

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

U.S. IMMIGRATION AND NATURALIZATION SERVICE,
SEATTLE DISTRICT,
SEATTLE, WASHINGTON

Respondent

and

Case No. SF-CA-30742

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 40, AFL-CIO

Charging Party

Ms. Marian M. Luisi

For the Respondent

Hazel E. Hanley, Esquire

For the General Counsel

Mr. James A. Broz

For the Charging Party

Before: WILLIAM B. DEVANEY

Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.⁽¹⁾, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns, in the first instance, whether Respondent changed conditions of employment by telling the Union President that when on duty as an Inspector he must in the future be in uniform whether or not his duties involve contact with the public. If it changed conditions of employment, it is asserted that Respondent acted without prior notice or opportunity to bargain and/or that it imposed the new condition of employment on the President of the Union in retaliation for his engagement in protected activity.

This case was initiated by a charge filed on March 17, 1993 (G.C. Exh. 1(a)) which alleged violation of §§ 16(a)(1) and (5) of the Statute. A First Amended charge was filed on May 17, 1993 (G.C. Exh. 1(b)) to allege violation of §§ 16(a)(1), (2), (4) and (5) of the Statute. The Complaint and Notice of Hearing issued on December 2, 1993, alleged violations of §§ 16(a)(1), (2), (4) and (5) of the Statute and the date, time and place of hearing were to be determined later (G.C. Exh. 1(c)). By Order dated March 18, 1994, pursuant to § 2429.2 of the Rules and Regulations, 5 C.F.R. § 2423.2, this case was transferred to the Denver Region (G.C. Exh. 1(e)); by Order dated June 22, 1994 (G.C. Exh. 1(f)), the case was set for hearing on July 19, 1994, at a location to be determined, in Seattle, Washington; and by Order dated July 6, 1994 (G.C. Exh. 1(g)), the location of the hearing was fixed, pursuant to which a hearing was duly held on July 19, 1994, in Seattle, Washington, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, August 19, 1994, was fixed as the date for mailing post-hearing briefs. Respondent and General Counsel each timely mailed an excellent brief received on August 22, 1994, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. Mr. James Anthony Broz is an Immigration Inspector/Special Operations, GS-11 (Tr. 16) and has been employed in the Seattle District of INS for 23 years. For the past five years he has been President of Local 40 (Tr. 17) and for approximately six years he also has been Northern Regional Vice President of AFGE's National Immigration and Naturalization Service Council (Tr. 18). The Northern Region encompasses, "... the 20 northern states, Alaska to Michigan and Ohio, the entire tier of northern states down to Utah, Colorado, Kansas, and Missouri." (Tr. 18).

2. Mr. Broz stated that he had, "... 75 percent official time . . ." (Tr. 19); and the record shows that he normally works for INS only on Sundays and on holidays when he is on overtime (Tr. 204, 206, 207). On Monday, February 15, 1993, a holiday, Mr. Broz, as was his want, worked as an Immigration Inspector and while performing secondary inspection duties interviewed two Korean applicants whom he determined to be inadmissible (Tr. 42-43). Although he offered them the opportunity for an exclusion hearing (Tr. 43), the applicants decided to withdraw their applications and Mr. Broz prepared a form which notified the American Consul in Seoul of the reason for cancellation of their visas (Tr. 44).

3. Tuesday, February 16, 1993, being neither a Sunday nor a holiday, Mr. Broz was at home in Renton, Washington, on official time and was performing Union related work (Tr. 44, 45). At about noon (Tr. 45), one of Mr. Broz' immediate supervisors⁽²⁾, Mr. Al Deitering, a Supervisory Immigration Inspector, called Mr. Broz and told him that the two Korean applicants had changed their minds and were now requesting an exclusion hearing before an Immigration Judge and that he wanted Mr. Broz to come in and complete the paperwork for the hearing (Tr. 45-46). Mr. Broz objected, argued that someone else could do it, offered to send his affidavits by fax or to come in early on the 17th. (Tr. 47-49). Mr. Deitering said he would check with his supervisor, Mr. Gary Phillips, Port Director, Seattle-Tacoma International Airport (hereinafter, "Sea-Tac"), about Mr. Broz's suggestions, either to fax his affidavits or come in early the next day and prepare them, and Mr. Deitering called back shortly thereafter to say that Mr. Phillips wanted Mr. Broz to come in (Tr. 48). Mr. Broz said he wouldn't come in unless he was given an order in writing. Mr. Deitering agreed to check and, again, called back to inform Mr. Broz that he was not going to get the order in writing but he was ordered to return to Sea-Tac (Tr. 48-49). Mr. Broz was still unwilling to comply and called the Area Port Director, Mr. Earle Morgan (Tr. 25, 49), Mr. Phillips' supervisor, to protest his being called to work and he stated that he repeated his offers, to send the affidavits by facsimile or to come in the following day. Mr. Broz stated that Mr. Morgan said ". . . my way of resolving the dispute seemed reasonable and that he would talk to the people at the airport." (Tr. 49). Mr. Morgan testified that, ". . . Mr. Broz stated to me that he had been directed to report to work; and he -- at the time that he called me, he was on official time, which I took as union time. He asked me if he needed to report. I said, I will check into that." (Tr. 228). I found Mr. Morgan to be a very credible witness and credit his version of Mr. Broz' statement to him. Specifically, I do not credit Mr. Broz' statement, that Mr. Morgan said his, Broz', way of resolving the dispute seemed reasonable and that he would talk to the people at the airport, for the reason that this statement not only is contrary to Mr. Morgan's testimony, but is self-serving and out of character inasmuch as, if Mr. Morgan had told Mr. Broz he found his proposal reasonable, as the supervisor of the Port Director, Mr. Phillips, there would have been nothing to discuss, he would have told the Port Director that Mr. Broz need not report but could fax his affidavits and/or report early the following morning, February 17.

