned conveyance. Except as provided in 1-2.2d, the use of a privately owned conveyance shall be authorized only when such use is advantageous to the Government. A determination that the use of a privately owned conveyance would be advantageous to the Government shall be preceded by a determination that common carrier transportation or Government-furnished vehicle transportation is not available or would not be advantageous to the Government. To the maximum extent possible, these determinations and the authorization to use a privately owned conveyance shall be made before the performance of travel. (Respondent's Ex. 18).

On or about May 1, 1979, Richard Thut, Deputy Commissioner, Border Patrol, ordered that a detail of agents be sent from the Northern Region to Livermore, California for duty on May 8, 1979. Mr. Thut acted at the direction of the Commissioner, INS. He determined that only commercial air would be used because of the short time span involved, the availability of government vehicles for use in Livermore, the need for high visibility, and the expectation that the operation would be highly mobile with agents moving from place to place.

When agents requested to use privately owned vehicles (POVs), either at no greater cost to the government of transportation or time, or possibly at their own expense, they were informed that commercial air would be the exclusive means of travel. One employee was advised that if he took his personal automobile and did not fly, disciplinary action would be taken. Employees were given no explanation for the decision, other than that it emanated from the Commissioner's office.

Employees were very upset at the inability to take their POVs and complained to the local AFGE officers, who contacted the AFGE, National Border Patrol Council president, Richard Bevans. Bevans had an established method of contact in the Commissioner's office with Dr. Ralph Thomas, the Commissioner's executive assistant. Bevans called Dr. Thomas two or three times a day for three days and was informed that Dr. Thomas had stepped out temporarily, but would return his call. Dr. Thomas finally returned Mr. Bevan's call on Saturday before the agents were to depart on Monday. Thomas said that nothing could be done over the weekend, and the employees would have to proceed as scheduled.

Agents on the detail to Livermore had one unmarked and a number of marked vehicles available for personal use when off duty. The unmarked vehicle was difficult to schedule among seven employees. Employees were wary about driving the marked government vehicles as these vehicles were easily identifiable, vandalism to INS vehicles was not uncommon, and employees understood that they would be responsible for any damage done to the Government vehicles during off-duty time. Consequently, the agents' activities during off-duty hours were more restricted than if they had had their own automobiles available for personal business. Thus, the decision had a significant impact on their working conditions during the detail.

Prior to May 1979 a past practice existed in the Northern Region whereby agents assigned to extended operational details outside the Northern Region were given the option of using POVs. POVs were authorized for extended California details in July 1977 and September 1977. Commercial air had not been used exclusively for travel to California details since 1972 and 1973. The optional use of POVs depended upon the agents' ability to meet the reporting requirements and not incur any additional cost or loss of time over and above that received for travel by commercial air. Additional travel time had to be by days off or annual leave. In some cases in the past, POVs had been permitted, but no reimbursement was allowed. Emergency situations and instances where agents were acting in other than their normal operational mode were recognized exceptions to the use of such vehicles and were always fully explained to employees. Agents could have met the reporting requirement in this instance by using POVs.

2. Conclusions

The decision not to allow the use of personally owned vehicles under any circumstances in this instance constituted a unilateral change in past practice. The Union was not notified of the decision nor given the opportunity to bargain over its impact and implementation. The dealings by Respondent clearly lack that "directness and dignity appropriate to partners on an equal footing." United States Air Force, Air Force Logistics Command, Newark, Ohio, 4 FLRA No. 70 (1980). Respondent's action violated sections 7116(a)(1) and (5) of the Statute.

III. Objections to the Election

A. Laredo, Texas Allegations

1. Coffee Break Change

The findings and conclusions concerning the change in coffee break practice at Laredo, Texas are set forth supra. With regard to the possible effect on the election, the following additional findings and conclusions are made.

a. Findings of Fact

At all times material there were approximately 125-150 employees throughout the Laredo Sector with about 70-80 at the Laredo Station. (Tr. 25, 295-296, 328).

Virtually all the Border Patrol Agents in Laredo were very upset by the sudden abolition of the coffee break practice. (Tr. 36, 46, 51-52, 100-102, 170, 186, 212). A majority of them complained vehemently to AFGE's officers about the sudden change. The Union informed employees that an unfair labor practice charge had been filed, but it would take months to resolve. (Tr. 51-52, 100-102, 170-172, 212-213, 245, 252).

The only explanation given to employees as to why the past practice had to be changed at that specific time, during the election campaign, was management's long-standing objection to congregating in one coffee shop. This objection never before resulted in a complete cancellation of the practice. (Tr. 44-45, 100, 162, 212, 244-245, 252).

After the change in the break practice, employees often discussed among themselves their dissatisfaction with AFGE's response to management's termination of the coffee break practice. The general consensus of opinion at the station was that AFGE was no longer effective but, rather, now appeared very weak when tested. After the February change in past practice, employees' attitude toward AFGE turned very negative, whereas before personnel matters were perceived as going along well. (Tr. 101-102, 170-172, 177-178, 186, 214-215, 235, 248-249, 252-255, 262). Four employees testified that the change significantly affected their vote, which was cast for IBPO. (Tr. 172, 215, 247, 255, 262).

b. Conclusions

The coffee break was terminated inexplicably and without notice during the election campaign based upon a problem--employee's congregating in one coffee shop--that had existed as long as the practice. When it became evident that AFGE could not stop or ameliorate the change,

employees turned their anger toward AFGE, openly complaining about its ineffectiveness and discussing alternatives. It was made to appear that AFGE was unable to stop management from unilaterally changing conditions of employment. It is concluded that management's conduct in making a unilateral change in past practice in this respect during the election campaign could reasonably have had a significant impact or influence on the free choice of the 80 or so voters at the Laredo station and, therefore, affected the results of the election. It is recommended that this objection be sustained.

