U.S. DEPARTMENT OF JUSTICEIMMIGRATION AND NATURALIZATION SERVICE Respondent

andAMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL Charging Party

Case No. WA-CA-00159

Lisa Belasco, Esquire For the General Counsel Robert S. Sherman, EsquireSusan Dole, Esquire For the Respondent
T. J. Bonner, PresidentDeborah S. Wagner, Esquire For the Charging Party Before: RICHARD A. PEARSON Administrative Law Judge

## DECISION

## Statement of the Case

The General Counsel of the Federal Labor Relations Authority (the Authority), by the Regional Director of the Washington Regional Office, issued an unfair labor practice complaint on September 27, 2000, alleging that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), by terminating

its Spousal Transfer Program and Compassionate Transfer Program (the Programs) without first notifying the employees' exclusive representative and giving the Union an opportunity to bargain over the substance and the impact and implementation of that change.

The Respondent's answer denies that it violated the Statute in terminating the Programs. While admitting that it unilaterally terminated the Programs, it asserts that it was required to do so because the Programs were illegal; it further asserts that it fulfilled its obligation to bargain over the impact and implementation of the changes.

A hearing was held in Washington, D.C. on February 13, 2001. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine

and cross-examine witnesses, and file post-hearing 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 Department of Justice, Immigration and Naturalization Service (INS/Respondent) is an agency as defined by 5 U.S.C. § 7103(a)(3). The American Federation of Government Employees, National Border Patrol Council (Charging Party/Union) is a labor organization as defined by 5 U.S.C. § 7103(a)(4), and it is the exclusive representative of a unit of the Respondent's employees. The Union represents approximately 8,500 employees of the United States Border Patrol, a sub-component of the Respondent. A separate division of the American Federation of Government Employees, the National Immigration and Naturalization Service Council (NINSC), represents other INS employees.

The INS has promulgated, as part of its Administrative Manual, a Merit Promotion and Reassignment Plan (Resp. Ex. 1), which sets forth the procedures for INS employees to apply for vacant positions within the agency. Most such positions are filled by competitive procedures detailed in the Merit Promotion and Reassignment Plan, but the plan also excepts certain types of placement actions from those competitive procedures (See, e.g., Resp. Ex. 1 at pages 2265.08 - 2265.11). Testimony at the hearing also revealed that other exceptions to the competitive transfer procedures have been developed that are not specifically contained in the Merit Promotion and Reassignment Plan. This case involves two exceptions for noncompetitive transfers, the Spousal Transfer Program and the Compassionate Transfer Program.

Under the Spousal Transfer Program (GC Ex. 9), if an INS employee is married to another INS employee and one spouse is transferred to a different duty location, then the other spouse is entitled to be noncompetitively reassigned to a vacant position in the same geographic area, under certain conditions. A transfer under this program cannot be made to a position with a higher promotion potential than the employee's current position. According to the INS, "This program is designed to keep INS families together as well as eliminate or reduce their economic hardship of maintaining two separate households." Resp. Ex. 3 at 1. (The Spousal Transfer Program, published at page 2261.01 of the INS Administrative Manual, is attached to this decision as Appendix A.)

Under the Compassionate Transfer Program (GC Ex. 8), an employee may request a transfer to a different position or duty location when the employee or a member of his family has a compelling medical emergency that requires the employee to move to another geographical location. A transfer through this program also cannot be made to a position with a higher promotion potential than the employee's current position. (The Compassionate Transfer Program, which by its terms constitutes an exception to the INS Merit Staffing Plan, is not part of the INS Administrative Manual. It is attached to this decision as Appendix B.)

The Programs have been in effect at the INS for at least twenty-three years. Near the beginning of 1997, Cynthia Lowell, head of the INS's staffing, recruitment and placement branch, conducted a review of the entire Merit Promotion and Reassignment Plan for conformance with applicable law and regulations. She became convinced that the Programs violated one or more of the merit system principles, and she discussed her views with her supervisor. Ultimately, INS's general counsel's office was also consulted, and on December 18, 1997, the Associate General Counsel wrote to the Office of Personnel Management (OPM), asking for a determination of the lawfulness of the Programs (Resp. Ex. 3). According to Ms. Lowell, officials at OPM advised INS orally that the Programs did indeed violate merit system principles and were unlawful, but these officials were unwilling to put their advice in writing. A meeting of INS and OPM officials was held in January 1998, at which these issues were discussed, and on January 23, 1998, OPM wrote a brief response to INS that referred to the meeting but stated no opinion about the lawfulness of the Programs (Resp. Ex. 2).

Between 1997 and early 1999, the INS and its two unions were also engaged in partnership discussions on a variety of matters, including a labor-management work group devoted to merit promotion issues. No records of these meetings were entered into evidence at the hearing. At the partnership meetings, Ms. Lowell and other management representatives advised the union participants of their concern about the illegality of the Programs, and they tried to develop a consensus on alternative plans to replace the Programs. Several three-day meetings on merit promotion issues were held between 1997 and 1999, although it is unclear how much time was devoted to discussing the Programs. Neither the Charging Party nor NINSC reached any agreement with the INS on replacing the Programs during these talks, but NINSC was apparently more amenable to the agency's suggested alternatives than the Charging Party. INS did not formally notify the unions during these meetings that the Programs would be terminated.

