UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 505, AFL-CIO Charging Party	Case No. SF-CA-02-0506

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MAY 27, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

PAUL B. LANG
Administrative Law Judge

Dated: April 23, 2003
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: April 23, 2003

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
LOS ANGELES, CALIFORNIA

Respondent

and Case No. SF-CA-02-0506

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 505, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 03-24
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE LOS ANGELES, CALIFORNIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 505, AFL-CIO Charging Party	Case No. SF-CA-02-0506

Gerald McMahon, Esquire
For the Respondent

Alfredia Clyde, President, AFGE Local 505
For the Charging Party

John R. Pannozzo, Jr., Esquire
For the General Counsel

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed by the American Federation of Government Employees, Local 505, AFL-CIO (the Union), against the U.S. Department of Justice, Immigration and Naturalization Service, Los Angeles, California (the Respondent) on May 1, 2001. On October 23, 2002, the Regional Director of the San Francisco Region, Federal Labor Relations Authority issued a Complaint and Notice of Hearing alleging that on or about the first week of April 2002, the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), by unilaterally terminating the 4/10 Alternate Work Schedule

(AWS)[1] for employees in the Alien Criminal Apprehension Program (ACAP) who are members of a bargaining unit represented by the Union. Such action was taken by the Respondent without first completing bargaining with the Union to the extent required by the Statute.

The Respondent filed an Answer in which it denied the aforesaid allegation. A hearing was held before the undersigned Administrative Law Judge on January 14, 2003, in Los Angeles, California at which time all parties appeared with Counsel and were afforded the opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs.

This Decision is based upon consideration of the evidence, demeanor of witnesses, and the parties' post-hearing briefs. I make the following findings of fact, conclusions of law, and recommendations.

Positions of the Parties

The General Counsel

The General Counsel maintains that, by letter dated February 28, 2002, the Respondent informed the Union of its intention to terminate AWS for employees in the ACAP. By letter dated March 8, 2002, and hand delivered to the Respondent the Union submitted a timely demand to bargain concerning the proposed action along with a request for information. The Respondent subsequently implemented the proposed change without either bargaining or providing the requested information.

The General Counsel further argues that, in view of the nature of the Respondent's violation, a *status quo ante* (SQA) remedy is appropriate in addition to the customary cease and desist order and the posting of a notice.

The Respondent

The Respondent denies having received the March 8, 2002 letter from the Union and maintains that the Union did not submit a timely demand to bargain and request for information. Therefore, the termination of AWS was not a violation of its duty to bargain under the Statute.

The Respondent has not directly addressed the issue of an appropriate remedy if it is found that an unfair labor

[1] A 4/10 AWS program allows employees to complete a 40 hour workweek by working 10 hours on each of four days.

practice occurred. However, the Respondent has submitted evidence bearing on the justification for its termination of AWS in light of the efficiency of its operations. Since the impact of AWS on the Respondent's operations is relevant to the issue of a remedy, it will be assumed that the Respondent does not concede that an SQA remedy would be appropriate.

Findings of Fact

The issues in this case have been significantly narrowed by the following stipulation by the parties:

a. If it is found that the Union's letter of March 8, 2002, was delivered on that day, the Respondent committed the unfair labor practice as alleged.

b. If it is found that the Union's letter of March 8, 2002, was not delivered on that day, the Respondent did not commit the unfair labor practice as alleged.

c. The termination of AWS for the ACAP employees on or about the first week of April 2002 was substantively negotiable under 5 U.S.C. §6131.

In view of this stipulation, it will only be necessary to address the factual issue of delivery of the letter dated March 8, 2002, and, if necessary, the fashioning of an appropriate remedy.

The Timeliness of the Demand to Bargain

The issue of timeliness arises out of the language of paragraph 9B(3)(b) of the national collective bargaining agreement between the U.S. Immigration and Naturalization Service and the National Immigration and Naturalization Service Council (Jt. Ex. 1 at 21).[2] That language establishes a time limit of ten working days after receipt of notice of a proposed change in working conditions at the local level for the Union to submit a written demand to bargain and a request for information. Provisions of this sort are in keeping with the recognition by the Authority of the validity of contractual time limits on the exercise of rights conferred by the Statute. *See Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 51 FLRA 1532, 1536 (1996).

