

FEDERAL LABOR RELATIONS AUTHORITY Office of Administrative Law

Judges WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY U.S. CUSTOMS
SERVICES SAN DIEGO DISTRICT SAN DIEGO,
CALIFORNIA Respondent

and NATIONAL TREASURY EMPLOYEES UNION Charging Party Case Nos. SF-CA-01-0186

SF-CA-01-0521

Michele L. Kenney, Esquire For the Respondent
Robert Bodnar, 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 National Treasury Employees Union ("Union") against the Department of the Treasury, United States Customs Service ("Respondent"), as well as a Consolidated Complaint and Notice of Hearing issued by the Regional Director of the San Francisco Region of the Federal Labor Relations Authority ("FLRA"). It is alleged in the Complaint that the Respondent violated §§ 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* ("Statute") by unilaterally discontinuing the practice of providing approximately one month's advance notice of mandatory overtime to Customs Inspectors ("Inspectors") and Canine Enforcement Officers ("CEO's") employed by the Respondent in the San Diego, California area.⁽¹⁾

The General Counsel has filed a motion for summary judgment which has been opposed by the Respondent. The positions of the respective parties are set forth below.

Position of the General Counsel

The General Counsel maintains that there are no

remaining factual issues inasmuch as the Respondent has, in its answer to the complaint, admitted that it is an "agency" as defined by the Statute (Answer, para. 3), that the Union is a "labor organization" as defined by the Statute (Answer, para. 4) and that it committed the unfair labor practices as alleged (Answer, para. 16).

The General Counsel also relies upon an affidavit by Lee Deloatch (Ex. C) who is an Inspector and the president of the Union. The Deloatch affidavit generally describes the Respondent's prior practice of prescheduling overtime a month in advance. Under that practice Inspectors were allowed to volunteer for overtime on specific days. On or about December 13, 2000, the Respondent announced that it was discontinuing the practice of prescheduling overtime. Although there were some preliminary communications between Mr. Deloatch and a representative of the Respondent, he was never provided with the details of the new procedure which was eventually implemented. The result of the change has been to cause problems for employees who are now required to make last minute changes in personal plans and child care arrangements.

The General Counsel also relies on the affidavit of Robert Petrin (Ex. D), who is a CEO and was the Executive Vice President of the Union from March of 1998 to April of 2001. On March 13, 2001, Mr. Petrin was called to a meeting with certain management representatives of the Respondent and was informed that the monthly prescheduling of overtime was to be discontinued. There was some discussion, but no final agreement. On March 16, 2001, the Respondent advised the CEO's that the prescheduling of overtime would

cease. There were further communications between Mr. Petrin and a management representative which culminated in a formal request to bargain. The Respondent did not reply to the request.

The General Counsel argues that the subject of prescheduled overtime is fully negotiable pursuant to § 7106(b)(2) of the Statute.⁽²⁾ Furthermore, the General Counsel maintains that, even if the subject of prescheduled overtime is not substantively negotiable, the effect of the change was more than *de minimis*, thereby obligating the Respondent to bargain over its impact and implementation.

Finally, the General Counsel maintains that a *status quo ante* remedy is appropriate and that the Respondent should be directed to restore the practice of prescheduling overtime approximately one month in advance for the effected Inspectors and CEO's and to refrain from unilaterally changing the practice without first notifying the Union and affording it the opportunity to bargain over the proposed change.

Position of the Respondent

In its reply to the motion the Respondent reiterates

its admission that it committed the unfair labor practices alleged in the complaint. However, Respondent raises a number of alleged factual issues concerning the remedy which, it maintains, preclude the granting of summary judgment.

Respondent maintains that it had no duty to negotiate concerning the scheduling of overtime and argues that there is a material issue of fact as to whether the elimination of the prescheduling of overtime is *de minimis* because Inspectors and CEO's can still avoid being drafted to work overtime by volunteering for overtime on the daily schedule and are still able to exchange overtime assignments. In support of that argument the Respondent has submitted the affidavit of Jose Perez, the Overtime and Scheduling Supervisor of the Southern California Customs Management Center in San Diego (Respondent's Ex. 1). Mr. Perez states that:

The only thing that has changed is that an employee can no longer have the certainty that they [*sic*] will be working an 8 hour shift of their choice on a given day 2 to 4 weeks in advance of that assignment.