In a letter dated June 18, 1999, the INS informed all employees that the Compassionate Transfer Program (to the extent that it applied to medical conditions of family members)[(1)] and the Spousal Transfer Program were being terminated immediately, because they had been found to be illegal (GC Ex. 11). On June 22, 1999, the

Respondent faxed a similar letter to the Union, informing it of the immediate termination of the Programs and attaching a legal analysis supporting its conclusion that the Programs were illegal (GC Ex. 10). This letter also invited the Union to engage in bargaining to ameliorate the impact of the action and suggested that the Union consider a "job swap" plan that NINSC was in the process of approving. Ed Campbell, head of labor relations for the INS, also telephoned Mr. Bonner on June 22 to advise him of the agency's action.(2)

On July 22, 1999, the Union responded to the Respondent's termination notice by requesting bargaining and submitting a series of proposals. The Union also presented its own legal analysis supporting the legality of the Programs and demanded their restoration during negotiations (GC Ex. 12). On August 16, 1999, the Respondent refused to reinstate the Programs but offered to begin joint negotiations with the Charging Party and NINSC on October 25. In a subsequent telephone conversation between Mr. Bonner and Mr. Campbell, the Union indicated that it was unwilling to negotiate jointly with NINSC. According to Mr. Bonner's testimony, Mr. Campbell further indicated that management was unwilling to consider any of the Union's proposed substitutes for the Programs and that management would only discuss its own proposed "job swap" program. Accordingly, no negotiations ever took place concerning the impact of the Respondent's termination of the Programs or concerning any alternative programs.

## Discussion and Conclusions

### A. Positions of the Parties

The General Counsel alleges that the Programs concern conditions of employment; therefore, the Respondent was obligated to bargain with the Union before terminating them. By failing to do so, the Respondent violated the Statute. Both the General Counsel and the Union further argue that the Programs are not unlawful. Even if the Programs are found to be unlawful, they argue that the Respondent violated the Statute by failing to negotiate over procedures and appropriate arrangements regarding the termination of the Programs. They cite the belated notification to the Union of the termination decision and the Respondent's alleged refusal to discuss the bargaining proposals offered by the Union.

The Respondent admits that it unilaterally terminated the Programs but asserts that it was legally obligated to do so because the Programs were illegal. The Spousal Transfer Program, it contends, discriminates in favor of married employees and thus constitutes a prohibited personnel practice forbidden by 5 U.S.C. § 2302(b)(1)(E). The Compassionate Transfer Program, it states, confers an impermissible "preference" to employees based on the medical problems of family members rather than on the employee's own medical problems. Since the family members' problems are not "job-related," they cannot be considered without violating the merit system principles. The Respondent agrees that it was obligated to bargain over the impact and implementation of its decision to terminate the Programs, but it insists that it did so. It points to the partnership meetings prior to the termination of the Programs, in which it discussed many alternatives to develop flexible transfer and reassignment procedures, and to its offer to meet with the Union in October 1999. The Union's bargaining proposals of July 22, 1999, according to the Respondent, simply reiterated proposals that had been previously discussed and rejected by management in the partnership meetings; by doing so, the Union was guilty of bad faith bargaining, in the Respondent's view, and the breakdown in negotiations was the Union's fault.

### B. Analysis

#### 1. Legal Framework of Bargaining Obligation

Before implementing a change in conditions of employment affecting bargaining unit employees, an agency is required to provide the exclusive representative with notice of, and an opportunity to bargain over, those

aspects of the change that are within the duty to bargain. *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas,* 55 FLRA 848, 852 (1999). The extent to which an agency is required to bargain over changes in conditions of employment depends on the nature of the change. A union may be entitled to bargain over the actual decision, or substance, of the change. *See, e.g., Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 35 FLRA 153, 155 (1990). When an agency changes a past practice because it is unlawful, it has no duty to bargain over the substance of the decision to change. *Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 49 FLRA 1522, 1527-28 (1994); *Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana*, 9 FLRA 543, 568 n.9 (1982). However, an agency acts at its peril in unilaterally changing a condition of employment on this basis, and it will be found to have committed an unfair labor practice if its defense is determined not to apply. *United States Immigration and Naturalization Service, Washington, D.C.*, 55 FLRA 69, 73 (1999). Furthermore, even when an agency changes a past practice to conform with law, it is required to afford the union an opportunity to bargain, upon request, concerning the impact and implementation of the change. *Department of the Air Force, Air Force Logistics Command, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 17 FLRA 394 (1985).

In this case, there is no dispute that the Programs are "conditions of employment" within the meaning of the Statute and I so find. See, *U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Cincinnati, Ohio District Office*, 37 FLRA 1423, 1430 (1990) (matters relating to employee reassignments are mandatory subjects of bargaining). The parties also agree that the Respondent did not bargain with the Union before terminating the Programs.(3) The overriding issue is whether the Programs were unlawful. If the Respondent correctly decided that the Programs were illegal, then the unilateral termination was justified; a further issue would then arise as to whether the Respondent fulfilled its obligation to bargain over the impact and implementation of its decision. But if the Programs were not unlawful, then their unilateral termination was clearly an unfair labor practice, and the question of impact bargaining is moot.