2. Change in 1977 Local Agreement

The findings and conclusions concerning the change in the 1977 local agreement are set forth supra. With regard to the possible effect on the election, the following additional findings and conclusions are made.

a. Findings of Fact

A majority of the Border Patrol Agents in Laredo were very upset by the changes in the local agreement and complained vehemently to AFGE's officers about the sudden change. The terms of the agreement had been in effect for years and were viewed as a significant health and safety benefit. No problems with the agreement had ever been announced to the employees by management. AFGE informed the employees that an unfair labor practice charge would be filed, but it would take months to resolve. Employees discussed among themselves their dissatisfaction with AFGE's response to management's change in the agreement. Employee attitude toward AFGE turned negative, and the general consensus was that AFGE was weak and ineffective. Four employees testified that the change significantly affected their vote, which was cast for IBPO. (Tr.46, 52, 170-172, 213-215, 246, 252-254, 448, 459).

b. Conclusions

It is concluded that management's action in not maintaining the existing conditions of employment contained in the local agreement to the maximum extent possible during the election period and deliberately choosing the election period as an appropriate time to make changes in the local agreement violated the posture of neutrality that agency management was required to maintain. Such conduct could reasonably be expected to have a significant impact or influence on the free choice of the 80 or so voters at the Laredo station. While the Union could possibly have stopped or ameliorated the changes by requesting and engaging in meaningful negotiations, the change itself was initiated during the election period, without being essential or necessary to the functioning of the agency. It contributed to the turmoil which local management sought to exploit and violated the posture of neutrality that agency management was required to maintain. Cf. Department of the Air Force, Air Force Plant Representa-

tive Office, Detachment 27, Fort Worth, Texas, 5 FLRA No. 62 (1981). It is recommended that this objection be sustained.

3. Supervisors Signing IBPO Petition

a. Findings of Fact

In early January Richard K. Kesselus, a technical advisor with the IBPO, addressed an AFGE meeting in Laredo concerning the benefits of IBPO and a possible petition challenge by the IBPO. He made arrangements to do so with Stephen Young of the local AFGE chapter. After his presentation, Mr. Kesselus left recognition petitions with agents in Laredo. (Tr. 77, 423-425).

Larry Botell, second vice president of the AFGE local, heard Mr. Kesselus speak. He had never seen an AFGE representative outside of the local officers and felt that AFGE was not doing much for the employees. He felt the Union should do more. He discussed his dissatisfaction with other employees and became an IBPO supporter. He subsequently passed around the IBPO authorization petition for signatures in January 1979 at the Laredo station. At the top of the petition, in large, bold black letters was the heading, "AUTHORIZATION PETITION." Also at the top was the typed statement: "We, the undersigned, hereby petition the International Brotherhood of Police Officers to act as our representative and exclusive Bargaining Agent for the purpose of Collective Bargaining."

Botell asked supervisors to sign the petition. He explained that it was a petition for the IBPO in order to see whether there was enough interest so that an election could be held to determine whether IBPO or AFGE would be the exclusive bargaining agent. He also stated that the petition would help get both unions to come down and talk with the employees. (Tr. 439, 444-445, 450-452, 456, 458-459).

Six management officials or supervisors signed the authorization petition, including Millard McMillan, deputy chief of the Laredo sector; Palmer Layne Burget, patrol agent in charge, Laredo station; Bob Gamble, assistant patrol agent in charge, Laredo station; and Joe Galvan, Gordon Acre, and H.G. Poole, supervisory patrol agents. (Tr. 54-55, 174, 217, 237, 349, 383). The signatures of McMillan, Gamble, and Burget were on the front page. (Tr. 54-55, 389). Botell turned the petitions over to Stephen Young, then AFGE president, who had some other signatures. (Tr. 84, 445).

During mid-January 1979, Dennis Ekberg, labor relations specialist, INS, Washington, D.C., received a complaint from James Jones, AFGE, that supervisors were signing an IBPO petition which was being circulated. Mr. Jones requested that Mr. Ekberg look into the matter. Mr. Ekberg discovered that six supervisors had, in fact, signed the petition and

reported this to Mr. Jones. Mr. Jones requested that supervisors cease signing the petition. Mr. Ekberg subsequently held a conference call with regional labor relations specialists, informing them that supervisors must remain neutral and not sign the IBPO petition. (Tr. 277-278). Mr. McMillan and Mr. Burget, who had signed the petition, were subsequently advised that higher management was displeased over the incident. (Tr. 350, 384, 396).

The IBPO petition was filed January 19, 1979. (General Counsel's Ex. 1(a)). The formal notice to employees of the filing of the petition was posted February 20, 1979 to March 2, 1979. (General Counsel's Ex. 1(ii), attachment 1; Respondent's Ex. 1).

AFGE did not request that INS issue a disclaimer. No action was otherwise taken by management, or the supervisors concerned to acknowledge or explain the particular incident to bargaining unit employees. (Tr. 56, 175, 279, 282, 358, 397).

During February and March 1979, INS headquarters issued memoranda to all chief patrol agents directing management neutrality during the course of the representation challenge. These memoranda were posted on employee bulletin boards in the Laredo station. (Tr. 270-271, 373-374; Respondent's Ex. 1 and 2).

One employee testified that the supervisors' signing the IBPO petition had the most impact on his negative view of AFGE and vote in favor of IBPO, as he thought the supervisors might know something he did not know. (Tr. 172-173). Other employees also testified that some supervisors indicated to him that they had signed the petition because they wanted another union. (Tr. 217, 233).

b. Conclusions

Respondent INS has renewed its motion, first made before the Regional Director, that this objection to the election, dealing as it does with alleged pre-petition misconduct, be dismissed. The Regional Director denied Respondent's original motion ruling, in part, that the issue of timeliness of the objections could best be resolved on the basis of a developed record. (General Counsel's Ex. 1(ii), 1(qq)).

An objection based on conduct occurring prior to the filing of the representation petition may not be considered as grounds for setting aside the election. Cf. Assistant Secretary Ruling No. 58, 5 A/SLMR 789 (1975); Ideal Electric and Manufacturing Company, 134 NLRB No. 1275, 49 LRRM 1316 (1961); Maywood Inc. and Furniture Workers, AFL-CIO, 251 NLRB No. 139, 105 LRRM 1577 (1980) (evidence of misconduct occurring before the filing of the representation petition may be considered only insofar as it lends meaning and dimension to related post-petition conduct).

The record reflects that AFGE had knowledge of the conduct occurring prior to the filing of the representation petition in mid-January 1979, but it did not challenge the validity of IBPO's showing of interest pursuant to the regulations, see 29 CFR §202.2(f)(2) (1975) and 5 CFR §2422.2(f)(2) (1980), or file an unfair labor practice complaint. AFGE signed the consent election agreement without qualification. (General Counsel's Ex. 1(c)). Compare Department of the Navy, Navy Commissary Store Complex, A/SLMR No. 654, 6 A/SLMR 231 (1976).

The requirement that, in these circumstances, allegations of pre-petition misconduct be presented and disposed of at the proper time, prior to the holding of an election, permits expeditious consideration of the matter at the appropriate time and fosters stability in Federal labor relations. Therefore, the renewed motion is granted, and it is recommended that this objection be overruled and dismissed.