Mr. Broz stated that Mr. Deitering called back at about 12:30 p.m., and said, ". . . the D.D. [District Director] had agreed with Gary's decision and that I should come in to work." (Tr. 50). Mr. Broz arrived at the worksite at about 1:30 p.m. dressed in civilian clothes (Tr. 51). He went first to Mr. Deitering's office to pick up the files; Mr. Deitering was present and said nothing about his attire; and he went to the office, at the opposite end of the Immigration level, where his desk is located, to work on the Korean applicant files (Tr. 51-52). He returned to Mr. Deitering's office for forms (Tr. 53) and Mr. Deitering came to his desk and, ". . . asked me why I was so annoyed at coming back to work" (Tr. 54) and he had, again, asserted that he was at home doing things he thought needed to be done and were time sensitive; that anybody could have done the work on the files he was called in to do, etc. (Tr. 54). Mr. Broz said this conversation lasted about ten minutes (Tr. 54). Then, shortly before 3:00 p.m., when his normal work day ends, he called Mr. Deitering and asked if he should complete the work on overtime or come back the next day and Mr. Deitering told him to complete the work on the Korean files (Tr. 52-53). Mr. Broz completed the work around 4:00 p.m. (Tr. 52) and returned the files, with his overtime bill, to Mr. Deitering at 4:00 p.m. Mr. Deitering said nothing about his attire (Tr. 55).

4. After leaving the INS office, Mr. Broz stopped in the adjoining Public Health Office for about twenty minutes to chat with an employee (Tr. 55) and when he left the Public Health Office to go to the elevators, Mr. Phillips, the Port Director, hailed him and Mr. Broz stated the following conversation took place,

"A. The first thing that he said was, Jim, did you come in to work on the files?

"A. I said that yes, I had.

...

"A. He said, Jim, you're not wearing your uniform.

...

"A. I said, Yes, I'm not.

...

"A. He told me, Jim, when you come into this office to work, I want you to wear your uniform."

(Tr. 56-57).

Mr. Broz objected and said people had worked, even on primary or secondary inspection, in civilian clothes; and that he had only worked on files and had no contact with the public.⁽³⁾ Nevertheless, he said Mr. Phillips responded,

"A. Jim, I'm telling you that when you come into this office to work, you're to wear your uniform." (Tr. 58)

Mr. Phillips, in substantial agreement, stated,

". . . I counseled him that when he come (sic) in to do immigration work he should be in an immigration inspector uniform.

"Q. How did he respond?

"A. He said, Well, I'm just in here to do paperwork.

"My response was to that, If you are coming in to do immigration work, you should come in in your uniform. That was about as far as the dialogue went.

...

"Q. That was just a very short dialogue?

"A. Yes.

"Q. Were there any other comment made?

"A. As far as I know, no, there was no other comments." (Tr. 213).

After he arrived at his home, Mr. Broz called Mr. Morgan and told him,

". . . he [Mr. Phillips] had ordered me in the future to wear my uniform if I was going to be working at Sea-Tac Airport. . ." (Tr. 59)⁽⁴⁾

I do not credit Mr. Broz' testimony that he told Mr. Morgan that he was going to file an unfair labor practice charge for the reason that Mr. Morgan, who I found to be a wholly credible witness, specifically denied that Mr. Broz made any such statement to him.⁽⁵⁾

5. Article 25 of the Agreement of the parties, entitled, "Uniforms and Appearance", provides, in relevant part, as follows:

"E. . . Supervisory officers will be responsible for conducting informal daily visual inspections of the officers in their respective units or stations. If uniform deficiencies are noted, immediate corrective action will be taken." (G.C. Exh. 20, Art. 25, E, p. 40)⁽⁶⁾
(Emphasis supplied).

6. Respondent's Administrative Manual with respect to uniforms provides, in relevant part, as follows:

"SERVICE UNIFORMS INSPECTION

"I. Purpose. To promote and maintain high standards of appearance and grooming on the part of all uniformed Service personnel as well as adherence to uniform requirements through the regular inspection of uniforms. The term uniform for the purposes of this instruction includes insignia and equipment required to be worn with the uniform and optional items authorized for wear by officers.

"II. General. Inspection of uniforms will consist of two phases, formal inspection and informal inspection.

"III. Formal Inspection. This is to be performed every six months . . .

"IV. Informal Inspections. It is an inherent responsibility of management to insure the proper uniforming of personnel. This responsibility of Supervisory Immigration Inspectors, Supervisory Border Patrol agents and Unit Supervisors is a continuing one if day-to-day compliance with uniform regulations is to be attained. . . .