**2. The Spousal and Compassionate Transfer Programs Are Lawful**

The Respondent claims that the Spousal Transfer Program is unlawful because (1) it discriminates on the basis of marital status in violation of 5 U.S.C. §§ 2301(b)(2) and 2302(b)(1)(E); and (2) provides an unauthorized preference in violation of 5 U.S.C. § 2302. It claims that the Compassionate Transfer program is unlawful because it provides an unauthorized preference, also in violation of 5 U.S.C. § 2302.(4)

I have reviewed both of the Programs in their statutory and regulatory context and in light of relevant case law, and I find both of them to be lawful. Before analyzing each of the Programs individually, some general observations are appropriate.

First, the burden of persuasion is on the INS here to affirmatively demonstrate that the Programs are unlawful. It has asserted the illegality of the Programs as a defense to its admitted failure to negotiate the substance of its change in conditions of employment, and this means that it must carry the burden of establishing that defense. *See, e.g., U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C.*, 56 FLRA 351, 356 (2000).

Similarly, in evaluating the lawfulness of the Programs, the Respondent's request for a legal determination by OPM on this issue is commendable but ultimately irrelevant. Although OPM's expertise in Federal personnel law might normally entitle it to deference, especially on a question that appears to be one of first impression, OPM chose not to express its opinion in writing. Thus, while I accept the testimony of the INS witnesses that OPM advised them at a meeting in January 1998 that the Programs were illegal, I cannot give any deference to that advice. Because OPM has offered no legal rationale for its purported conclusion, that conclusion cannot be given any weight at all.

As the Authority held in a similar case, when an agency asserted the unlawfulness of a practice as a defense to its unilateral termination, "whether an agency acts in good faith is irrelevant in determining whether a change is unlawful." *General Services Administration, National Capital Region, Federal Protective Service Division, Washington, D.C.*, 50 FLRA 728, 733 (1995)("*GSA*"), reversed on other grounds sub nom. *General Services Administration v. FLRA*, 86 F.3d 1185 (D.C. Cir. 1996); *see also, Marine Corps Logistics Base, Barstow, California*, 33 FLRA 196, 202 (1988). Similarly, the "possible illegality" of a practice is insufficient to justify its unilateral termination. *GSA*, *supra* at 733. Thus the Respondent must demonstrate by a preponderance of the evidence that the Programs violate federal law, and its consultations with OPM shed no light whatever on this ultimate question.

In light of the burden facing the Respondent in defending the unilateral termination of personnel policies that had existed for more than 23 years, I find the legal support cited by the INS to be particularly flimsy. To justify its conclusion that the Programs were illegal, the Respondent should have either strong statutory or regulatory language to this effect or definitive case law, but the INS has presented neither. The INS's rationale for the purported illegality of the Programs is offered at three places in the record: in its letter to OPM asking for a legal opinion (Resp. Ex. 3), in the attachment to its termination notice to the Union (GC Ex. 10), and in its Post-Hearing Brief. Although each of those documents cites (and often mis-cites) provisions of Title 5 of the United States Code and federal regulations, none cites a single federal court or agency decision that is on point. In other words, while the prohibition against "marital status" discrimination has been in effect since 1978, and the merit system principles have been in effect far longer than that, the Respondent has not found a single case holding that spousal or compassionate transfer rules (or any other analogous rules) constitute a violation of the merit system. I find it quite troubling that the Respondent would stake out such a novel position on an issue that is one of first impression in federal personnel law, and that it would assert that its position is so unassailable that it is not subject to bargaining - all for the purpose of terminating two programs that had endured for over twenty years.(5)

As I will explain below for each program, I find the Respondent's justifications for its unique interpretations of federal personnel law to be unpersuasive.

**a. Marital Status Discrimination**

In explaining the Spousal Transfer Program, the Respondent states in its brief that it makes an employee's marital status the "sole basis" for a noncompetitive reassignment. This is inaccurate as a factual matter and thus misrepresents the legal issue. An INS employee is not entitled to reassignment under the program because he or she is married, but rather because he or she is married to another INS employee. Accordingly, while unmarried employees are disadvantaged by the rule, so also are married employees whose spouses don't work for INS. This distinction is significant, as will be discussed below.

Nonetheless, the Respondent is correct that an employee must be married to qualify for a Spousal Transfer, and thus marital status is one essential factor in the Program. But what provision in federal personnel law prohibits this? The INS cites 5 U.S.C. §§ 2301(b)(2) and 2302(b)(1)(E).

The Respondent's reliance on 5 U.S.C. § 2301 is misplaced. Section 2301(b) sets forth a series of general "merit system principles," the second of which provides, as relevant here, that "[a]ll employees . . . should receive fair and equitable treatment in all aspects of personnel management without regard to . . . marital status."(6) However, the MSPB has, since its creation, consistently held that the merit system principles themselves are merely "hortatory" and not self-executing. *Summers v. Department of the Treasury*, 4 MSPR 1, n.1 (1980); *Wells v. Harris*, 1 MSPR 208, 215 (1979). Those decisions noted that a merit system principle is legally enforceable only when coupled with a specific violation of law, rule, or regulation directly implementing one of the merit system principles. When the Authority has been required to evaluate merit system principles that arguably conflict with provisions of the Statute, the Authority has come to the same

conclusion as the MSPB, and this view has been upheld in the Circuit Courts. *American Federation of Government Employees, Local 1923 and U.S. Department of Health and Human Services, Health Care Financing Administration, Baltimore, Maryland*, 44 FLRA 1405, 1502 (1992); *Department of Treasury v. FLRA*, 837 F.2d 1163 (D.C. Cir. 1988), enforcing 24 FLRA 494 (1986).