4. IBPO Use of Management Bulletin Board

c. Findings of Fact

As noted, on February 14, 1979 and March 23, 1979 INS headquarters issued memoranda to all chief patrol agents concerning dealings with rival unions during the pendency of the representation challenge. (Respondent's Ex. 1 and 2). These memoranda were posted on employee bulletin boards in the Laredo station, (Tr. 270-271, 373-374), and provided, in part, as follows:

> The filing of the petition by the IBPO creates certain obligations on the part of Management in dealing with AFGE and IBPO. Under labor relations case law, IBPO and AFGE are now considered to be on equal footing as participants in a representation proceeding. That is, while AFGE is still the exclusive representative of Border Patrol employees, the formal challenge by the IBPO gives IBPO equal status with AFGE insofar as access to employees is concerned. The general rule is that any facilities or services furnished by Management in connection with the representation proceeding must be made available on an impartial basis.
>
> The specific means of gaining access to employees which the union may wish to utilize are: (1) Use of employee (NOT the AFGE) bulletin boards; (2) Use of employee mail drawers; (3) Use of space in a non-work area for setting up a table for distribution of literature; and (4) Use of space in a non-work area for holding a meeting with employees who are in a non-duty status. In regard to the latter point, you may be approached by an IBPO or AFGE representative who is not and INS employee for space to conduct a meeting with employees. Where there is space available, i.e., a non-work area, you may

allow such a union representative to meet with employees who are in a non-duty status. You should NOT permit any employee who would otherwise be in a duty status to attend such a meeting.

If either IBPO or AFGE requests use of any of the facilities or services described above and if such facilities or services are available within your sector, you should grant the request. If you receive a request not addressed above, please call your Regional Labor Relations Specialist for advice before acting on the request.

During the course of this representation challenge, it is imperative that Management maintain a neutral posture. No supervisor, station senior, Assistant Chief, Deputy Chief or Chief should express an opinion to any bargaining unit employee regarding the relative merits of IBPO, AFGE or unions in general. Likewise, no employee should be questioned by any management representative concerning his or her views about the unions. Further, please be reminded that employees do have the right to politicize for the union of their choice or against all unions so long as they do so on their own time and do not interfere with the work of other employees.

In this very delicate situation I urge you to contact your Regional Labor Relations Specialist for guidance should you have any questions about your dealings with employees or representatives of IBPO, AFGE or any other union.

Initially, Laredo management permitted the IBPO to place material on an employee bulletin board in the locker room. (Tr. 359, 401, 441). However, when IBPO material, announcing an authorized campaign visit by IBPO representatives, was torn down by an unknown person or persons in April 1979, the IBPO representatives complained to management. (Tr. 351, 385, 430, 441). Laredo management checked with the Region and was instructed to let the IBPO use management's side of a double, glassed-in, locked bulletin board. (Tr. 351-352). The left side of this board had been customarily used by AFGE, and the right side had been customarily used by Laredo management for station instructions and policies. Each party had separate keys. (Tr. 351-352; 362).

Management's side of the locked bulletin board was opened, and management's material was moved to the side to make room for the IBPO meeting notice. IBPO and management material was placed together on management's side of the locked bulletin board, with IBPO's material being placed more on the right side of management's board and management's literature being placed more on the left. The IBPO materials, possibly also including a newsletter, remained on the board until the election was over.

(Tr. 260-262, 363-366, 385-386, 456). Some management material was also observed to be taped to the outside glass. (Tr. 126-127, 185).

Stephen Young, local AFGE president, complained to Palmer Layne Burget, the patrol agent in charge, about the placement of IBPO material on management's side of the locked bulletin board. Young was advised that the station had to give equal treatment to both unions. (Tr. 56, 79-81, 398). Bargaining unit members were never given any explanation by management concerning why materials supporting IBPO were posted on management's side of the bulletin board. (Tr. 56, 122, 175, 255-256, 363). Mr. Burget assumed that the local AFGE president would pass on the explanation to the employees. (Tr. 398).

Two unit employees testified that they gained the impression that management was supporting the IBPO by being allowed to use management's side of the locked bulletin board. (Tr. 216, 255).

b. Conclusions

The unfair labor practice principles contained in section 7116(a)(3) of the Statute are applicable in an election situation when the question at issue concerns agency treatment of competing labor organizations.[4/] Cf. U.S. Department of the Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143, 2 A/SLMR No. 160 (1972). This section permits an agency to furnish "upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status." The legislative history reflects that the House Committee on Post Office and Civil Service noted in its report on H.R. 11280, containing this language, that such an example would be "providing equal bulletin board space to two labor organizations which will be on the ballot in an exclusive representation election." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 49 (1978).

4/ Section 7116(a)(3) provides:

> "§7116. Unfair labor practices
> "(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> "(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status[.]"

INS and IBPO contend that the circumstances here justified INS providing to IBPO the same privilege extended to AFGE--the use of a locked bulletin board.

The record reflects that management did not, in these circumstances, merely provide to IBPO equal facilities or "equal bulletin board space" to that given AFGE. AFGE used one side of a glassed-in, locked bulletin board equal to that of management. In this instance, management did not, upon request, provide IBPO with such a bulletin board or space. Rather, management, without any explanation to employees, permitted IBPO to _share_ its own bulletin board space for the purpose of posting campaign material, space which had customarily been used exclusively by management for management material.

It is not necessary that an agency actually intend by its conduct to influence the voters. Rather, agency conduct prior to an election which tends to reflect a non-neutral attitude may compromise the employees' free choice. It is concluded that this conduct allowed IBPO an unfair advantage, could reasonably have been viewed by unit employees as agency assistance or support of IBPO, consitututed interference with the employees' free choice to select an exclusive representative, and that such interference affected the results of the election. It is recommended that this objection be sustained.

B. Yuma, Arizona Allegations

1. Circulation of IBPO Petition

a. Findings of Fact

In January 1979, before, during and after unit briefings, while employees were at gas pumps, and at other times, Ron Strong, a border patrol agent and IBPO supporter, asked employees who were on duty to sign an IBPO petition which he kept in his mail drawer. One employee reported Strong's gas pump petition activity to the local AFGE president, who complained to the patrol agent in charge. Superviors were in the general area; however, no specific supervisor was identified as having specific knowledge of, or sanctioning such conduct. The patrol agent in charge and the station senior patrol agent testified that they were unaware of any solicitation by Mr. Strong and that activities just after shift briefings were busy and noisy.

b. Conclusions

Respondent's renewed motion to dismiss this objection to the election as involving conduct occurring prior to the filing of the representation petition is granted for the reasons set forth with regard to the similar Laredo objection, _supra_. It is recommended that this objection be overruled and dismissed.