The Union's demand for bargaining and request for information was initiated by a letter dated March 8, 2002, from Alfredia Clyde, President of the Union, to Frank E. Johnston, Assistant District Director for Investigations (G.C. Ex. 2). Johnston is the representative of the Respondent who, by letter of February 28, 2002, to Clyde, gave notice to the Union of the proposed termination of AWS (Jt. Ex. 3).[3] Clyde testified that, upon completion of her March 8, 2002 letter, she made a copy and wrote or typed the phrase "Union Copy" at the top. She then summoned Laverne Jenkins, a Union steward, some time in the mid-afternoon, gave her both the original and copy of the letter and told her to deliver the letter to Johnston's office.[4] Three or four days later Clyde asked Jenkins whether she had delivered the letter. Jenkins stated that she had made the delivery on the previous Friday, which was March 8, by giving it to the receptionist. Clyde thereupon asked

[2] There is also a Local Supplemental Agreement between the parties which establishes and describes AWS (Jt. Ex. 2).

[3] The Respondent did not challenge Clyde's testimony that Johnston's letter was not received by the Union until March 8, 2002. The date of delivery is further confirmed by the postal receipt (Jt. Ex. 3 at 2).

[4] Clyde did not direct Jenkins to deliver the letter directly to Johnston rather than through a receptionist. Clyde testified that a written bargaining demand is customarily submitted to the management representative who initiated the proposed change and that the Union copy would either be stamped or signed. However, there is no evidence that Clyde told Jenkins to obtain a receipt or other proof of delivery and Jenkins did not do so.

Jenkins to bring the Union copy to the Union office where it was filed with other demand letters.[5]

Jenkins testified that she had been a Union steward since February 6, 2002, and that, as of the date of the hearing, she had never delivered documents from the Union to the Respondent other than on March 8. She essentially corroborated Clyde's testimony with regard to the instructions she received from Clyde and that Clyde gave her the original and one copy of the demand letter.

After receiving the documents from Clyde, Jenkins returned to her own office and put the copy of the demand letter on her desk. She then took the original letter to the office of the Assistant Director for Investigations; she had never before been to that office but knew she was in the right place because of the sign on the front door. Once inside the office, Jenkins encountered a wall between the inner office and the reception area. There was a locked door on the right which required a access code to enter and a bank style window with a slot at the bottom through which documents could be passed. She slid the letter through the slot where it was taken by a person whom she described as an African-American woman with a full head of black hair who was, in Jenkins' words, "a little stocky."[6] Jenkins did not speak to the woman behind the window; she merely gave her the letter and left the office. This occurred at about 2:40 p.m.[7]

Ronneisha Barnes testified that she is an Investigative Assistant. Her duties include backing up the secretary for the Assistant District Director for Investigations, a function which involves answering telephones and screening visitors. Her workstation is outside the offices of Johnston and Kevin Jeffries (who is presumably the District Director for Investigations). Visitors who come to the window are handled by the secretary or Barnes, but any of the approximately thirty people who work in the area can approach the window. Once visitors are identified they can be buzzed through the door.

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[5] It is unclear whether Clyde saw the Union copy again before it was filed.

[6] Jenkins testified that she had never seen the woman before but was later informed by counsel that her name was Ronneisha Barnes.

[7] Jenkins did not explain why she remembered the time so precisely.

Barnes acknowledged that she was working on March 8 and that her normal work hours encompass the time when Jenkins stated that she came to the office to deliver the demand letter. However, Barnes testified that she had never before seen the letter of March 8 and that she does not recall Jenkins delivering any letter.[8] She also testified that there are not a great number of documents delivered to the window. Furthermore, both Jeffries and Johnston are accustomed to personally accepting documents which are intended for them. A person with a document to be delivered to Johnston, for example, could be buzzed through and could go directly to Johnston's office. If a person handed a document to Barnes through the window slot Barnes would normally ask who the document was for and would then either put it in the recipient's box or put it on that person's desk.