According to Mr. Perez the Respondent is not drafting more people to work overtime under the current system than it did prior to the change.

The Respondent has also submitted an affidavit from Robert Root who is Acting Branch Chief for the Canine Branch in San Diego (Respondent's Ex. 2). Mr. Root's affidavit contains the following statement regarding the impact of the change on CEO's:

The discontinuation of the practice of prescheduling overtime has not resulted in more drafting or more hold-overs. The only loss to the CEOs is that they have lost the certainty [of] knowing ahead of time that they will be working OT on a given scheduled day off.

The Respondent also maintains that there is a material question of fact as to whether the *status quo ante* ("SQA") remedy requested by the General Counsel is appropriate. Such a remedy, if allowed, would require the Respondent to rescind the change in its scheduling of overtime and revert to the practice of scheduling overtime for two pay periods in advance. In support of its position the Respondent relies upon the statements in the Perez and Root affidavits that the changed procedure has not resulted in an increase of involuntary overtime. In addition, Mr. Perez states that the scheduling of overtime for three shifts of Inspectors and CEO's over a single pay period of two weeks can take up to 164 man hours. It is unclear whether Mr. Perez is referring to prescheduling or to scheduling on a daily basis or both. It is also unclear whether there would be a significant difference in the total amount of time expended on scheduling in view of the fact that, in either

case, the Agency is contractually obligated to assign overtime in accordance with six criteria as well as the requirement of attempting to even out overtime earnings.⁽³⁾ Mr. Root states that the scheduling of overtime for CEO's can take from three to five working days a month and that applying the "low earner" rule might add another day and a half to the process. It is also necessary to inform effected CEO's of the cancellation of overtime assignments.

In addition, the Respondent cites evidence as to the events surrounding the change of procedure in an apparent effort to show that the Union waived its right to bargain by failing to submit bargaining proposals as to its impact and implementation (Respondent's Ex. 10, 11). Finally, the Respondent argues that it was, as a matter of law, absolved of any duty to bargain on the scheduling of overtime by virtue of Executive Order 13203 which revoked both Executive Order 12871 and the Presidential Memorandum of October 28, 1999, thereby terminating Labor-Management Partnerships.⁽⁴⁾

Findings of Fact

1. The Union is a "labor organization" as defined in

§ 7103(a)(4) of the Statute and is the exclusive representative of Inspectors and CEO's employed by the Respondent (Complaint, para. 4; Answer, para. 4).

2. The Respondent is an "agency" as defined in § 7103(a)(3) of the Statute (Complaint, para. 3; Answer, para. 3).

3. On or about December 13, 2000, the Respondent informed Inspectors assigned to the San Diego area that, beginning in January of 2001, it was discontinuing the practice of prescheduling overtime approximately thirty days in advance (Answer, para. 11).

4. On or about March 13, 2001, the Respondent informed CEO's assigned to the San Diego area that it intended to discontinue the practice of prescheduling overtime approximately thirty days in advance (Answer, para. 13).

5. On April 1, 2001, the Respondent discontinued the advance scheduling of overtime for CEO's and began the scheduling of overtime on a daily basis (Respondent's Ex. 2).

6. At all times pertinent to these cases Inspectors and CEO's who work overtime as Inspectors have had the option of volunteering for available overtime on any given day. In the event that there is an insufficient number of volunteers, the collective bargaining agreement⁽⁵⁾ allows the Respondent to draft Inspectors for involuntary overtime so long as it takes into account negotiated protections in the following descending order of priority:

a. Those who have been excused from overtime by their supervisors.

b. Inspectors already working overtime on days off.

c. Inspectors whose days off are on the following day.

d. Inspectors who have volunteered to work the following day which is their day off.

e. Inspectors who have worked 16 hours on the previous day.

f. Inspectors who have worked 20 hours of overtime in the same week (all work on a Sunday or holiday counts toward the 20 hours).

