

**OFFICE OF ADMINISTRATIVE LAW JUDGES**

**WASHINGTON, D.C. 20424-0001**

MINE SAFETY AND HEALTH ADMINISTRATION, ROCKY MOUNTAIN  
DISTRICT, DENVER, COLORADO

Respondent

and

Case No.  
DE-CA-20400

NATIONAL COUNCIL OF FIELD LABOR LOCALS, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3416

Charging Party

David L. Pena Counsel for the Respondent

Julia D. Hurst and Matthew Jarvinen Counsel for the General Counsel, FLRA

Richard W. Coon Representative of the Charging Party Before: GARVIN LEE OLIVER  
Administrative Law Judge

**DECISION**

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (5), by terminating a practice of permitting unit employee field inspectors to park their privately owned vehicles and government owned vehicles at the Denver Federal Center. The complaint alleges that Respondent took the action without providing the Charging Party (Local 3416 or Union) prior notice and an opportunity to negotiate over the substance or over the impact and implementation of the change.

Respondent's answer admitted the allegations as to Respondent, the Union, and the charge, but denied any violation of the Statute.

A hearing was held in Denver, Colorado. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor I make the following findings of fact, conclusions of law, and recommendations.

## Findings of Fact

The National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO, (NCFLL) is the exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining. Local 3416 is an agent of NCFLL for purposes of representing unit employees in Respondent's Rocky Mountain District. (G.C. Exs. 1(b) and 1(c)).

The official policy of the Mine Safety and Health Administration (MSHA) regarding overnight parking of government owned vehicles (GOVs) has been stated in Department of Labor regulations, DLMS-2, paragraph 1546 since at least 1984. As relevant here, that policy states that GOVs "should be parked at the official duty station on government-owned or controlled lots." (Respondent's Exhibits 1-4; Tr. 58-59).

This case concerns the parking of vehicles by employees of Respondent's Metal and Non-Metal Mine Safety and Health Division whose duty station is 730 Sims Street, Lakewood, Colorado. There is an open parking lot adjacent to the building. Approximately 50 government vehicles are parked there on a regular basis, and it is also open for parking by the public. (Tr. 67, 72).

Since at least 1985, with Respondent's knowledge and acquiescence, unit employee field inspectors have been permitted to park their privately owned vehicles (POVs) and GOVs at the Denver Federal Center which is between 6th and Alameda and Kipling and Union Streets, also in Lakewood, Colorado. The Denver Federal Center is a large complex of buildings with several government controlled parking lots. It is normally a three to ten minute drive from the Denver Federal Center to the Sims Street office, or a 20-30 minute walk. (Tr. 31-32, 37, 68). The drive could take longer, up to 30 minutes, depending on the time of day. (Tr. 68, 73).

In approximately 1985, in response to concerns regarding vandalism which was occurring to both GOVs and POVs at the Sims Street location, Local 3416 President Richard W. Coon and Respondent's District Manager William Gardner reached an agreement that inspectors could avail themselves of the option of parking both POVs and GOVs at the Denver Federal Center. Inspectors could drive POVs to the Denver Federal Center, park their POVs, pick up their assigned GOVs to drive to the Sims Street location and then to the field. Inspectors are normally out of town on temporary duty assignments from Monday morning until Friday for several weeks a month. The assigned GOV is used to accomplish this work. The assigned GOV would be parked in the Denver Federal Center on weekends or whenever the inspector was at the Sims Street duty station. The inspector's POV would be parked in the Denver Federal Center while the inspector was out of town. An inspector was required to obtain a parking sticker for the POV from the General Services Administration which controls parking at the Denver Federal Center. (Tr. 15-19).

The practice continued with the knowledge of Acting District Manager Marvin Nichols in 1986 (Tr. 20-21), and of District Manager Vernon Gomez from 1986 to November 1991 (Tr. 21-22).

In the 1980s there were about 20 inspectors in the Division. At the time of the hearing there were ten. (Tr. 30). Initially Ronald Simpson and three other inspectors took advantage of the parking option. (Tr. 19-20). Since about 1987 only Ronald Simpson has continued to avail himself of the opportunity. (Tr. 28).