2. IBPO Campaign Activity

a. Findings of Fact

During the campaign, Ron Strong, border patrol agent and IBPO supporter, continued to discuss IBPO with other employees and he asked employees to vote for the IBPO during his conversations with other employees on duty time. No specific supervisor was identified as having specific knowledge of, or sanctioning, such activity.

IBPO representatives conducted an authorized campaign visit to Yuma. They were only permitted to speak with off-duty personnel.5/

b. Conclusions

This objection was not raised in the original objections, and is found to be without merit. It is recommended that this objection be overruled and dismissed.

C. Chula Vista, California Allegations

1. Unilateral Change in Grooming Standards

a. Findings of Fact

In 1972, the Border Patrol, I & NS, published a personal appearance provision in its Administrative Officers' Handbook entitled the M-68. (Joint Ex. 30; Tr. 643). Beginning on or about 1975, grooming standards for border patrol agents became an issue for discussion at the national level between AFGE's National Border Patrol Council and I & NS management. The parties' collective bargaining contract in effect in 1975 made specific reference to the M-68 standard. In 1976, both sides proposed changes in the standard, but neither side prevailed, and the M-68 standards were in effect nationwide during the life of the 1976 contract. (Tr. 643-4).

In January 1978 Steven Rickman, then AFGE's local president in Chula Vista and the western regional vice president, met with the newly appointed acting chief of the sector, Albert Franco. Mr. Franco presented to the Union personal grooming standards for sector agents which he had prepared and which were more specific than the M-68 standards. Mr. Rickman informed Chief Franco that he would not negotiate a separate grooming standard at the local level, pursuant to AFGE's national policy; that the entire subject was

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5/ Mr. Babcock testified that employees coming on duty for a new shift talked to the IBPO representatives while supervisors were in the area. I credit the contrary detailed testimony of the station supervisors as to the conditions of the visit.

scheduled for negotiations at the national level later that same year; and that further time to comment was, therefore, unnecessary. Mr. Rickman also advised Mr. Franco that these proposals were a definite change in past practice. He stated that the proposed standards would be very controversial since some agents had been in the service for 5-6 years with an acceptable appearance and were not in compliance with the proposed standards. (Tr. 668-671; 684-685; Respondent's Ex. 6, Joint Exhibits 31, 38). Mr. Franco decided to hold further action in abeyance until a new chief was appointed. (Tr. 889).

On April 9, 1978 Donald Cameron became chief patrol agent for the Chula Vista sector. He issued a slightly revised version of the Franco grooming standards by memorandum to all sector stations dated May 23, 1978 (Joint Ex. 4), providing a copy to the Union on May 30, 1978. (Joint Ex. 32). The memorandum stated that all personnel in the sector were required "to adhere strictly to the grooming standards as set forth in form M-68, Officers' Handbook" and gave detailed instructions concerning the grooming of hair, sideburns, moustaches, and beards.

On June 7, 1978 the agent in charge of the Chula Vista station made reference to the sector grooming standards in a memorandum to all personnel. He stated that the standards would be enforced as follows:

> Our policy will be to issue violators of these standards a direct oral admonishment to comply by the next tour of duty. In addition, violators will be warned that failure to comply will result in: (1) immediately being placed in a leave without pay status until such time as compliance is achieved, and (2) the institution of disciplinary action for failure to follow instructions. (Joint Ex. 5)

Employee reaction to the sector grooming standards and enforcement policy was very hostile. (Tr. 673, 742, 780, 798, 827-828). Employees complained in large numbers to AFGE officials and demanded that the Union take some action. (Tr. 673, 753, 770, 798). AFGE filed a grievance, and one agent filed an equal employment opportunity complaint. The grievance was held in abeyance pending final disposition of the EEO complaint. (Tr. 673-675, 826; Joint Ex. 6-10, 12-13). Some employees were dissatisfied with the Union's response. (Tr. 750, 770-771, 798-799).

Grooming standards were enforced throughout 1978 and 1979. (Tr. 898, 916-917, 928, 969). The chief patrol agent at sector meetings periodically reminded all agents in charge to enforce the standards. (Tr. 891, 916, Respondent's Ex. 9, 10, 11). However, primary responsibility for enforcement was up to the immediate supervisors, and enforcement among the agents varied depending on the supervisor. (Tr. 903, 697, 751-752, 930). In general, supervisors continued looking for a generally "neat appearance" consistent with the M-68 standards. (Tr. 708-710, 932-933, 967-968, 1011-1012). Employees were periodically told to get hair cuts or trim

their moustaches. (Tr. 690-691, 751-752, 767-768, 968). There was no general abuse or disregard of the guidelines. (Tr. 894, 921, 968).

During a labor-management monthly meeting on March 7, 1979 Chief Patrol Agent Cameron advised the Union that the central office was in the process of formulating a national grooming standard, but that his sector policy on grooming standards would be adhered to until superseded. (Tr. 917, Respondent's Ex. 12).

In March or April 1979, Albert Franco, deputy chief, Chula Vista sector, observed an officer of the Chula Vista station who did not have good grooming. He advised the patrol agent in charge of the station. (Tr. 894). He also reiterated the grooming standards to a meeting of agent supervisors in April 1979. (Tr. 678).

On April 23, 1979, Patrol agent in charge Watson, Chula Vista station, issued a memorandum to all personnel which stated as follows:

> Personal Grooming Standards as outlined by the Chief Patrol Agent in his memorandum dated May 23, 1978 were effective upon receipt by the Patrol Agent in Charge, Chula Vista Station.
>
> Unit Supervisors at the Chula Vista Station have the initial responsibility to insure there is compliance with the directive at all times. All agents at the Chula Vista Station will be in compliance NOT LATER THAN April 26, 1979.
>
> Unit Supervisors will refer to the Patrol Agent in Charge, by memorandum, those agents who are found to be NOT in compliance with the Personal Grooming Standards directive. Consideration will be then given towards the institution of disciplinary action.
>
> This memorandum rescinds my instructions dated June 7, 1978 with the subject Grooming Standards at the Chula Vista Station. (Joint Ex. 14).

Other stations in the sector placed similar orders into effect. Approximately 400 border patrol agents were subject to the standards at this time. (Tr. 902).

The employees' reaction to the memorandum was immediate and hostile. (Tr. 690, 707, 746, 775, 793-794, 846). The standards issue became the primary topic of conversation (Tr. 777, 762, 798) and somewhat of a rallying point for employees. (Tr. 727). Employees complained to the Union. (Tr. 726, 744-745, 776-777, 793-794, 846). In turn the Local

immediately requested the assistance of the National Headquarters of AFGE. (Tr. 651, 660-662). AFGE headquarters filed an unfair labor practice charge against I & NS for this sudden "get tough" policy and requested that the FLRA petition for an immediate stay of the policy. However, no stay was sought by the FLRA. (Tr. 662). The unfair labor practice charge was eventually dismissed. The General Counsel determined that the Respondent's action was a continuation of its enforcement policy announced in May 1978; that the charge was, therefore, untimely; and that the charge was also barred by section 7116(d) due to the 1978 grievance on the same issue. (Joint Ex. 16).