The INS argues that 5 U.S.C. § 2302(b)(1)(E) constitutes the "specific violation of law" implementing the merit system principles of section 2301. Section 2302 as a whole lists a series of "prohibited personnel practices." Subsection (b) states that an agency official "shall not . . . (1) discriminate for or against any employee . . . (E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation" (emphasis added). The emphasized phrase is significant, because it indicates that marital status discrimination is not prohibited *per se*, but only as defined in some other provision of law or regulation. In other words, the principle against marital status discrimination, like the merit system principles, is also not self-enforcing, but requires specific statutory or regulatory language to flesh it out. *See*, *Mitchell v. Espy*, 845 F.Supp. 1474, 1492 (D.Kan. 1994).

Unfortunately, no federal statute defines marital status discrimination, and although 5 U.S.C. §§ 2301(c) and 7202 authorize the issuance of regulations to implement the prohibition against marital status discrimination, there is no government-wide regulation that defines the term.[(7)] In this regulatory void, the MSPB and its Office of Special Counsel have been left to enforce the statutory prohibition, and the Authority has stated that it will consider MSPB decisions for guidance in the application of 5 U.S.C. § 2302. *See, e.g.*, *National Federation of Federal Employees, Local 1904 and U.S. Department of Veterans Affairs Medical Center, New Orleans, Louisiana*, 56 FLRA 196, 198 (2000).

The MSPB has held that an agency may not reassign an employee or take other personnel actions based on marital status. *Hundley v. Office of Personnel Management*, 83 MSPR 632, 635-36 (1999); *Craighead v. Department of Agriculture*, 6 MSPR 159, 161-62 (1981). More importantly, MSPB decisions do shed some light on the meaning of "marital status" discrimination. It has held that in order to establish a prohibited personnel practice based on marital status, one must demonstrate that single and married people are treated differently, and that the discrimination "goes to the basic nature of the appellant's marital status." *Ellis v. Department of the Treasury*, 81 MSPR 6, 11 (1999); *Miller v. Department of Justice*, 41 MSPR 353, 356 (1989) (dismissing claim of marital status discrimination because there was no proof that married and unmarried individuals were treated differently); *Boucher v. Veterans Administration,* 27 MSPR 320, 321 at fn. (1985)(claim of discrimination must "go to the essence of his status as a single person").[(8)] In this regard, the MSPB has found that personnel actions based on the identity of one's spouse, rather than the fact that one is married, do not constitute marital status discrimination. *Shah v. General Services Administration*, 7 MSPR 626, 628 (1981). In *Shah*, the claimant alleged that comments about the fact that he was married to a white American woman constituted marital status discrimination. The MSPB rejected this claim because the allegation related to whom he was married to, not the fact that he was married. *Id. See also, McClain v. Office of Personnel Management,* 76 MSPR 230, 242 (1997); *James v. Department of the Army*, 55 MSPR 124, 127 (1992).

Unlike the above-cited cases, almost all of which involve allegations of discriminatory treatment of individuals, the case at hand involves an allegation that an agency program generally discriminates against a class of employees. In the *Hundley* case, *supra*, the appellant made a similar claim, challenging an OPM requirement that the income of an annuitant's spouse be considered in evaluating the annuitant's application for waiver of an overpayment. She argued that since single people are not subjected to similar considerations, married people are the victims of a prohibited personnel practice. The MSPB considered this argument on its merits and found that OPM had shown "a legitimate, reasonable basis" for its practice; specifically, it found that consideration of a spouse's income was "highly relevant" to the factors on which waiver requests are to be evaluated. 83 MSPR at 638-39. It is apparent, therefore, that even when married individuals are treated differently than single people, the distinction is not unlawful unless it has no legitimate or reasonable basis.

I have also considered state and federal court decisions examining employer anti-nepotism rules under state laws that prohibit marital status discrimination. Many employers prohibit two married employees from working together, and employees have occasionally challenged such rules as unlawful marital status discrimination. I have not found a federal court decision applying the federal prohibition against such discrimination to such anti-nepotism rules. However, several state laws are quite similar to the language of 5 U.S.C. § 2302(b)(1)(E), in that they refer to actions based on "marital status" without any significant elaboration as to the intended scope of the term "marital status." In applying those state laws in relation to anti-nepotism rules, most (albeit not all) state and federal courts have interpreted "marital status" narrowly and held that those rules are lawful.

The decision of the Michigan Supreme Court in *Miller v. C.A. Muer Corp.*, 420 Mich. 355, 362 N.W.2d 650 (1984), offers a review of the national case law on this issue and presents a concise but persuasive explanation as to why "the term 'marital status' [does not] include the identity, occupation, and place of employment of one's spouse." 420 Mich. at 362.