Mr. Simpson would typically drive his POV to the Denver Federal Center on Monday, park his POV there, pick up his GOV, drive it to the Sims Street location, spend a period of time there, and then proceed to the field for mine inspections. Mr. Simpson sometimes drove in with his wife, who worked at the Denver Federal Center. (Tr. 37-38).

On or about January 24, 1992, Respondent, by District Manager Roderic M. Breland, terminated the practice of allowing field inspectors to park their GOVs at the Denver Federal Center.<sup>(1)</sup> Breland made no change concerning POVs. Mr. Breland issued instructions that Simpson's GOV should be parked at the Sims Street duty station lot in accordance with MSHA policy. There is no evidence that Respondent notified the Union and gave it an opportunity to bargain. (Tr. 60, 63).

Respondent has nine GOVs. Eight are used by the field inspectors. One is used by the district office staff consisting of the District Manager, Assistant Manager, Administrative Officer, and two specialists who need to travel away from the office on occasion and to downtown Denver, a distance of about ten miles. The Union President also has permission to use the district office government vehicle on occasion. (Tr. 61-63).

Mr. Breland testified that the GOVs are not exclusively for the use of the inspectors to whom they are assigned. Thus, it is necessary to have the vehicles parked in the convenient Sims Street location in case employees other than he assigned inspectors need to use them. Four-wheel-drive and sedan vehicles need to be assigned based on the type of terrain in which they are to be driven. Mr. Breland cited an instance when it took considerable effort to locate Mr. Simpson's GOV at the Denver Federal Center when Mr. Simpson was not using it. It was needed for an inspector from outside the office who needed a GOV for official purposes. (Tr. 63-64).

Mr. Breland also testified that security is a concern in requiring GOVs to be parked at the Sims Street location. Although the Sims Street parking lot is open to the public, it is patrolled by the Federal Protective Service. From about 1986 to 1988 the Sims address had more incidents of vandalism than the Denver Federal Center, but in recent years Sims Street has had far fewer reported acts of vandalism. From 1989 through 1991 there were 21 reported instances of vandalism at the Denver Federal Center while there was only one reported at the Sims Street location. (Tr. 45-47, 65-66).

Since approximately January 24, 1992, Mr. Simpson no longer drives his POV to the Denver Federal Center, nor does he leave it overnight while on temporary duty or travel. Mr. Simpson's wife, who is employed at the Denver Federal Center, drives him to his Sims Street duty station where his assigned GOV is now parked. (Tr. 37-38).

### Discussion and Conclusions

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally terminating a practice of permitting unit employee field inspectors to park their privately owned vehicles and government owned vehicles at the Denver Federal Center.

The record reflects that Respondent did not terminate a practice of permitting inspectors to park POVs at the Denver Federal Center, but did change the practice of permitting inspectors to park GOVs at the Denver Federal Center. The record shows that prior to this change, inspectors would park their POVs at the Denver Federal Center, where they would pick up assigned GOVs and proceed to the Sims Street duty station and on to perform mine inspections in the field as assigned. The inspectors could return their assigned vehicle to the Denver Federal Center at the end of their field assignments and pick up their own vehicles.

This practice constituted a condition of employment. See U.S. Department of Justice, Immigration and Naturalization Service, El Paso District Office, 34 FLRA 1035, 1042-48 (1990) (INS). It was also a past practice consistently exercised for an extended period of time with the Respondent's knowledge and consent. Norfolk Naval Shipyard, 25 FLRA 277, 286 (1987).

Respondent contends that its determination to have government vehicles parked at the Sims Street office location involved a determination of its internal security practices, under section 7106(a)(1) of the Statute, and of its methods and means of performing work, pursuant to section 7106(b)(1), and it was not obligated to bargain on the decision.

#### Internal Security

Under section 7106(a)(1) of the Statute, management's right to determine its internal security practices includes the right to determine the policies and practices that are necessary to safeguard its operations, personnel and physical property against internal and external risks. American Federation of Government Employees, Local 1920 and U.S. Department of Defense, Army and Air Force Exchange Service, Fort Hood Exchange, Fort Hood, Texas, 47 FLRA 340, 348 (1993) (AFGE). The agency must demonstrate a link or reasonable connection between its goal of safeguarding its personnel, property, or operations and its practice or decision designed to implement that goal. The Authority will not examine the extent to which the practices adopted by management to achieve its security objectives actually facilitate the accomplishment of those objectives. Id. at 348-49.