Two supervisors referred 26 individuals to the patrol agent in charge for non-compliance with the grooming standards. Several individuals were anxious to have discipline imposed so they could file a complaint. They were well aware that the previous EEO case had been found deficient because the individual who filed the case had not actually been disciplined. (Tr. 680-682, 689-690). One such individual wore his hair in a pony tail in order to challenge the grooming standard. (Tr. 732). No discipline was imposed prior to the election, and, after the election, the employees learned that the sector had decided not to impose discipline pending the issuance of central office grooming standards. (Tr. 737).

b. Conclusions

AFGE contends that the sudden reinstitution of the highly controversial grooming standards, one week before the election ballots were received, disturbed the laboratory conditions and tended to impact unduly and improperly upon the free choice of the voters.

The record reflects that the grooming standards were in effect and enforced continually by sector management from June 1978 through the election, although the severity of enforcement on individual agents varied among supervisors. The record also shows that enforcement of the standards was reemphasized by sector management in early 1979 and that, accordingly, additional steps were taken to reiterate and enforce the standards by some supervisory personnel just before the election. In my opinion, these actions did not tend to interfere with the employees' free choice in the selection of an exclusive representative. Employees were well aware of management's initial 1978 position on the grooming standard, the AFGE's response thereto, and the fact that some supervisors were more lenient than others in interpreting management's directives. They would reasonably assess the 1979 actions as part of a continuing enforcement, or even as a continuing controversy, concerning grooming standards, rather than as a sudden, inexplicable, unsupportable "crackdown" or change. Inasmuch as this objection is not supported by a preponderance of the evidence, I recommend that it be overruled and dismissed.

2. Alleged Management Announcement of IBPO Rally

a. Findings of Fact

In April 1979 a notice announcing a debate between IBPO and AFGE for April 18, 1979 was placed by unknown person or persons on the station's official hot board. The notice was typed on a plain sheet of paper without a letterhead, was signed by Jeffrey L. Otherson, a border patrol agent and IBPO supporter, and indicated that the April 18, 1979 meeting for purposes of holding the debate had been called by Otherson. The same notice was placed by Otherson on the employee bulletin board. (Petitioner's Ex. 3).

The "hot board" is a clip board containing primarily official announcements. It is placed on the podium in the muster room and is read by supervisors to agents at the beginning of shifts. There is an open traffic area around the hot board and every employee has access to the board. Sometimes employees place unofficial announcements on the board and to the side announcing births, etc.

There was no probative evidence that the announcement was actually read by supervisors off of the hot board. The assistant patrol agent received a complaint that the announcement was on the board, immediately checked the board, removed it, and placed it on the employee bulletin board. On April 16, 1979 the local AFGE president directed a letter to the chief patrol agent confirming a formal protest, but expressing appreciation "of your prompt resolution of the matter." (Respondent's Ex. 8). The local AFGE president also placed a notice on the employee bulletin board prior to the April 18, 1979 meeting date which stated that the meeting called by Otherson did not have the sanction of AFGE and would not be attended by AFGE officials. (General Counsels' Ex. 2).

b. Conclusions

There was no showing of improper activity by management in connection with this incident, or that the incident could reasonably have had a significant impact or influence on the free choice of voters. It is recommended that this objection be overruled and dismissed.

3. Circulation of IBPO Petition

a. Findings of Fact

Miquel A. Vallina testified that Jeffrey Otherson and Mr. Bader solicited for the IBPO petition in the anti-smuggling office of the station and could possibly have been overheard by a supervisor although the supervisor never gave him any such indication. (Tr. 792-793, 797). Mr. Heineke, the head of the anti-smuggling unit in 1979, testified to the arrangement of the offices, the busy traffic through the area, and his

lack of knowledge or awareness of any solicitation activity. (Tr. 1019-1021).

Mr. Musegades, the assistant patrol agent in charge at Chula Vista, testified to never seeing any open solicitation activity (Tr. 962), as did Mr. Grimm (Tr. 972) and Mr. Geer (Tr. 1001), both station seniors at that time. Testimony was also presented that a counseling session had been conducted by Mr. Musegades and Mr. Geer on January 18, 1980 in which Mr. Otherson was warned about any improper solicitation activity. (Respondent's Ex. 14, Tr. 962-963, 1002-1003).

Mr. Steven Rickman, the then Local AFGE President, testified that he had complained to Sector management based on a report that Jeffrey Otherson was passing a petition around. Management took prompt action to prevent misconduct, and Mr. Rickman was satisfied that "management cooperated with us a hundred percent as far as making sure that there were no violations with respect to this petition." (Tr. 691-693).

b. Conclusions

Respondent's renewed motion to dismiss this objection to the election as involving conduct occurring prior to the filing of the representation petition is granted for the reasons set forth with regard to the Laredo objection, supra. It is recommended that this objection be overruled and dismissed.

D. San Clemente, California Allegation

1. Shift Briefing and Circulation of Petition by IBPO

a. Findings of Fact

On January 17, 1979, Jeffrey Otherson, border patrol agent and IBPO supporter, went to the San Clemente station for the purpose of contacting off-duty agents before the midnight shift change. He arrived shortly before midnight and spent the time until almost midnight explaining the purpose of his visit to the supervisory border patrol agent. The supervisor finally agreed that he could address agents in the squad room. By this time, both agents coming on duty and some agents going off duty were intermingled in the squad room. The agents coming on duty were given a short briefing, and Otherson then briefly addressed the group. He explained the IBPO and presented his petition for signing. He secured about 6-7 signatures. Employees on and off duty heard his talk and may have signed the petition. The local AFGE union steward subsequently, and prior to February 1, 1979, reported the activity to Steven J. Rickman, a border patrol agent and an officer of AFGE Local 1613 and AFGE western regional vice president. Rickman concluded that management had been cooperative in trying to prevent violation with respect to the petition and that Otherson's contact with on-duty personnel was inadvertent.

b. Conclusions

Respondent's renewed motion to dismiss this objection to the election as involving conduct occurring prior to the filing of the representation petition is granted for the reasons set forth with regard to the Laredo objections, supra. It is recommended that this objection be overruled and dismissed.