V. Disciplinary Action. Failure to comply with instructions from Supervisory officer pertaining to uniforms, may be cause for disciplinary action." (Res. Exh. 4, Section 2415.01 (Nov. 3, 1989)) (Emphasis supplied) (The language as revised in 1989 is virtually unchanged from the September 11, 1978, language. See, Res. Exh. 4, Section 2415.00).

"SERVICE UNIFORMS - IMMIGRATION INSPECTORS

"II. When to be Worn. All Immigration Inspectors and other officers engaged in the examination of applicants for admission to, or departure from the United States shall be properly attired in official uniforms unless otherwise authorized by the Regional Commissioner. New appointees to Immigration Inspector positions will be permitted a period of two months to acquire a working uniform. All official uniforms, including dress coat, must be obtained prior to completion of four months of service. Each officer performing inspections will maintain a sufficient quantity of all items enumerated in paragraph IV herein to perform inspectional duties with a clean, presentable and complete uniform at all times. Regional Commissioners are responsible for ensuring that their subordinates exercise supervision necessary to maintain adequate appearance of uniformed personnel under their jurisdiction. District, Regional, and Central Office staff officers may be authorized to wear the official inspectors uniform.

"Immigration Inspectors performing full-time or part-time adjudications work which requires interview of applicants or petitioners, or which involves personal contact with the public, shall be dressed in civilian clothes when performing such duties, except: Immigration Inspectors at land border ports of entry, engaged primarily in inspection activities, whose only adjudicative duties are in connection with issuance or denial of border crossing cards; and, inspectors at ports of entry where inspection work is commingled with adjudicative work during the tour of duty, may wear the uniform, when approved by the Regional Commissioner. A combination of civilian and uniform clothing shall not be worn with the exception of the unadorned raincoat when the partial uniform can be identified as such by the public.

"III. Official Uniform. All Immigration Inspectors will carry the Service identification card while on duty. Unless specifically exempted therefrom, Inspectors shall wear, while on duty, the official uniform prescribed in these instructions. . . ." (Res. Exh. 4, Section 2415.02 (Nov. 3, 1989)) (Emphasis supplied).

7. Chief Inspector Michael Hrinyak testified that all Immigration Inspectors throughout the United States are required to wear a uniform (Tr. 179); that it is a condition of their employment (Tr. 179). He pointed out that Article 25 of the Agreement of the parties, as set forth in Paragraph 5, above, specifies daily inspections (Tr. 182) and that that provision parallels a section in the Administrative Manual, see, Paragraph 6, above, ". . . that requires supervisors, on a daily basis, to note inspectors uniforms in (sic) any deficiencies." (Tr. 182). Chief Inspector Hrinyak further stated that he had never observed any Immigration Inspector performing inspection functions while in civilian clothes (Tr. 179). Moreover, he testified that,

"A. All deskwork at a port of entry should be directly connected to inspection activities. It should be directly related to one of these two activities, because there is no other deskwork at a port of entry." (Tr. 188-189).

I had stated that Mr. Broz was doing what was described as "deskwork"; he came to work in civilian clothes; and was told he must, in the future, wear a uniform. With this as a premise, I asked him how this fit under the second paragraph of A.M., Section 2415.02, II, beginning with, "Immigration Inspectors performing full-time or part-time adjudication work . . ." and he responded:

"A. It doesn't fit in the second paragraph. That deskwork, as it is so lightly dismissed, is directly involved with the examination of an applicant for admission.

"Q. Even though they are not present?

"A. Even though they are not present. That deskwork set them up, I imagine, for some sort of hearing, either before an immigration judge or some other officer. So it is directly involved with their application for admission and their examination." (Tr. 189).

8. Mr. Phillips, Port Director of Sea-Tac, has been the local supervisor, *i.e.*, the officer in charge, at Sea-Tac since 1976 (Tr. 209). He testified that Sea-Tac Immigration Inspectors all wear uniforms when on duty (Tr. 210). Mr. Phillips stated that Inspectors, Special Operations and Senior Inspectors have different positions descriptions but all wear uniforms when on duty (Tr. 210), except that Senior Inspectors sometimes come in and work plainclothes in and around the area (Tr. 210-211). He stated that Special Operations Inspectors do not work in civilian (plain) clothes; that roving is done by Senior Inspectors and is a uniformed position (Tr. 211). Mr. Phillips emphasized that he maintains the policy that every Immigration Inspector at Sea-Tac wear a uniform (Tr. 212) and that he has admonished, or caused the supervisors to admonish, employees including, in addition to Mr. Broz (Tr. 213), other Union officials (Helen Meadows and Lisa McDaniel (Tr. 220-221)), for uniform violations (Tr. 212, 220-221). Mr. Phillips said he had never, before February 16, 1993, seen Mr. Broz wearing civilian clothes on duty (Tr. 215), although he had seen Mr. Broz in civilian clothes on a number of occasions when he was on official time, *i.e.*, union time (Tr. 216, 217, 218). He further stated that he had no objection to Mr. Broz wearing civilian clothes when he is on official time; that his instruction on February 16 did not apply to official time; and that his only concern was that Mr. Broz wear his uniform when on duty (Tr. 216). Mr. Phillips further stated that Mr. Broz had not been recalled from official time to perform government work except on February 16, 1993 (Tr. 216-217) when he was called in to complete a case that he had worked on the day before (Tr. 213).