In the instant case, Respondent investigated the incidence of reported vandalism of vehicles located at both the Denver Federal Center and 730 Sims Street. The Federal Protective Service reported that from 1989 to 1991, while there were 21 reported instances of damage to vehicles parked at the Denver Federal Center, there was only one reported incident of such vandalism reported at the Sims Street location. Thus, it cannot be disputed, on this record, that MSHA's vehicles are more secure at the Sims Street location than at the Denver Federal Center.

Moreover, implicit in the Department's regulations on the overnight parking of GOVs are security concerns. The requirement that GOVs be parked on government controlled lots recognizes security needs with respect to government property, and seeks to ensure that GOVs are in a secure location over which the government has control. The lot at Sims Street is patrolled by the Federal Protective Service.

Thus, Respondent has demonstrated a reasonable connection between its action and the security of its

property. Accordingly, the Respondent was not required to negotiate with the Union concerning its decision to require that GOVs be parked at the Sims Street location.

### Method and Means

In this case the Respondent directed that GOVs should be parked directly adjacent to the duty station. GOVs are used by field inspectors to inspect mines and by the administrative staff to travel in the Denver area on official business on occasion. By locating the vehicles in a convenient location directly adjacent to the duty station Respondent facilitates its ability to accomplish its work in an efficient and effective manner. Thus, Respondent's decision as to where GOVs should be parked is nonnegotiable at its election as it constitutes a "means of performing work" within the meaning of section 7106(b) of the Statute. Cf. American Federation of Government Employees, Local 644, 21 FLRA 1046 (1986); INS, supra.

### Impact and Implementation

Where an agency in exercising a management right under section 7106(a) of the Statute changes conditions of employment of unit employees, it still has an obligation to bargain over the matters set forth in section 7106(b)(2) and (3) of the Statute if the change results in an impact upon unit employees or such impact was reasonably foreseeable. U.S. Government Printing Office, 13 FLRA 203 (1983).

In Department of Health and Human Services, Social Security Administration, 24 FLRA 403 (1986) (SSA), the Authority reassessed and modified the de minimis standard previously used to identify changes in conditions of employment which require bargaining. The Authority stated that in order to determine whether a change in conditions of employment requires bargaining, it would carefully examine the pertinent facts and the circumstances presented in each case. The Authority further stated that in examining the record, principal emphasis would be placed on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on the conditions of employment. The Authority also stated that equitable considerations would be taken into account in balancing the various interests involved, that the number of affected employees and the parties' bargaining history would be given limited application; and that the size of the bargaining unit would no longer be a consideration.

The General Counsel argues that the change was more than de minimis. The General Counsel claims that all ten inspectors who were given the opportunity to park both their GOVs and POVs at the Denver Federal Center no longer have the opportunity to park both the GOVs and POVs in a secure area should they choose to do so, meaning that new transportation arrangements have to be made in order to get to and from work. The General Counsel points out that Mr. Simpson no longer drives his POV into the office because he is unable to park it in a secure area, and he had to find another means of getting to the office.

Respondent contends that no bargaining was required since the change was de minimis. Respondent points out that the change affected only a single employee; that since 1987, no other employee has engaged in the practice that Mr. Simpson has followed. Respondent claims that the result of the change from Mr. Simpson's perspective is that he no longer has to commute to and from the Denver Federal Center to his office, but is driven directly to work by his wife without the necessity of stopping at the Denver Federal Center to pick up the GOV. Respondent asserts that the only effect of the change has been a minor inconvenience to Mr.

Simpson's wife, a non-employee to whom Respondent owes no duty. Respondent maintains that Mr. Simpson's desire to park his POV at the Denver Federal Center for security reasons is not based in fact because the Sims Street parking lot is more secure. Moreover, he was not required to make any change in the parking location of his POV; in fact his wife continues to park a POV at the Denver Federal Center. Respondent claims equitable considerations are clearly on its side when the Agency's interest regarding the security of its GOVs and its ability to carry out its work in an efficient and effective manner is weighed against the minor inconvenience to Mr. Simpson and his wife.