The Michigan court cited the rationale of the U.S. District Court in *Klanseck v. Prudential Ins. Co. of America*, 509 F.Supp. 13, 18 (E.D.Mich. 1980), and concluded that in cases of alleged marital status discrimination, "The relevant inquiry is *if* one is married rather than *to whom* one is married." 420 Mich. at 362 (emphasis in original.) Similarly, in *Bradley v. Stump*, 971 F.Supp. 1149 (W.D.Mich. 1997), the District Court dismissed a lawsuit filed by a national guard commander who challenged his employer's rule prohibiting his wife from working in his unit. The employee alleged that the rule violated his federal constitutional rights as well as the Michigan statute expressly prohibiting marital status discrimination, and the District Court cited the Michigan Supreme Court's decision in *Miller* as determinative. Although some state courts have interpreted "marital status" more expansively and have found anti-nepotism rules unlawful, the majority of courts have agreed with the *Miller* rationale. *See* cases cited in *Miller*, 420 Mich. at 362, and in *Muller v. BP Exploration (Alaska) Inc.*, 73 FEP Cases 579 at 581 (Ala. Sup. Ct. 1996). Although decisions involving state law are not binding here, the legal issue posed in the anti-nepotism cases is closely analogous to the issue presented by the Programs in the current case. And most significantly in my analysis, the rationale of the *Miller* and *Muller* decisions is consistent with the MSPB's approach to marital status claims, as expressed in *Hundley*, *Ellis* and other decisions.

Applying these principles to the case at hand, I consider it significant that the Spousal Transfer Program does not offer reassignment simply to married employees. Because the program offers reassignment only to employees who are married to other INS employees, it is actually making a distinction based on the identity of an employee's spouse. Just as single employees are ineligible for this program, so are many married employees. Thus, in the words of the MSPB in *Ellis*, the distinction created by the Spousal Transfer Program does not "go to the basic nature of the appellant's marital status." 81 MSPR at 11. Similarly, in the words of the *Boucher* decision, the discrimination "does not go to the essence of his status as a single person". 27 MSPR at 321. Instead, the Program singles out a specific subgroup of married employees - those whose spouses also work for INS and have been transferred to a distant location. It is not because these employees are married that they are given preference for reassignment, but because they have suffered the separation of their spouses due to another personnel action by INS. Therefore, I do not believe that this constitutes "marital status" discrimination prohibited by section 2302.

Further, applying the principles expressed by the MSPB in *Hundley*, I find that there is "a legitimate, reasonable basis" for any preference in reassignment given to employees under the Spousal Transfer Program. 83 MSPR at 638. The Respondent itself articulated this reason in its letter to OPM: "This program is designed to keep INS families together as well as eliminate or reduce their economic hardship of maintaining two separate households." Resp. Ex. 3 at 1. If an INS employee is transferred to a different location and his (or her) spouse is unable to move with him, not only are the employees faced with the financial and emotional hardships of separation, but the agency itself is penalized: the INS will have two unhappy employees, one of

whom may be motivated to resign, at a severe monetary cost to the agency.

Contrary to the Respondent's current insistence, these are legitimate considerations for an employer in its personnel policies. Indeed, testimony at the hearing demonstrated that the INS utilizes non-merit-related factors to reassign employees in a variety of situations. For instance, if a Border Patrol Agent is involved in a shooting or receives a death threat, he may be reassigned, because the agency considers such a reassignment to be in its own interest. The rationale for such transfers is not significantly different than the agency's interest in avoiding the problems posed by two married INS agents working at geographically distant locations. Furthermore, the entitlement to reassignment under the Spousal Transfer Program can hardly be called a "benefit" to married employees; rather, it is a recognition of the unique problems faced by an INS employee whose spouse has just been transferred by the same agency to a distant location. Finally, the fact that the Spousal Transfer provision is narrowly tailored to remedy the problems caused by the transfer of the employee's spouse is a reflection of its reasonableness. Thus, even if the Spousal Transfer Program bases personnel actions partially on an employee's marital status, it is a legitimate, reasonable action that does not constitute a prohibited personnel practice or violate any other relevant statute or regulation.

**b. Unauthorized Preference**

The Respondent also claims that the Spousal Transfer Program and the Compassionate Transfer Program each constitute an unauthorized preference in violation of 5 U.S.C. § 2302(b)(6). Section 2302(b)(6) makes it a prohibited personnel practice to:

grant any preference or advantage not authorized by law, rule or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of *any particular person* for employment.

5 U.S.C. § 2302(b)(6) (emphasis added). As the language of this section makes clear, not all preferences are prohibited - only those that help or hurt a "particular person."

Moreover, the MSPB has interpreted § 2302(b)(6) and explained that preferences provided to a "class" as opposed to a "particular person" do not violate that section. *Weir v. OPM*, 62 MSPR 91, 94 (1994). In *Weir*, the claimant alleged that an OPM regulation improperly assigned preferences to certain types of veterans and thus violated § 2302(b)(6). In other words, the claimant made the same argument as the INS now makes: i.e., that by exceeding the legal scope for veterans' preference, the agency's use of an "unauthorized preference" was a prohibited personnel practice. The MSPB dismissed his claim, because there was no showing that the regulation was promulgated for the purpose of injuring or improving a "particular person" as opposed to a "class" of persons. *Id.*

The case cited by the Respondent, *Special Counsel v. Byrd*, 59 MSPR 561 (1993), does not support the Respondent's position. That case involved a preference created for a particular individual. In finding that such a preference violated 5 U.S.C. § 2302(b)(6), the MSPB emphasized that the personnel action at issue "give[s] a preference to a *particular* individual." *Id.* at 570 (emphasis added and internal quotation marks omitted).