E. El Centro, California Allegations

The AFGE objection that the IBPO petition was at all times left on a desk in the Anti-Smuggling Office with the knowledge of the station supervisors and was signed on duty time was withdrawn by AFGE during the course of the hearing. (Tr. 542).

F. Instructor Support of IBPO During Border Patrol Academy Classes, Glynco, Georgia

1. Findings of Fact

The Border Patrol sends its newly hired agents to the Border Patrol Academy, Glynco, Georgia for four months of training. The training program includes instruction in law, Spanish, and the use of firearms. The new recruits are told at orientation meetings to take any problems they may have to their law instructor for advice and counseling.

Robert M. Shannon was a class coordinator and instructor at the Academy during the approximate period from July 1978 to March 1979. He was a member and secretary-treasurer of AFGE, INS, local 3784. However, he was in communication with the IBPO in November of 1978 concerning their petition activity, and, in early 1979, at the time the election was being set up, he went to Washington, D.C., at the request of IBPO, to review a list of bargaining unit members.6/ In March 1979 Mr. Shannon became the law instructor for one section of the 130th session, consisting of 24 students.

After the agent trainees received their ballots, some of the students in Mr. Shannon's class wanted to know why there was an election, what a union could do for them, the pros and cons of both unions, and posed questions to Mr. Shannon. Most of the questions were asked and discussed with groups of students during class breaks and in the hallway, lobby, or the classroom itself, but occasionally a question relating to the

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6/ The consent election agreement reflects a dispute as to whether Border Patrol personnel assigned to the Academy are members of the appropriate unit and eligible to vote in the election. (General Counsel's Ex. 1(c)). It was agreed that instructors could vote, but such ballots would be subject to challenge. (Tr. 492).

differences between the two unions came up during class time.

In response to a question on the differences between the AFGE and IBPO in providing legal representation for agents concerning work-related matters, Mr. Shannon stated that an agent's request for legal representation under the present system would go to the AFGE local, and, in turn, to the national council, national representative, and then to the AFGE itself. He stated that the IBPO, on the other hand, had promised to provide legal representation by an attorney within five hours anywhere in the country.

Mr. Shannon presented both sides, but some agents gained the impression that he shaded the presentation in favor of IBPO, or that he leaned in favor of IBPO. In answering the questions, Mr. Shannon discussed his personal experiences with AFGE. There is no evidence that he made derogatory references to AFGE at this time. He also told the class that he was affiliated with the IBPO. He stated that the IBPO was working to get agents a GS-11. He stated that border patrol agents should have a union for police officers instead of secretaries. One student testified that he voted for IBPO on the basis of this statement, as it seemed logical that law enforcement officers should have a union that represented police officers. Mr. Shannon did not specifically urge the agents to vote for IBPO. He stated that he "was not telling anyone in the classroom how to vote, but...." He emphasized the "but." Some agents gained the impression that Mr. Shannon meant by this that you could go out and vote for AFGE or IBPO, but the preference was IBPO, and he favored IBPO. Two agents testified that they voted for IBPO because of what they learned or the impressions they gained from Mr. Shannon.7/

2. Conclusions

Section 7116(e) authorizes statement during representation elections encouraging employees to vote in elections, correcting the record where false or misleading statements are made, or conveying the Government's

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7/ In making the above findings, I gave no weight to the testimony of Fernando Vasquez, who was not in Mr. Shannon's class, concerning his discussions with roommates, or to that of Hortance C. Sanchez, who was not in the class, concerning his discussions with roommates and an unidentified person. I credited the testimony of Baltazar Longoria concerning events prior to January 1979 as relevant background information and to the extent it lends credence, meaning, and dimension to the related post-petition conduct found herein. This testimony of Mr. Longoria reveals that Mr. Shannon told a class in approximately November 1978, among other things, that they would soon have an opportunity to replace AFGE, which was not a strong union, with IBPO, a law enforcement oriented organization.

view on labor-management relations. The Government's views are that employees should be free to choose or reject union representation while management maintains a posture of neutrality, and, as further stated by Congress in section 7101 of the Statute, that "labor organizations and collective bargaining are in the public interest." Department of the Air Force, 5 FLRA No. 62 (1981).

Agency instructors possess a unique status. While instructors are generally not recognized as supervisors or management officials, it is a generally-felt belief that they have suasion over their students. Students inherently feel pressure to "please" instructors and to be deferential to their desires. Department of Transportation, Federal Aviation Administration Aeronautical Center, FLRC No. 72A-1, 1 FLRC 246 (1973). Further, by the very fact that they hold positions as agency instructors, students may reasonably view such instructors as possessing special knowledge of agency policies and practices and of the working conditions the students will encounter upon completion of their training.

In view of these special circumstances, it is especially important that agency instructors, during a representation election and in a classroom situation, as here, make no statements outside the permissible scope of section 7116(e) which could distort true employee choices.

An examination of the statements made by Mr. Shannon in this case reveal that they went beyond the scope of permissible statements under section 7116(e). Any presentation by an instructor in a classroom environment of "both sides" of obvious campaign issues is inherently violative. Moreover, Mr. Shannon's statement concerning IBPO working to obtain a GS-11 for agents; that agents should have a union for police officers instead of secretaries; and that he "was not telling anyone in the classroom how to vote, but...." interfered, under the circumstances, with the student-employees' freedom of choice. It is recommended that this objection to the election be sustained.

G. Change Concerning Use of Personally Owned Vehicles in Northwest Region

The findings and conclusions concerning the change in the use of personally owned vehicles for travel on extended details are set out supra. With regard to the possible effect on the election, the following additional findings and conclusions are made.

1. Findings of Fact

There are approximately 100 bargaining unit employees in the Northern Region. The change was made as employees were receiving their mail ballots. Other employees besides those scheduled for the detail were

concerned about the change in practice, since, if the detail were to be extended, they would be subject to the change. Employees were disturbed by what they perceived to be weakness and ineffectiveness on AFGE's part. The fact that the Union could not even obtain a reason for the action from management led them to seek alternatives to AFGE.

2. Conclusions

It is concluded that management's conduct in making a unilateral change concerning the use of personally owned vehicles for travel on extended details at the time employees were receiving their mail ballots could reasonably have had a significant impact or influence on the free choice of the 100 or so voters in the Northern Region and, therefore, affected the results of the election. It is recommended that this objection be sustained.

H. Assault Form Implementation

1. Findings of Fact

In 1976-1977, during consultations with I & NS management, AFGE's National Border Patrol Council (NBPC) expressed its concern that no statistics were being maintained on assaults on border patrol agents, and suggested that such statistics be kept in order to encourage prosecution of assailants. (Tr. 1222-1223). INS was also aware of the need for keeping track of such assaults from the standpoint of its reporting requirements to the Congress and the Department of Justice. The then existing memoranda reports did not cover all assaults. (Tr. 1298-1299).