Johnston testified that, at the time when AWS was terminated, he was the acting Assistant District Director for Investigations. He first saw Clyde's letter of March 8, 2002, at a meeting he had with her on or about April 2 or 3. He had received no prior notification of the Union's demand to bargain over the proposed termination of AWS.

On March 27, 2002, Goldie Lane-Owens, the Vice President of the Union, sent an e-mail to Johnston (with copy to Clyde) referencing the notice of the proposed termination of AWS and requesting that the Union be provided with certain information that had previously been requested.[9] Johnson responded by e-mail on March 28 in which he stated that the information would be provided by April 1.

After careful consideration of all of the evidence, I find as a fact that the Union made a timely demand to bargain by hand delivery of its March 8, 2002 letter from Clyde. The actual delivery was probably made to Barnes, but the identity of the person who accepted the letter is not crucial to this finding. Barnes herself testified that a number of other employees in her work area could have accepted the letter when it was slipped under the window by Jenkins. I have made this finding with the realization that the General Counsel bears the burden of proof by a preponderance of the evidence pursuant to §2423.32 of the Rules and Regulations of the Authority. I am also aware

[8] Barnes later testified that she did not remember seeing the letter of March 8.

[9] It is undisputed that the only information request from the Union was contained in the demand letter of March 8.

that evidence of timely delivery would have been more definitive if Clyde had instructed Jenkins to obtain some sort of a receipt, if only an acknowledgment of delivery on the Union's copy of the demand letter. However, the Respondent also bears some responsibility for the lack of certainty of delivery because of its internal office procedures.

Clyde testified that she had given an original and one copy of the demand letter to Jenkins. Jenkins testified that she had given the original letter to Barnes through the window slot. Barnes first testified that she had never seen the letter before, but later testified that she did not remember having seen it. She also testified that, if she had received the letter, she would have either put it in Johnston's mailbox or on his desk. I credit Jenkins' testimony because she is far more likely to have remembered the first and only time she had delivered a demand letter for the Union, whereas Barnes understandably could not positively state that she had ever seen the letter prior to the hearing. Although Barnes testified that most documents were delivered to the office by internal mail rather than through the window slot, delivery to the window was not unknown and there is no reason for her to have remembered the delivery of a document that was presented without comment as to its contents or its intended recipient. Even if Barnes had not actually received the letter, it could have been accepted by someone else in the office.

Although the Respondent has argued with some validity that Jenkins could have handed the letter directly to Johnson, the configuration of the reception area in Johnston's office was such as to entitle a visitor such as Jenkins to assume that documents could be delivered to Johnston by being passed under the window to any employee who was in the vicinity. While it is unclear what happened to the letter after it was received, the evidence indicates that Johnston did not actually see the Union's demand to bargain until his meeting with Clyde in early April, which was after the contractual time limit had expired. Nevertheless, delivery was completed when Jenkins passed the letter under the window. Either Barnes or any other employee at or near the window had at least apparent

authority to accept the letter on behalf of Johnston.[10] It is not the fault of the Union if the letter was lost or misrouted. While it is true that the Union could have taken greater precautions to verify the time of delivery, it is also true that the Respondent could have used a date stamp or a log to record the receipt of documents.

Although the evidence is not conclusive, I have determined that it is more likely than not, that the Union delivered its written demand to bargain to the Respondent on March 8, 2002. Furthermore, while the method by which the Union effected delivery was not ideal, it was sufficient.

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[10] The common law doctrine of apparent authority, whereby a principal (in this case the Respondent through Johnston) is bound by the actions of a person (Barnes) in whose authority a third party (the Union) is entitled to place good faith reliance has been recognized in cases such as *U.S. Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, Region II*, 38 FLRA 193, 197 (1990).

The Remedy

In *Federal Correctional Institution*, 8 FLRA 604, 606 (1982), the Authority set forth five factors to be used in determining whether an agency should be required to rescind a change over which it was required to negotiate. Each of those factors will be considered separately.