In this case, the Programs do not injure or improve the job prospects of a "particular person." The Programs assist two classes of employees - individuals married to other INS employees who have been transferred and individuals experiencing family emergencies. In light of the plain language and MSPB precedent interpreting § 2302(b)(6), I find that the Respondent has not established that the Programs violate 5 U.S.C. § 2302(b)(6).

The Respondent also cites the Rehabilitation Act, 29 U.S.C. § 791, and its implementing regulations as supporting the unlawfulness of the Programs, but this argument is wholly inappropriate. While the

Rehabilitation Act requires employers to reasonably accommodate employees with disabilities, it does not prohibit employers (private or federal) from considering other factors in making personnel decisions. Nobody argues that INS employees are entitled to compassionate or spousal transfers on the basis of the Rehabilitation Act (indeed the Programs long predate that statute). Thus, the Act's inapplicability to the Programs does not demonstrate that the Programs are unlawful; it merely shows that the Rehabilitation Act is irrelevant.

The Respondent also makes a general argument that 5 U.S.C. § 2302 prohibits agencies from granting any preference that is not explicitly provided by statute or regulation. Other than the provisions discussed above, which do not stand for that principle, the Respondent cites nothing that supports such a sweeping notion.

**3. Conclusions**

In sum, I find that the Respondent has failed to establish that the Programs were unlawful. Therefore, the Respondent was obligated to bargain with the Union before terminating the Programs. Its admitted refusal to do so constituted a violation of § 7116(a)(1) and (5) of the Statute.

In light of this conclusion, I do not need to address the General Counsel's alternative argument that the Respondent failed to bargain over the impact and implementation of the change. However, in case it is subsequently found that the Programs were unlawful, and that the Respondent had no obligation to bargain over the decision to terminate them, I briefly note my further conclusion that the INS did not fulfill its obligation to bargain over the impact and implementation of the Programs. It is undisputed that no such negotiations occurred, but the INS blames this on the Union's bad faith in offering proposals that had been previously rejected by the Respondent in the parties' partnership meetings. The fallacy in such an argument is that the 1997 -1999 partnership meetings (which sought to revise the INS merit promotion procedures) are not the equivalent of negotiations on a specific proposed change in working conditions. Those meetings occurred before the agency notified the Union that it was going to terminate the Programs and cannot be offered as a substitute for post-notification bargaining. Moreover, the INS' earlier rejection of the Union's alternatives to, and modifications of, the Programs did not preclude the Union's renewal of those proposals in formal bargaining. Many, if not all, of the proposals submitted by the Union in GC Ex. 12 are fully negotiable. For instance, Union Proposal B.1. suggests that a Partner Transfer Program be substituted for the Spousal Transfer Program, expanding the eligibility for reassignment to unmarried employees and thereby eliminating the purported illegality of the spousal transfer. The INS has offered no explanation of why this proposal is non-negotiable, other than stating that it had rejected the proposal in partnership meetings. It is therefore apparent that the Respondent simply refused to engage in any meaningful post-implementation bargaining, and accordingly I conclude that it violated section 7116(a)(1) and (5).

**C. The Appropriate Remedy**

Where management changes a condition of employment without fulfilling its obligation to bargain over the substance of the change, the Authority grants a *status quo ante* remedy in the absence of special circumstances. *GSA*, 50 FLRA at 737. The Respondent has cited *Federal Correctional Institution*, 8 FLRA 604 (1982), in favor of a limited remedy, but the remedial criteria of that decision are applicable only to failures to engage in impact-implementation bargaining; in cases of failure to engage in substantive bargaining, the *GSA* standard is applied. The Respondent has not cited the existence of any special circumstances in this case, and none are apparent in the record. Accordingly, I find that a return to the *status quo* is appropriate to remedy the Respondent's unfair labor practice.[(9)] This requires the Respondent to rescind its termination of the Programs and to retroactively apply those Programs to any employees who might have been entitled to reassignment since June 18, 1999, as well as to notify and bargain with the Union prior to making any changes in the Programs.

Based on the foregoing, I recommend that the Authority issue the following Order:

**ORDER**

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of Justice, Immigration and Naturalization Service, shall:

1. Cease and desist from:

(a) Unilaterally changing or terminating provisions of the Spousal Transfer Program and Compassionate Transfer Program (the Programs), without first notifying and bargaining with the American Federation of Government Employees, National Border Control Council (the Union), the exclusive representative of its employees.

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

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

(a) Rescind the June 18, 1999 termination of the Programs, reinstate the Programs as of that date, and retroactively apply the terms of the Programs to eligible employees.

(b) Notify and upon request bargain with the Union concerning any proposed changes in the Programs.

(c) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a representative of the Immigration and Naturalization Service, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Washington Regional Office, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 25, 2001.

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RICHARD A. PEARSON

Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF THE**

**FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change or eliminate the Spousal Transfer Program or the Compassionate Transfer Program (the Programs) without providing the American Federation of Government Employees, National Border Patrol Council (the Union), with notice and opportunity to bargain concerning any proposed change in the Programs.