In December 1977, INS presented the Union with a proposed form. (Joint Ex. 40). It was circulated to NBPC officers and local presidents for their comments. The Union received negative comments concerning the form. The employees felt that some of the questions on the form could be used for disciplinary action, or might lead to self incrimination in

criminal proceedings. (Tr. 1227-1229). On May 18, 1978 the Union requested that the proposed form be the second item on the agenda for discussion during the semi-annual consultations to be scheduled later in 1978. (Joint Ex. 41A).

On August 4, 1978 INS forwarded the Union a "final edition" of the assault form, stating that implementation would occur before the end of the fiscal year. (Joint Ex. 42). The Union replied that the form was on its agenda for the scheduled consultations, and any unilateral implementation by management would result in the filing of an unfair labor practice charge. (Joint Ex. 43).

The assault form was discussed during the consultations in mid-August 1978. The Union reiterated its concerns and requested that several items on the form be deleted on the basis that they had no value for statistical purposes, but would present the potential for self incrimination. Certain cosmetic changes were made, but no agreement was reached on the key issues. (Tr. 1229-1230; 1243; Joint Ex. 44).

On September 2, 1978 the Union wrote to the Commissioner, INS demanding further consultations and negotiations on the proposed form prior to implementation and requesting a meeting with the Commissioner to discuss the issue, among others, in hopes of reaching a speedy resolution. (Joint Ex. 45). A meeting was held with the Commissioner, but the assault form was not discussed. The Commissioner stated that such discussion would be inappropriate as the form was being rewritten and was still in the formative stage. (Tr. 1230-1231).

In October 1978 the Union received complaints that the form had been distributed and was being unilaterally implemented. Richard Bevans, President, NBPC, AFGE, passed on the complaint to INS and asserted that the Union had previously demanded negotiations. As a result of the Union's complaint, INS sent out a telegram to the regional offices stating that the form had not been approved for use, had been distributed in error, and distribution and/or utilization of the form would be held in abeyance until further notice. (Tr. 1232; Joint Ex. 46A,B).

The assault form issue was discussed in some length during the consultations in January 1979. (Tr. 1232, 1244) Richard Bevans, NBPC president, and John Frecker, NBPC vice president, both discussed their concerns over the assault form with Richard Thut, deputy commissioner of the Border Patrol, INS. (Tr. 1244, 1303). INS offered to recommend that agents be issued hollow point ammunition in exchange for the Union dropping its objections to the assault report form. The Union refused this offer. Mr. Thut stated, "Well, that is the best you are going to get." Mr. Bevans replied that, under the circumstances, the Union would handle it at the national contract negotiations to begin the following week. (Tr. 1233-1234, 1244, 1304). Mr. Frecker also met with Mr. Thut,

but, according to Mr. Thut, no agreement with the Union was reached on the proposed assault form. (Tr. 1302-1303). When Mr. Thut left the consultations, it was his view that the Union's objections to the form were still on the table. (Tr. 1304; Joint Ex. 48A, B).

Under the collective bargaining agreement, these meetings are for consultations and/or informal discussions. Unresolved issues are set aside and may become subjects of negotiation or renegotiation at the time of renegotiation of the agreement. (Tr. 1235; Joint Ex. 1, p. 4).

National contract negotiations were held the following week in mid-January 1979. Negotiations were halted by the INS that same week after the filing of the IBPO representation petition. Neither side had time to discuss the assault form issue. (Tr. 1236, 1244).

During the election campaign conducted January-April 1979, Mr. Thut was informed by INS labor relations specialists that there should be no changes in personnel practices during the campaign period because everything was in a limbo status. (Tr. 1306).

On March 20, 1979 INS notified NBPC that, after a review of the respective positions and the discussions held in January 1979, INS had decided to implement the assault form effective April 2, 1979. (Joint Ex. 47A). The decision to implement the assault form during the election campaign was made by Mr. Thut. (Tr. 1305) According to Mr. Thut, there was no specific reason why the form was implemented in April 1979 as opposed to after the election. The possible effect on the election was not discussed. (Tr. 1307).

President Bevans made no specific additional bargaining request after receiving the March 20th implementation notice, because he considered that the Union's bargaining demands were already on record and contract negotiations had been halted by INS in January as a result of the IBPO petition. (Tr. 1240, 1244-1245, 1249).

After being notified by management that the form had been distributed to Border Patrol stations and was being implemented, Bevans notified his regional officers. NBPC's officers were upset and stated that Bevans must have dropped the ball somehow since the Union had been fighting the form for several years. (Tr. 1238).

George Murphy, a regional vice president, received many complaints from local officers and members who knew that AFGE had been fighting the form and could not understand why the Union had agreed to the form. Murphy attempted to explain that the form was being implemented over AFGE's objections, but the people he spoke with were not satisfied with his explanations. (Tr. 1252-1254).

William Johnson, president of the Blaine sector locals, contacted the other sector presidents, who informed his that the employees were rather upset with AFGE because the form had been agreed to with the objectionable incriminating questions still present. The people he spoke with advised him that employees felt AFGE had made a deal with INS. Mr. Johnson was informed that employees could not understand why the particular form had been put out when all the input they had given the Union established that employees wanted the form changed. (Tr. 1259). The AFGE had been advising unit employees of the status of matter through its newspaper. (Tr. 1249-1250).

The AFGE included implementation of the assault form as one of its objections to the election dated June 8, 1979. (General Counsel's Ex. 1(i)). The AFGE also filed an unfair labor practice complaint concerning the implementation of the form on August 29, 1979. (Joint Ex. 49).

The Regional Director, FLRA, Sixth Region, dismissed the unfair labor practice charge by letter dated March 24, 1980. The Regional Director stated, in part, as follows:

> Based on the above, it is noted that the Activity on two occasions discussed the form in detail with the Union and made constructive changes at the Union's request, and thus bargained over the impact and implementation of the assault form. Inasmuch as the parties failed to reach agreement in regard to certain aspects of the form over a one year period, specifically the use of a weapon by an officer and the requirement that the officer sign the form, it is concluded that the parties ultimately reached impasse. Accordingly, the Activity's implementation of the assault form is not deemed violative of the Statute. It is noted that the investigation discloses no probative evidence that the Agency engaged in any bad faith bargaining during the course of discussions over the assault form. (Joint Ex. 50).