In choosing between unprotected Inspectors⁽⁶⁾ the Respondent is required to draft those with the lowest overtime earnings (Respondent's Ex. 1).

7. At all times pertinent to these cases CEO's have had the option of volunteering for overtime. If there is an insufficient number of volunteers, the Respondent drafts CEO's with the lowest overtime earnings (Respondent's Ex. 2).⁽⁷⁾

8. The cessation of prescheduled overtime has had little or no effect on the number of Inspectors and CEO's who are drafted for involuntary overtime (Respondent's Ex. 1 and 2).

9. The cessation of prescheduled overtime for Inspectors and CEO's has relieved the Respondent of the necessity of informing effected employees of last minute changes in the overtime schedule so as to avoid the requirement of paying for cancelled overtime (Respondent's Ex. 1 and 2).⁽⁸⁾

10. By letter dated July 18, 2001, the Respondent informed the Union that, pursuant to Executive Order 13203⁽⁹⁾, it would no longer bargain on subjects described in 5 U.S.C. § 7106(b)(1)⁽¹⁰⁾ (Respondent's Ex. 9).

11. By letter dated August 2, 2001, Respondent again informed the Union that it would no longer be bound by provisions in the collective bargaining agreement in which it had agreed to bargain over matters covered by 5 U.S.C. § 7106(b)(1). Respondent further stated that it had drafted a revised National Inspectional Assignment Policy ("NIAP") which would go into effect on September 30, 2001⁽¹¹⁾ (Respondent's Ex. 9).

12. By letter dated October 1, 2001, to the Union, Respondent confirmed that the revised NIAP had gone into effect on that date. The Respondent further stated that its implementation of the revised NIAP was being accomplished inspite of the fact that the matter had been referred to the Federal Service Impasse Panel and that the Respondent had. . . instructed our managers to discuss the NIAP implementation with their local union officials and to implement it fairly and reasonably keeping safety and quality of work life in mind.

(Respondent's Ex. 11).

13. Neither the original nor the revised NIAP specifically refer to the prescheduling of overtime. The original NIAP states, in pertinent part:

The local framework for scheduling will remain in effect . . . until and unless the parties agree jointly to modify it. Either party may initiate discussions to modify the current local scheduling framework. . . .
(Respondent's Ex. 5, page 5.)

* * * * *

Assignments should be scheduled in advance when requirements are known. In such cases, individual assignments will be made as far in advance as practicable . . . Staffing will then be altered as necessary to accommodate fluctuations in actual workload. . . . Current notification and verification systems will be retained (Respondent's Ex. 5, page 17).

14. The revised NIAP states, in pertinent part:

Overtime assignments should be scheduled in advance when requirements are known. In such cases, individual assignments will be made as far in advance as practicable in order to minimize inconvenience to

the employee concerned (Respondent's Ex. 4, page 6).

Discussion and Conclusions

For the reasons stated below, the General Counsel's motion for summary judgment will be granted and the Respondent will be directed to resume the practice of prescheduling overtime.

Summary Judgment is Appropriate

In numerous cases, such as, *Dept. of Veterans Affairs and AFGE Local 2400*, 50 FLRA 220, 222 (1995), the Authority has confirmed that, in considering motions for summary judgment which have been filed pursuant to 5 CFR § 2423.7, it will apply the criteria which have been established with regard to Rule 56 of the Federal Rules of Civil Procedure. Among those criteria is the principle that, in determining the existence of a material issue of fact, all evidence is to be construed in a light most favorable to the opposing party, *Fleet Nat. Bank v. H&D Entertainment, Inc.*, 96 F.3d 532, 537 (1st Cir. 1996), *cert. denied*, 520 U.S. 1155, 137 L. Ed.2d 495 (1997).

As shown in the above listed Findings of Fact, the evidence submitted by the Respondent itself has established that the General Counsel and the Union are entitled to judgment as a matter of law.