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

WE WILL rescind the June 18, 1999 termination of the Programs, reinstate the Programs as of that date, and apply the terms of the Programs to eligible employees.

WE WILL notify and upon request bargain with the Union concerning any proposed change to or termination of the Programs.

(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, Federal Labor Relations Authority, Washington Regional Office, whose address is: Tech World Plaza North, 800 K Street, NW, Suite 910, Washington, DC, 20001, and whose telephone number is: 202-482-6702

APPENDIX A

I&N SERVICE ADMINISTRATIVE MANUAL 2261.01

MEMBERS OF FAMILY REQUIREMENT

1. Advocacy. A public official may not advocate a relative's appointment, employment, promotion, or advancement anywhere in his/her agency or in an agency over which he/she exercises jurisdiction or control. A public official advocates a relative's appointment if the action is recommended either orally or in writing. The term "relative" is defined in FPM Chapter 310, subchapter 1.

2. Public Official. A public official is anyone who by law, rule, regulation, or delegation has appointment of promotion authority within his/her organization, or authority to recommend employees for appointment or promotion. Supervisors, regardless of grade level, who have the authority to recommend the appointment or promotion of employees supervised by him/her, are public officials.

Personnel officials who have the authority to appoint or promote or to recommend the appointment or promotion of employees are public officials.

3. Employment of Subordinate. Relatives of public officials may be employed by the subordinate of the official if the official is in no way involved in the action. However, when a person officially charged with approving personnel actions delegates this responsibility to appointing officials, one of his/her relatives can be appointed by a subordinate official only if there is full and continuing delegation of authority. If the action is taken in the name of the public official, or if the public official is required to review or approve the action, it is still officially the public official's action, and the employment restrictions apply. In all cases, any action which might result in or create the appearance of preferential treatment to any person must be avoided.

4. Reassignment of Spouse. If an employee is transferred from one duty location to another within the Service, his/her spouse, when also employed by the I&NS, will be noncompetitively reassigned at no additional expense to the Service, to the new duty station or to a duty station within the local commuting area if possible when all of the following conditions are present:

(a) a vacancy exists for which the employee is fully qualified and which possesses no known promotion potential;

(b) the vacancy has not been announced under competitive procedures;

(c) the employee's performance is at an acceptable level of competence;

(d) the employee's spouse would not be in the supervisory chain (i.e., supervised by or supervising his/her spouse).

When no suitable vacancy exists at the time of the transfer, the employee's spouse will be considered for the first appropriate vacancy (as defined in section 4a-d above) that occurs subsequent to his/her move. The provisions of this section apply only in those instances when both spouses are employed by the Service.

_____ _____

May 1, 1978 TM 782

## APPENDIX B.

## Compassionate Transfers

B-1 Introduction. Employees may request compassionate transfers when dire emergencies exist affecting the physical or mental health of the employee or a member of the employee's immediate family residing in his/her household, which the employee feels would necessitate reassignment to another position or location. When granted, such compassionate transfers constitute an exception to the Merit Staffing Plan. Requests for compassionate transfer will be submitted in the manner prescribed below.

B-2 Format for Submission of Requests for Compassionate Transfer.

(a) Employees will submit a memorandum, through official channels, to the Assistant Commissioner for Personnel, Central Office, stating, in detail, the circumstances which in the employee's opinion warrant a compassionate transfer. (NOTE: As indicated above, requests for compassionate transfer involving persons other than immediate family members regularly residing in the employee's household will not be accepted for adjudication.) The circumstances described in the employee's memorandum will be verified by the Service if deemed necessary.

(b) A statement must be included in the employee's memorandum acknowledging that all costs involved in the requested transfer will be borne by the employee. (Compassionate transfers will normally not be granted at Government expense except in isolated instances of extreme emergency and severe financial hardship which would preclude the employee's transfer at his/her own expense.)

(c) A statement must also be included in the employee's memorandum acknowledging that if the compassionate transfer is granted, the employee understands that he/she will not be eligible for further reassignment to another duty location, except by promotion or reassignment to a position with known promotion potential, for a period of two years after entrance on duty in the new location.

(d) Attached to the memorandum will be at least two independent medical opinions from licensed physicians or psychiatrists which substantiate the circumstances presented in the employee's memorandum.

(e) Appropriate officials at the employee's duty station will review the request for compassionate transfer, verify validity of the circumstances contained in the request, ascertain whether adequate medical documentation has been submitted, and indicate their recommendation for approval or disapproval of the request, and submit any other additional information pertinent to the request to the appropriate regional office. If the required medical documentation has not been submitted, the local officials will return the material to the employee for complete documentation.

(f) Regional officials (program and administrative) will review the request for compassionate transfer, make appropriate recommendations for approval or disapproval, note any additional information which should be considered in adjudicating the request, and forward it to the Assistant Commissioner for Personnel, Central Office.

B-3 Adjudication of Requests for Compassionate Transfer.

The Assistant Commissioner for Personnel will determine whether the circumstances detailed in the employee's memorandum meet the required criteria and insure that the request has gone through proper channels. Submissions not meeting the criteria will be returned, through official channels, to the employees.