9. Mr. Thomas Warner Simmons, Deputy District Director for the Seattle District (Tr. 190), testified that he worked as an Immigration Inspector at Montreal International Airport in 1967 and at New York City from

1968 to 1970 (Tr. 193); that uniforms were worn by Immigration Inspectors at all times at those locations; and that in Seattle, ". . . we adhere to the national uniform policy." (Tr. 193).

10. Ms. Linda Harlow, Supervisory Immigration Inspector, and one of Mr. Broz' immediate supervisors (Tr. 203), testified that she had never seen Mr. Broz on duty in civilian clothing (Tr. 204, 205). She stated that Mr. Broz never told her he was performing duties relating to the mission of the Immigration Service while he was on official time; had never asked her to adjust the amount of official time taken to reflect work performed for Respondent; and, so far as she is aware, he is on official time when he is in civilian clothes (Tr. 205).

11. Employees from the District Offices not working in uniforms when called to airports, including Immigration Inspectors, are permitted to work as Inspectors in civilian clothing. This is a recognized and established exception to the uniform policy, not only at Sea-Tac (Tr. 226-227), but elsewhere (Tr. 156, 164, 166, 172, 173, 181, 194, 195, 202-203).

12. Mr. Broz, when asked, "Q. In your experience for some 20 years at the Seattle District, Mr. Broz, please describe the practice of when employees must wear the INS uniform", responded,

"A. Normally it's required at all times when conducting primary or secondary inspections." (Tr. 36).

Mr. Broz stated, "It [the administrative manual] says that it [the INS uniform] will be worn normally during primary and secondary inspections, unless you are exempt by the regional commissioner, I believe is what it says." (Tr. 37). Mr. Broz conceded that never in his career had he requested authority from the Regional Commissioner, or his designee, to perform inspection functions while in civilian clothing (Tr. 107). Further, Mr. Broz stated that he did not have permission to wear civilian clothes on February 16, 1993 (Tr. 103).

Mr. Broz also testified, in part, as follows:

"Q. . . .

"Now, when you are at Sea-Tac Airport at your worksite, performing representational duties . . . and you happen to have time on the clock to return to your duty as an INS inspector, what do you do about what you wear?

"A. If I am going to be returning to duty to inspect arriving passengers, I would change from what I was wearing at -- while I was on official time into a uniform.

"Q. In fact, Mr. Broz, even when you have no contact with the public but are at your worksite solely to perform INS work and not union work, what do you usually wear to your worksite?

"A. I would wear my uniform." (Tr. 40-41).⁽⁷⁾

The foregoing constituted Mr. Broz' testimony concerning his wearing his uniform before February 16, 1993. The following constitutes his testimony after February 16, 1993:

"Q. How, Mr. Broz, is the rule that you understand Mr. Phillips imposed on you on the 16th of February, how does that change the way you would ordinarily dress, anyway?

"A. It doesn't, except in the instances where I was called back to duty from my residence to come in to do something like that; or if I was at work and was on official time, and I was told that I had to do something, was called back from official time -- sometimes I still take official time at my desk. But I would then have to go home, change into my uniform, and then come back to the airport to complete whatever duties I was told to do." (Tr. 64) (Emphasis supplied).

...

Q. Did you believe that he [Phillips] had made such a change, to stop you from wearing civilian clothes when on official time?

"A. No, I did not." (Tr. 109-110).

...

"Q. You have stated that the change represented by Mr. Phillips' telling you to wear your uniform when re-called to duty is more than di (sic) minimis because now you would have to go home and get your uniform and come back to work?

"A. That would be an incident where I would feel that I would have to do that, yes." (Tr. 111).

...

"Q. So what you are saying, then, is that there have been occasions when you have changed into your

uniform?

"A. Yes." (Tr. 112).

...

"Q. Well, perhaps then you could repeat for us how this incident of having to wear your uniform while on duty has changed your working conditions.

"A. I believe that if I was at work on a labor-management assignment, for instance, negotiating something, and I had been in a suit and tie or in some other attire other than a uniform and I was told to go back to work, that I would have to go home then and get a uniform -- put my uniform on and then return to work. That's what I said.

"Q. And in the past you testified that you have had your uniform with you on occasion when you knew you were going to have to work?

"A. Right." (Tr. 136).

...

"Q. How would the way you would dress differ before February 16, 1994 (sic), Mr. Broz, if you came into the office wearing civilian clothes to work only part of the day on LMR matters and then the rest of your day was to be devoted to primary and secondary inspections?

"A. I would bring my uniform with me.

"Q. Then how would you prepare to dress if you knew that you were going to be spending part of your day on LMR and the other part, as you have described, co-mingling that with tidy-up work for INS, paperwork?

"A. In the past I would not have brought my uniform." (Tr. 144).

13. Mr. Broz testified that he had seen other Inspectors performing primary or secondary inspections not wearing the INS uniform as follows:

"Q. Mr. Broz, have you ever observed any other inspector performing primary or secondary inspections not wearing the INS uniform?

"A. Many times.

"Q. Name some people.

"A. . . . Mr. Ken Hamilton, Mr. Blake Brown, Mr. Ron Strob. I've witnessed probably twenty individuals, many of them who have left the agency by now or left the Seattle District." (Tr. 41).