The AFGE appealed the dismissal. The General Counsel, FLRA, affirmed the dismissal by letter dated July 31, 1980, stating, in part, as follows:

In agreement with the Regional Director, it was concluded that further proceedings on the instant charge are unwarranted as the evidence fails to establish that the Charged Party acted in derogation of any bargaining obligation owed the Charging Party under the Statute. In this regard it was determined that, during protracted discussions from 1977 through 1978 over the impact and implementation of an assault report form, substantive changes in the form were made at the request of the Charging Party. It was further found that, following such discussions, the Charged Party gave adequate notice of its intention to implement the form and that the Charging Party neither objected to such implementation nor requested further negotiations on the matter before the form was implemented. (Joint Ex. 51).

2. Conclusions

The record reflects that INS did not maintain existing personnel policies, practices, and matters affecting working conditions to the maximum extent possible during the campaign and election period of the representation proceeding in this instance. The implementation of the assault form had been under consideration for over a year. The record reflects that the assault form was merely desirable, rather than being essential or necessary to the functioning of the agency. The unjustifiable implementation of the controversial form, approximately one month before employees received their election ballots, had a reasonably foreseeable negative effect on the voters' attitude toward their incumbent labor organization. Such conduct could reasonably be expected to have a significant impact or influence on the free choice of members of the unit. It is recommended that this objection be sustained.

IV. Conclusions and Recommendations

The Authority seeks to maintain, as closely as possible, conditions which will assure employees' basic right to complete freedom of choice in selecting a bargaining representative. Based on those objections which it is recommended be sustained, it is concluded that improper conduct occurred which could reasonably be expected to have improperly affected the results of the election. Pursuant to section 2422.20(g)(1) of the Authority's rules and regulations, an Administrative Law Judge may not recommend the remedial action to be taken regarding objections to an election.

With respect to the unfair labor practice cases, and pursuant to section 2423.26(a) of the Authority's rules and regulations, I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's rules and regulations and section 7118 of the Statute, the Authority hereby orders that the United States Department of Justice, United States Immigration and Naturalization Service shall:

1. Cease and desist from:

(a) Unilaterally altering or changing established past practices concerning coffee breaks, or the use of personally owned vehicles for travel by employees on extended inter-regional details, or any other term and condition of employment without first notifying any exclusive representative of its employees and affording such representative the opportunity to negotiate in good faith to the full extent consonant with law.

(b) Failing or refusing, during the pendency of a representation matter, to adhere to established personnel policies and practices and matters affecting working conditions to the maximum extent possible until the representation matter is resolved.

(c) 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 carry out the purposes and policies of the Federal Service Labor-Management Relations Stautue:

(a) Rescind the February 5, 1979 announced change in the established practice of allowing Border Patrol Agents in the Laredo station to take coffee breaks.

(b) Rescind the March 16, 1979 changes in the August 17, 1977 agreement between the Chief Patrol Agent, Laredo Sector, and American Federation of Government Employees, AFL-CIO, Local 2455 concerning traffic checkpoints and uniforms.

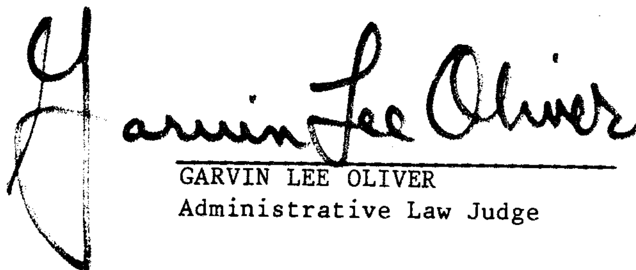
(c) Notify any exclusive representative of its employees of any proposed changes in established past practices concerning coffee breaks, or the use of personally owned

vehicles for travel by employees on extended inter-regional details, or any other term and condition of employment and, upon request, negotiate in good faith to the full extent consonant with law on such intended changes.

(d) During the pendency of a representation matter, adhere to established personnel policies and practices and matters affecting working conditions to the maximum extent possible until the representation matter is resolved.

(e) Post at its facilities in the Laredo Sector copies of the attached Notice marked "Appendix A," to be signed by the Chief Patrol Agent, Laredo Sector, and, at its facilities in the Northern Region, copies of the attached Notice marked "Appendix B," to be signed by the Commissioner, Immigration and Naturalization Service. Said notices 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.

(d) Pursuant to 5 C.F.R. Section 2423.30 notify the Regional Director, Region Six, 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.



GARVIN LEE OLIVER
Administrative Law Judge

Dated: July 23, 1981
Washington, D.C.

APPENDIX A

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL NOT unilaterally alter or change established past practices concerning coffee breaks, or any other term and condition of employment without first notifying any exclusive representative of our employees and affording such representative the opportunity to negotiate in good faith to the full extent consonant with law.

WE WILL NOT fail or refuse, during the pendency of a representation matter, to adhere to established personnel policies and practices and matters affecting working conditions to the maximum extent possible until the representation matter is resolved.

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 rescind the February 5, 1979 announced change in the established practice of allowing Border Patrol agents in the Laredo station to take coffee breaks.

WE WILL rescind the March 16, 1979 changes in the August 17, 1977 agreement between the Chief Patrol Agent, Laredo Sector, and American Federation of Government Employees, AFL-CIO, Local 2455 concerning traffic checkpoints and uniforms.

WE WILL notify any exclusive representative of our employees of any proposed change in the established past practice concerning coffee breaks or any other term and condition of employment and, upon request, negotiate in good faith to the full extent consonant with law on such intended change.

WE WILL, during the pendency of a representation matter, adhere to established personnel policies and practices and matters affecting working conditions to the maximum extent possible until the representation matter is resolved.

____
(Agency or Activity)

Dated: ______________ By: ______________________________
(Signature)

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, Federal Labor Relations Authority.

APPENDIX B

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

and in order to effectuate the policies of

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL NOT unilaterally alter or change established past practices concerning the use of personally owned vehicles for travel by employees on extended inter-regional details, or any other term and condition of employment without first notifying any exclusive representative of our employees and affording such representative the opportunity to negotiate in good faith to the full extent consonant with law.

WE WILL NOT fail or refuse, during the pendency of a representation matter, to adhere to established personnel policies and practices and matters affecting working conditions to the maximum extent possible until the representation matter is resolved.

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 notify any exclusive representative of our employees of any proposed change in the established past practice concerning the use of personally owned vehicles for travel by employees on extended inter-regional details, or any other term and condition of employment and, upon request, negotiate in good faith to the full extent consonant with law on such entended change.

WE WILL, during the pendency of a repesentation matter, adhere to established personnel policies and practices and matters affecting working conditions to the maximum extent possible until the representation matter is resolved.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

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, Federal Labor Relations Authority.