The Authority has rejected the contention that a change was no more than de minimis because, in part, it involved only one employee. Veterans Administration Medical Center, Phoenix, Arizona, 47 FLRA 419 (1993) (VA). The Authority has held that bargaining is required in such circumstances "so long as there was a demonstrable effect or a reasonably foreseeable effect on that employee or others in the bargaining unit." United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas, 47 FLRA 225, 232 (1993) (INS). The Authority has also held that the effect of changes on bargaining unit employees need not be limited only to those experienced in the workplace. VA, 47 FLRA at 423-24 (effect of the change involved outside employment); Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 39 FLRA 1357, 1372 (1991) (change regarding time spent in training exercises could involve an employee's family, travel, and/or educational plans).

In light of the above Authority precedent, and in view of the demonstrable effect of the change on Mr. Simpson's commuting arrangements, it is concluded that Respondent violated section 7116(a)(1) and (5) of the Statute by terminating the practice of permitting unit employee field inspectors to park government owned vehicles at the Denver Federal Center without providing the Union appropriate notice and an opportunity to negotiate over the impact and implementation of the change.

The General Counsel proposes that the remedy for the unfair labor practice include a return to the status quo ante. Balancing the nature and circumstances of the violation against the degree of disruption in government operations that would be caused by such a remedy, pursuant to Federal Correctional Institution, 8 FLRA 604 (1982), it is concluded that a status quo ante remedy is not appropriate. The impact experienced by the adversely affected employee on his personal commuting is slight whereas allowing GOVs to be parked at the Denver Federal Center instead of at the Sims Street duty station would, as demonstrated by the record, impair the efficiency and effectiveness of the Respondent's operations.

Based on the foregoing findings and conclusions, it is recommended 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, it is hereby ordered that the Mine Safety and Health Administration, Rocky Mountain District, Denver, Colorado, shall:

1. Cease and desist from:

(a) Failing and refusing to give the National Council of Field Labor Locals, AFGE, Local 3416, AFL-CIO, the agent of the exclusive representative of its employees, prior notice of changes in the practice of permitting bargaining unit employees to park government owned vehicles at the Denver Federal Center, and an opportunity to bargain concerning the impact and implementation of such a change.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, bargain with the National Council of Field Labor Locals, AFGE, Local 3416, AFL-CIO, concerning the impact and implementation of the change in the practice of permitting bargaining unit employees to park government owned vehicles at the Denver Federal Center.

(b) Post at its facilities in Denver, Colorado copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by District Manager, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Denver Region, 1244 Speer Boulevard, Suite 100, Denver, CO 80204 in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 30, 1993

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GARVIN LEE OLIVER

Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY**

**AND TO EFFECTUATE THE POLICIES OF THE**

**FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE**

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

WE WILL NOT fail and refuse to give the National Council of Field Labor Locals, AFGE, Local 3416, AFL-CIO, the agent of the exclusive representative of our employees, prior notice of changes in the practice of permitting bargaining unit employees to park government owned vehicles at the Denver Federal Center, and an opportunity to bargain concerning the impact and implementation of such a change.

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

WE WILL upon request, bargain with the National Council of Field Labor Locals, AFGE, Local 416, AFL-CIO, concerning the impact and implementation of the change in the practice of permitting bargaining unit employees to park government owned vehicles at the Denver Federal Center.

\_\_\_\_\_  
(Activity)

Date: \_\_\_\_\_ By: \_\_\_\_\_

(Signature)

(Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Denver Region, 1244 Speer Boulevard, Suite 100, Denver CO 80204, and whose telephone number is: (303) 844-5224.

1. Mr. Breland, who came to the office as assistant manager in March 1991, testified that he learned that Simpson was parking his GOV at the Denver Federal Center when a request from Simpson, submitted through his supervisor, for overtime or compensatory time, was supported partly on the basis that the time was used to rotate his POV and GOV through the Denver Federal Center. (Tr. 60). Mr. Simpson denied that he had ever claimed overtime or compensatory time for travel between 730 Sims and the Denver Federal Center. (Tr. 42, 88). It is not necessary to resolve whether Simpson requested overtime or compensatory time. Although Mr. Breland contended that he did not previously know that GOVs were being parked at the Denver Federal Center, he acknowledged that supervisor De Herrera was aware of the option and "said it was not worth the hassle to him . . . [and] the others that he knew never thought it was worth their own personal time to be rotating their vehicles and never gave it much thought." (Tr. 75).