...

"A. I believe that I saw Mr. Kelley do that, Immigration Inspector Kelley; I saw Mr. Callison do that. Specifically it was common enough that I didn't just keep track." (Tr. 42).

Mr. Blake Brown, Deportation Officer in the District office (Tr. 154), stated that in the District office they generally work in civilian clothes (Tr. 158); that from about 1979 until August, 1988, he had been an Immigration Inspector in the District Office (Tr. 155); that, ". . . sometimes we'd be called out to the airport to inspect a flight like at five or six o'clock . . ." and we would be dressed, "In street clothes." (Tr. 155-156). Mr. Brown stated that there were six or seven other examiners and Inspectors who would go to the airport to perform overtime inspections (Tr. 156).

Mr. Kenneth Stewart Hamilton, formerly Senior Immigration Examiner in the District Office and now an Adjudication Officer (Tr. 163), stated that he had conducted primary and secondary inspections at the airport and, ". . . if I had come from downtown in the middle of the week, when I was an inspector I would sometimes be in my uniform or sometimes in my civilian clothes. If on a weekend when I came from my home, or a holiday, like a Sunday or a Monday when I came directly from home, I would be in my uniform . . .". (Tr. 164). Mr. Hamilton, who maintained the overtime wheel at the District Office from March, 1985, until late November or early December, 1989, when he became an Examiner (Tr. 165), named twelve other District Office employees who conducted primary and secondary inspections at the airport, including: Blake Brown, George Marones, Arahn Strob, Jody St. John, Joe Neiman, Cheryl Zeh, etc. (Tr. 165-166). He stated that when working at the airport, "All the examiners and deportation officers would be in civilian clothes. And we as inspectors, sometimes civilian; sometimes our uniforms." (Tr. 166). Mr. Hamilton further stated that new Examiners are sent from the District Office to the airport for training in primary and secondary inspection and went in civilian clothes (Tr. 167). Mr. Hamilton explained that when he went to the airport from downtown he would be in civilian clothes unless he happened to be in uniform before he was called to the airport (Tr. 172, 173).

Of the persons identified as having performed primary or secondary inspections at the airport, only two were Inspectors assigned to Sea-Tac. These were: Mr. Allan Callison, Immigration Inspector/Special Operations (Tr. 147) (the same classification as Mr. Broz) and Mr. John Kelley, Immigration Inspector (Tr. 148). Mr. Callison testified that, ". . . I have been in the office in civilian clothes doing my duties, other than primary or secondary inspections . . . Collateral duties in association with the refugee project." (Tr. 151) (Emphasis supplied). Mr. Callison further testified,

"A. I did not get prior permission before I showed up in the office in civilian clothes, no.

"Q. And was it sanctioned that you could wear civilian clothes under those circumstances?

"A. I took it upon myself to wear civilian clothes that day.

. . .

"Q. . . . If you were told tomorrow that you must wear your immigration inspector's uniform at all times when on duty, would you consider that a change in your working conditions?

"A. No, ma'am." (Tr. 151-152) (Emphasis supplied).

Following an automobile accident, when he was in a full body cast and neck brace (Tr. 153, 214), Mr. Kelley came in part-time (Tr. 148) in civilian clothes to work ". . . strictly on the refugee program." (Tr. 148) (Emphasis supplied). Mr. Phillips stated, in part, as follows,

"A. . . . Kelley had a car accident and was in a full-body cast, and I permitted him to come in in something that was comfortable. He sat in the back room out of the view of the public and worked with the refugee adjudication." (Tr. 214).

Mr. Phillips stated that Senior Inspectors sometimes work in civilian clothes because they are engaged in undercover surveillance activity (Tr. 214-215).

Neither Mr. Callison nor Mr. Phillips was asked the date of the "refugee" program, but Chief Inspector Hrinyak stated that the refugee program (Mariel boat lift) occurred in 1980 (Tr. 181).

Conclusions

Respondent's recall of Mr. Broz from official time on February 16, 1993, to prepare the necessary affidavits and related paperwork on cases he had handled the day before, wherein he had found two Korean applicants inadmissible, they had declined a proffered exclusion hearing, they had decided to withdraw their applications and Mr. Broz had prepared the appropriate form notifying the American Consul in Seoul of the reason for

cancellation of their visas; but the two applicants subsequently changed their minds and requested an exclusion hearing, is not at issue, although Mr. Broz' real objection was that he was recalled from official time which objection he could attack only obliquely by the feigned claim that Respondent changed working conditions by telling him that in the future, ". . . when you come into this office to work, I want you to wear your uniform." (Tr. 57) or ". . . when you come into this office to work, you're to wear your uniform." (Tr. 58).⁽⁸⁾

Mr. Broz' statement that the parties' collective bargaining agreement does not address the times when inspectors must wear their uniforms (Tr. 35-36) is not entirely correct. Thus, Article 25, Subsection E provides, in part, that

". . . Supervisory officers will be responsible for conducting informal daily visual inspections of the officers in their respective units or stations. If uniform deficiencies are noted, immediate corrective action will be taken." (G.C. Exh. 20, Art. 25, E; Res. Exh. 6, Art. 25, E (draft 1993 Agreement) (Emphasis supplied).