Whether and when the agency notified the union concerning the change. There is no dispute over the fact that the Respondent delivered written notice of the proposed elimination of AWS on March 8, 2002, or that the notice requested that the Union submit its comments, if any, within ten days of receipt of the notice in accordance with the time limits set forth in the collective bargaining agreement. Therefore, there was no attempt by the Respondent to avoid its duty to bargain upon demand.

Whether, and when, the union requested bargaining over procedures for implementing the change and/or appropriate arrangements for employees adversely affected by the change. As stated above, I have found that the Union made a timely, in fact an immediate, request to bargain over the proposed change.

The willfulness of the Respondent's conduct in failing to bargain. The evidence indicates that, for whatever reason, Johnston never actually received the Union's demand letter. The Respondent's failure to bargain was the result of inefficiency or negligence by both parties rather than of the Respondent's willful misconduct.

The nature and extent of the impact upon adversely affected employees. The termination of AWS eliminated the ability of participating employees to work a four day week. The effect of the change was partially alleviated by the fact that employees retained the option of working a so-called 5/4/9 schedule whereby they would have a day off in alternate weeks. Nevertheless, the effect of the change, while perhaps not dramatic, is significant.

Whether, and to what extent, an SQA remedy would disrupt the Respondent's operations. The Respondent did not address the appropriateness of an SQA remedy in its post-hearing brief. The notice of the proposed change merely stated that the termination of AWS was necessary "in order to maintain the ACAP program's integrity, reliability and efficiency." (Jt. Ex. 3) Johnston testified that the termination of AWS has provided the Respondent with the ability to process aliens more efficiently at peak times when they arrive from state or county institutions.

According to Johnston the Respondent now has more customs officers available at peak times because of the elimination of the four day workweek.

The effect of Johnston's testimony is diminished by the absence of evidence of the number of employees who had participated in AWS or the rationale for the allowance of a 5/4/9 schedule which would also have provided for a four day workweek, albeit in alternate weeks. Although the resumption of AWS might subject the Respondent to some inconvenience, there is no evidence to suggest that it would cause a significant disruption in the Respondent's operations.

Upon consideration of all of the relevant factors, I have determined that a *status quo ante* remedy is warranted so as to undo the effect of the termination of AWS. The basis for this determination is that the effect of the change on bargaining unit employees outweighs the slight, if any, disruption to the Respondent's operations if AWS is restored.

After careful consideration of the memoranda and record evidence, I conclude that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Statute by refusing to negotiate with the Union concerning the termination of AWS in the ACAP unit.

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

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

1. Cease and desist from:

(a) Terminating the 4/10 Alternate Work Schedule (AWS) option for bargaining unit employees in the Alien Criminal Apprehension Program (ACAP) without first completing bargaining with the American Federation of Government Employees, Local 505, AFL-CIO, the exclusive representative of its bargaining unit employees.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit 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) Restore the 4/10 AWS option for ACAP employees in the collective bargaining unit represented by the American Federation of Government Employees, Local 505, AFL-CIO.

(b) Restore to ACAP employees in the collective bargaining unit any annual or sick leave which they took for time during which they would have been off of work if the 4/10 AWS option had not been terminated in April 2002.

(c) Post at its Los Angeles, California facilities, copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the District Director, 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 §2423.41(e) of the Rules and Regulations of

the Authority, notify the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, April 23, 2003.

PAUL B. LANG
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, Los Angeles, California, 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:

WILL NOT terminate the 4/10 Alternate Work Schedule (AWS) option for bargaining unit employees in the Alien Criminal Apprehension Program (ACAP) without first completing bargaining with the American Federation of Government Employees, Local 505, AFL-CIO, the exclusive representative of our bargaining unit employees.

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

WE WILL restore the 4/10 AWS option for ACAP employees in the collective bargaining unit represented by the American Federation of Government Employees, Local 505, AFL-CIO.

WE WILL restore to ACAP employees in the collective bargaining unit any annual or sick leave which they took for time during which they would have been off of work if the 4/10 AWS option had not been terminated in April 2002.

_____
(Respondent/Agency)

Dated:_____By:_____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, whose telephone number is: (415)356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. SF-CA-02-0506, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

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80 "F" Street, N.W.
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_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: APRIL 23, 2003
WASHINGTON, DC