Those requests submitted in the required manner will be adjudicated by a Central Office Committee composed of the following officials:

Associate Commissioners;

Assistant Commissioner(s) in charge of position(s) to which compassionate transfer is requested;

Assistant Commissioner for Personnel.

Each member of the above Committee will have one vote which will be cast for approval or disapproval of the request for compassionate transfer. Ties will be broken by the Deputy Commissioner.

B-4 Vacancy Announcements.

A position will not be filled on a compassionate transfer basis once a vacancy announcement has been issued for the position.

B-5 Notification of Employees.

Employees will be notified when decisions are made on requests for compassionate transfer.

B-6 Validity Period.

Requests for compassionate transfer which have been approved by the Central Office Committee, will remain valid for a period of one year from the date of the notification to the employee of approval. Approved cases pending transfer after one year must be resubmitted, by the employee, if the circumstances still warrant a compassionate transfer.

B-7 Changes in Compassionate Circumstances.

If following approval and awaiting transfer, the circumstances which prompted a compassionate request are ameliorated or cease to exist, the employee must notify the Central Office.

B-8 Transfers Involving Promotion.

Under no circumstances will a compassionate request which would involve a promotion to a higher grade level or reassignment to a position with known promotion potential be accepted.

DATED: September 25, 2001

Washington, DC

1. The Respondent determined that to the extent the Compassionate Transfer Program provided for an employee to request a transfer due to his or her own medical condition - as opposed to that of a family member - the Program was lawful. GC Ex. 11.

2. Although the letter to all employees was dated four days earlier than the letter to the Union, there was no direct evidence that employees actually received notice of the Programs' termination before the Union.

3. The Respondent does cite its pre-termination partnership discussions with the Union as indicia of its willingness to bargain, but it doesn't seriously argue that it was bargaining over the substance of its decision; it insists it had to terminate the Programs immediately upon finding that they were illegal; rather, the Respondent cites the partnership discussions as proof that it fully negotiated concerning the impact of the termination. Respondent's Post-Hearing Brief at 8-11. In any case, the Respondent's discussion of the alleged illegality of the Programs during partnership meetings prior to June 1999 does not meet the Statute's requirements of specific, definitive notice in advance of a proposed change. *Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 41 FLRA 690, 698-99 (1991); *Internal Revenue Service (District, Region and National Office Unit and Service Center Unit)*, 10 FLRA 326, 327 (1982).

4. In citing 5 U.S.C. § 2302 for the proposition that "unauthorized preferences" are prohibited, the Respondent does not specify what portion of that statute is implicated. It appears, however, that Respondent is referring to subsection (b)(6), which prohibits the granting of "any preference or advantage not authorized by law, rule, or regulation to any employee . . . for the purpose of improving or injuring the prospects of any particular person for employment".

5. As a procedural matter, I admit into evidence GC Exhibits 2 through 7, which are excerpts from collective bargaining agreements at six other Federal agencies, which contain provisions for noncompetitive reassignment similar to one or both of the INS's Programs. Although the existence of these contractual provisions at other agencies does not prove that any of them are lawful, I consider it to be of some probative value that despite the relative frequency of such programs in the Federal government, they have never previously been held unlawful by a court or agency authorized to enforce federal personnel law. In defense of its termination of the Programs, the INS argues that the Programs conflict with laws applicable government-wide; in this respect, it has opened the door to rebuttal of that position, including evidence that other agencies have similar programs that have not been found unlawful.

6. The Respondent cites an MSPB decision, *Acting Special Counsel v. MSPB* [sic], 6 MSPR 526, 530 (1981) for the proposition that "Section 2301(b)(2) embodies 'merit system principles which, in effect, make [marital status] discrimination in federal employment contrary to federal personnel policy.'" GC Ex. 10, Legal Analysis at p. 2. In quoting that decision (the case is actually entitled *Acting Special Counsel v. Sullivan*), the Respondent has substituted "marital status" for "political" discrimination, and this unexplained alteration radically changes the meaning of the decision. The *Sullivan* case did not involve marital status discrimination at all, and thus it is applicable to our case only by means of analogy.

7. 5 C.F.R. § 335.103(b)(1) requires that "actions under a promotion plan . . . shall be made without regard to . . . marital status . . . and shall be based solely on job-related criteria." However, as with the statutory provisions, this regulation does not define what "marital status" discrimination means. Moreover, 5 C.F.R. § 335.103(c)(3)(v) excepts from competitive procedures reassignments to positions that have no greater promotion potential than the employee's current position - and reassignments under the Programs are limited

in precisely the same language.

The Respondent also cites 5 C.F.R. § 720.901. This provision, however, applies only to competitive and noncompetitive "appointments," not reassignments of current employees. Additionally, in barring discrimination on the basis of marital status, it does not define "marital status."

8. The MSPB's interpretation of § 2302(b)(1)(E) has been affirmed by the United States Court of Appeals for the Federal Circuit. *See Chase-Baker v. Department of Justice*, 198 F.3d 843, 845 (Fed. Cir. 1999) (the prohibition against marital status discrimination is concerned "only with any difference in treatment of married and unmarried employees").

9. However, if the Programs were unlawful, it would be inappropriate to order the reinstatement of unlawful personnel practices as a remedy. In that case, the Respondent would be required to engage in bargaining over the impact of the Programs' termination, including bargaining over all negotiable proposals submitted by the Union.