Mr. Phillips testified, without contradiction, that he inspects employees on a daily basis on their attire (Tr. 215).

Mr. Broz was wholly incorrect in his assertion that the Administrative Manual only, ". . . says it [the INS uniform] will be worn normally during primary and secondary inspections, unless you are exempt by the regional commissioner . . ." (Tr. 37) (Emphasis supplied). It is true that Section 2415.02 provides, in part,

"II. When to be Worn. All Immigration Inspectors and other officers engaged in the examination of applicants for admission to, or departure from the United States shall be properly attired in official uniforms unless otherwise authorized by the Regional Commissioner. . . ." (Emphasis supplied).

but subsection III of 2415.02 further provides, in applicable part,

"III. Official Uniform. . . . Unless specifically exempted therefrom, Inspectors shall wear, while on duty, the official uniform . . .". (Res. Exh. 4, Section 2415.02, II and III (Nov. 3, 1989)). (Emphasis supplied).

Thus, the Administrative Manual quite clearly states that, unless specifically exempted, the uniform shall be worn by Inspectors while on duty - not merely when in the public view while performing primary or secondary inspections, as Mr. Broz and General Counsel, argue. Moreover, Chief Inspector Hrinyak testified, without contradiction, that all paperwork, or deskwork, performed by Inspectors, such as the work Mr. Broz was called in to perform on February 16, 1993, is part of the "examination of applicants" even if the applicants are not present (Tr. 188-189). Accordingly, both subsections II and III of Section 2415.02 of the Administrative Manual required Mr. Broz to be in uniform.

Chief Inspector Hrinyak stated that all Immigration Inspectors throughout the United States are required to wear a uniform; that it is a condition of their employment; and that he had never, in visiting the various ports of entry, seen any Inspector performing inspection functions while in civilian clothes (Tr. 179). Mr. Phillips

testified that, as Port Director, he maintained the policy that all Inspectors assigned to Sea-Tac wear a uniform (Tr. 212). The Chief Inspector stated that Inspectors could perform inspection functions in civilian clothes only at the discretion of the Regional Commissioner or in the case of an emergency, such as the 1980 Mariel refugee problem (Tr. 181; see, also, Res. Exh. 4, Section 2415.02, II). Throughout the United States, employees, including Immigration Inspectors, from the District Offices not working in uniforms when called to airports are permitted to perform inspection duties in civilian clothing (Tr. 156, 164, 166, 172, 173, 181, 194-195). Of course, this has been true at Sea-Tac (Tr. 226-227). Mr. Broz fully agreed (Tr. 60). I am aware that Chief Inspector Hrinyak stated that the Congressional requirement that passengers be inspected within 45 minutes constituted an emergency (Tr. 181). Although the Chief Inspector did not make the assertion, Respondent argues that the emergency created by the 45-minute inspection requirement sanctioned working District Office employees at the airports in their District Office attire, which meant, virtually without exception, civilian clothing (Respondent's Brief, p. 14). In general, I do not question the logic that enactment of a law requiring that passengers be inspected within 45 minutes did, indeed, sanction the use of District Office employees attired in civilian clothing; but, at least at Sea-Tac, the practice has been broadened a bit to include District Office trainees. Contrary to Chief Inspector Hrinyak's qualification that trainees, during their first two months, before they had received a uniform would be allowed to work at the airport in civilian clothes (Tr. 181), the record shows that trainees from the Seattle District Office were taken to Sea-Tac in civilian clothes at least a year after they had received their uniform allowances (Tr. 173-174). This merely underscores the obvious, namely, that training of Examiners in inspection techniques involves no urgent time constraints and may be scheduled in advance. Accordingly, Respondent has permitted the practice to develop at the Seattle District Office that any person on duty in the District Office may, when ordered by Respondent, work in inspection activity at Sea-Tac in civilian clothing.

Of course, Examiners, Deportation Officers and Inspectors from the District Office were sent in civilian clothing from the District Office to Sea-Tac to perform inspections (Tr. 60, 157, 161, 164, 166, 172); but, if they came from their homes they would be in uniform (Tr. 164, 171). Mr. Blake Brown stated that he had not gone to Sea-Tac since January, 1991 (Tr. 159) and Mr. Kenneth Stewart Hamilton said he had not gone to Sea-Tac for at least a year and a half (Tr. 169) and all of the others that he had mentioned, so far as he remembered, had not worked at Sea-Tac since 1988 or 1990 (Tr. 169-170) except Mr. Butler who had gone to Sea-Tac with him about a year and a half ago (Tr. 171).

The only credible evidence that any Immigration Inspector assigned to Sea-Tac had ever worked inspections in civilian clothes concerned Messrs. Kelley and Callison. Mr. John Kelley was given permission to work in civilian clothes when he was in a full body cast and neck brace (Tr. 148, 214). Even so, as he worked strictly on the refugee program (Tr. 148, 214), this appears to have been in 1980, some 13 years ago. Mr. Callison testified that he, on a single occasion, also on the refugee project - and, again, presumably, 13 years ago - without permission, "I took it upon myself to wear civilian clothes that day." (Tr. 151). As he stated, he was not engaged in primary or secondary inspections, but in "collateral duties in association with the refugee project." (Tr. 151).

The Agreement of the parties by implication, *i.e.*, ". . . informal daily visual inspections" (G.C. Exh. 20, Art. 25, E; Res. Exh. 6, Art. 25, E) and the Administrative Manual specifically required Mr. Broz to wear his uniform while on duty (Res. Exh. 4, Section 2415.02, III). Respondent's unequivocal policy, which it has consistently maintained, is that all Immigration Inspectors assigned to Sea-Tac must wear a uniform on duty. The record shows no deviation whatever from that policy. Certainly, two isolated departures, some thirteen years previously, one in which Respondent, for compassionate reasons, permitted an Inspector to work in civilian clothes while in a full body cast and a neck brace, and the other where an Inspector, without permission, showed up on a single occasion in civilian clothes and performed collateral duties in association

with the refugee project, afford no basis for support of any practice permitting Inspectors to work in civilian clothing. Cf., Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA 229, 240 (1982) ("... must be consistently exercised for an extended period of time and followed by both parties, or followed by one party and not challenged by the other over a substantially long duration").

Mr. Broz reacted much as a petulant child called in from play. He objected, he bargained, he protested, he imposed conditions, he appealed to higher authority, and he did not show up for at least an hour and a half after he was first called. By his begrudging, tardy compliance, he succeeded in delaying completion of his task within his regular work day so that he completed the work on overtime. He was neither criticized nor rebuked for his conduct and was not penalized in any manner for not being in uniform. To the contrary, Mr. Phillips, the Port Director, told him that, in the future, "... when you come into this office to work, you're to wear your uniform."⁽⁹⁾ (Tr. 58). Mr. Phillips did no more than remind Mr. Broz of the existing and established policy and changed no condition of Mr. Broz' employment.

Mr. Broz first responded as to how Mr. Phillips' instruction of February 16 changed the way he would ordinarily dress as follows:

"A. It doesn't, except in the instances where I was called back to duty from my residence to come in to do something like that; or if I was at work and was on official time, and I was told that I had to do something, was called back from official time -- sometimes I still take official time at my desk. But I would then have to go home, change into my uniform, and then come back to the airport to complete whatever duties I was told to do." (Tr. 64).

Later, perhaps recognizing the absurdity of his first example, i.e., being called back to duty from his residence, he modified his position as follows:

"A. I believe that if I was at work on a labor-management assignment, for instance, negotiating something, and I had been in a suit and tie or in some other attire other than a uniform and I was told to go back to work, that I would have to go home then and get a uniform -- put my uniform on and then return to work. That's what I said." (Tr. 136).

Mr. Phillips simply did not make any such statement to Mr. Broz and from the words Mr. Phillips used it is plain that he addressed only Mr. Broz' attire when he comes in - not his attire if he were at the airport on official time and ordered to duty. Thus, according to Mr. Broz, Mr. Phillips first said,

"A. The first thing that he said was, Jim, did you come in to work on the files?" (Tr. 56).

After Mr. Broz acknowledged that he had come in to work on the files and, indeed, was not in uniform, Mr. Broz stated that Mr. Phillips said,

"A. He told me, Jim, when you come into this office to work, I want you to wear your uniform." (Tr. 57).

After Mr. Broz had protested on the ground that he had only come in to complete the files and had had no contact with the public, he testified that Mr. Phillips stated,

"A. He said, Jim, I'm telling you that when you come into this office to work, you're to wear your uniform." (Tr. 58).

Mr. Phillips testified that he told Mr. Broz, when you, ". . . come in to do immigration work . . . [you] should be in an immigration inspector uniform." (Tr. 213) or, ". . . If you are coming in to do immigration work, you should come in in your uniform." (Tr. 213).

Mr. Morgan testified,

"A. The discussion in the afternoon was Mr. Broz stated to me, The port director came by where I was sitting processing and stated that next time I would be called in I needed to report in uniform." (Tr. 229).

Mr. Phillips addressed the single situation he confronted, namely, a Sea-Tac Inspector on duty in civilian clothes after having been called in from his residence. He simply told Mr. Broz that in the future, when he came in to the airport to work, to wear his uniform. He said nothing further; he reiterated existing policy. He did not address any contingency such as Mr. Broz being at the airport on official time in civilian clothes and being ordered to duty. It had never happened;⁽¹⁰⁾ Mr. Phillips had no occasion to address such hypothetical question; and his statement was precisely in accord with the admonition of the Administrative Manual, to wit: ". . . Inspectors shall wear, while on duty, the official uniform . . .". (Res. Exh. 4, Section 2415.02, III). Because it had never happened, the validity of Mr. Broz' speculation, and it is pure speculation without any basis whatever, that, if he were at the airport on official time in civilian clothes and he should be ordered to duty, he would have to go home, change into his uniform and return to the airport, was unaffected by Mr. Phillips' statement of February 16, 1993, for the reason that the policy was precisely the same before February 16, 1993, namely, that, "Inspectors shall wear, while on duty, the official uniform." Moreover, the validity of Mr. Broz' speculation is highly questionable. If some urgent need required Mr. Broz' being ordered to duty, that need would not be served by ordering him to return home, change to his uniform and return to the airport. Indeed, the record shows that when assistance has been required to timely complete inspections, employees from the District Offices have routinely been authorized and permitted to perform inspection functions at airports in civilian clothing.

Because Respondent changed no condition of employment of Mr. James A. Broz on February 16, 1993, Respondent did not violate §§ 16(a)(1) or (5) and the other allegations of the Complaint, asserted violations of §§ 16(a)(1), (2) and (4), are wholly without merit. In view of the disposition of this matter, it is unnecessary to consider, and I have not given any consideration to, Respondent's Motion to Permit Filing of Supplemental Brief and/or Motion of Counsel For The General Counsel To Strike Respondent's Motion To File A "Supplemental Brief", and both motions are denied.

Having found that Respondent did not violate §§ 16(a)(1), (2), (4) and (5) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. SF-CA-30742 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: November 22, 1994

Washington, DC

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(a)(5) will be referred to, simply, as, "§ 16(a)(5)".
2. Ms. Linda Harlow is also a Supervisory Immigration Inspector and at times is his immediate supervisor (Tr. 25).
3. I do not credit Mr. Broz' testimony that he told Mr. Phillips, "I said that often I had gone to meetings and had been wearing business attire and had come back and completed my shift without changing and that he had done the same." (Tr. 57). First, this was not an allegation of his charge (G.C. Exhs. 1(a) and 1(b)). Second, Mr. Phillips testified that Mr. Broz had responded that he was, ". . . just in here to do paperwork" (Tr. 213), made no mention of return from meetings, although when asked about his returning to the airport in civilian clothes he discussed his conduct (Tr. 222-223). I found Mr. Phillips' testimony in this regard more convincing than Mr. Broz'. Third, Mr. Broz' reference to his return to duty appears contrived. Later, he referred to his having performed, surreptitiously, duties for the Service while on official time and in civilian clothes. Assuming that his "return to duty", while remaining on official time occurred, Respondent would have known only that he completed his shift on official time.
4. I have not credited Mr. Broz' testimony that Mr. Morgan, in their conversation before Broz went to the airport, told Mr. Broz that he would call back. Indeed, Mr. Broz "heard back" when Mr. Deitering called and told him, ". . . the D.D. had agreed with Gary's decision and that I should come in to work." (Tr. 50). Nor do I credit Mr. Broz' testimony that he asked Mr. Morgan why he had not called back and/or that Mr. Morgan said, "He told me he was told to stay out of it." (Tr. 59), for the reason that Mr. Morgan credibly testified that,

"The discussion in the afternoon was Mr. Broz stated to me, the port director came by . . . and stated that next time I would be (sic) called in I needed to report in uniform." (Tr. 229).

5. "Q. And did Mr. Broz tell you that he was going to file an unfair-labor practice charge?

"A. No, he did not.

"Q. He did not say that?

"A. He did not say that to me." (Tr. 229).

6. This language is unchanged in the 1993 draft agreement (Res. Exh. 6, Art. 25, E, p. 40).

7. Mr. Broz also testified,

"A. I have been assigned where I have had contact with the public and where I was wearing civilian clothes, yes." (Tr. 37).

However, Mr. Broz gave no examples of his contact with the public when wearing civilian clothes and he later stated,

"A. Lots of time when I was on official time, I would co-mingle my official time with my functions as an I.I. For instance, I was ordered on detail, so I would have to fill out travel vouchers or make arrangements for the trips or fill out my T&A and so forth. Although my T&A would show official time for the entire day, I was maybe spending an hour or two on the paperwork that was required because I am an immigration inspector. And during those times I was wearing civilian attire." (Tr. 143-144) (Emphasis supplied).

Ms. Harlow, one of Mr. Broz' immediate supervisors, testified that she had never seen Mr. Broz on duty as an Immigration Inspector in civilian clothes (Tr. 204); and, further, that if Mr. Broz performed paperwork relating to the mission of the Service while he was actually on official time she would not know when he was doing that (Tr. 205) and he had never told her he was doing Service work while on official time (Tr. 205), nor had he ever asked her to adjust the amount of his official time because he had performed work as an Inspector (Tr. 205).

8. Mr. Phillips' version was, when you, ". . . come in to do Immigration work . . . [you] should be in an immigration inspector uniform." (Tr. 213), and ". . . If you are coming in to do immigration work, you should come in in your uniform." (Tr. 213).

Contrary to the allegation of Paragraph 15 of the Complaint, Mr. Phillips did not tell Mr. Broz that he must ". . . wear a uniform at all times while on duty. . . ." (G.C. Exh. 1(c), Par. 15). The distinction is that Mr. Phillips did not address Mr. Broz' attire if he should, while on official time away from home in civilian clothes, e.g., when engaged in negotiations with Respondent and/or at the airport, be ordered to duty.

9. I am well aware that Mr. Deitering, Mr. Broz' immediate supervisor, had said nothing about Mr. Broz being in civilian clothes; but I find nothing unusual in his failure to comment and Mr. Phillips' counseling Mr. Broz. Mr. Deitering was lax, perhaps even negligent, in the performance of his duty; nevertheless, he was not the Port Director, Mr. Phillips was, and sight cannot be lost of the undeniable fact that Mr. Broz was in violation of established policy.

10. As noted above, Mr. Broz implied that when at the airport on official time in civilian clothes he had been ordered to duty. The record shows that he was never ordered to duty and his time was never changed from official time. At most, while on official time, without Respondent's knowledge, he filled out travel vouchers (Tr. 143-144).