Prescheduling of Overtime is Negotiable

The Respondent has, in its answer to the Complaint and in its response to the motion, admitted that it violated the duty to negotiate with the Union within the meaning of §§ 7116(a)(1) and (5) of the Statute. Yet, the Respondent apparently denies that it is subject to any meaningful remedial order because the scheduling of overtime is a management right under § 7106 of the Statute and that it has no duty to negotiate concerning the impact and implementation of the practice because the cessation of prescheduling had only a *de minimis* effect on the Inspectors and CEO's in the San Diego area. The Respondent is incorrect on both counts.

With regard to the issue of management rights, the Union has not denied that availability for overtime is an essential duty of Inspectors and CEO's. Furthermore, the Union does not contest management's right to draft employees for overtime when there is an insufficient number of volunteers. The only issue in dispute is the amount of notice to which employees are entitled.⁽¹²⁾ An agency is obligated to negotiate over the impact and implementation of a management right (in this case the right to require overtime) so long as it has more than a *de minimis* impact on conditions of employment, *Dept. of Health and Human Services and AFGE Local 1760*, 24 FLRA 403, 407 (1986).

In determining whether a change in procedure has more than a *de minimis* effect on conditions of employment, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect of the change, *Dept. of the Air Force and AFGE Local 214*, 54 FLRA 914, 919 (1998). The effect of the cessation of prescheduling is far beyond the *de minimis* level. The Respondent maintains that the "only" effect of the change is to deprive employees of advance notice of their work schedules. Now, rather than knowing of assigned overtime about a month in advance, an employee does not learn of an overtime assignment until the day on which it is to occur. The substantial effect of the drastically shortened notice is obvious.

The statements in the Perez and Root affidavits that the Respondent has not had to draft more employees for overtime since the change fail to address the significance of the increased difficulty which employees can be expected to experience in attempting to trade overtime assignments at the last minute or in altering child care or other personal arrangements to accommodate overtime assignments. Similarly, the impact of the change is not substantially ameliorated by the opportunity of employees to volunteer for overtime with sufficient frequency as to reduce or eliminate the chance of their names appearing on a daily assignment sheet without

their advance notice. The increased necessity of volunteering for overtime is, in itself, more than *de minimis*. The fact remains that employees are now considerably more likely to be faced with unexpected extensions of their work days on short notice.

A Status Quo Ante Remedy is Appropriate

In *Federal Correctional Institution and AFGE Local 2052*, 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. According to the evidence submitted by the Respondent, it advised the Union on December 13, 2000, of its intent to cease prescheduling overtime for Inspectors as of the first pay period beginning in 2001. On March 13, 2001, the Respondent informed the Union that it would cease prescheduling overtime for CEO's on April 1, 2001.

Although the Respondent had previously indicated that, pursuant to Executive Order 13203, it was withdrawing its consent to negotiate with regard to matters within the scope of § 7106(b)(1) of the Statute, neither the language of the notices nor the cited portion of the Statute put the Union on fair notice that it had reserved the right to change the means by which overtime was scheduled. Therefore, although the Respondent did afford the Union some advance notice of the impending change, the amount of notice was not great in view of the potential impact upon the effected employees. While the Respondent maintained that the change in procedure was necessary to ensure its effective functioning, there is no evidence to show that an emergency situation existed such as to justify its implementation before it had completed negotiations with the Union.

Whether, and when, the union requested bargaining over procedures for implementing the change and/or appropriate arrangements for employees adversely affected by the change.

There is some conflict in the evidence as to when the Union first protested the change in the scheduling procedure. According to the affidavit of Lee Deloatch, president of the Union (General Counsel Ex. C), he protested the impending cessation of prescheduling on December 13, 2000, which was the day he was informed of the change. Mr. Deloatch further states that he was unable to meet with the Port Director until March of 2001 and that in April of 2001 the Assistant Port Director suggested a compromise whereby employees would be able to sign up for overtime about a week in advance as was allowed in Calxico, a location which was not under the Union's local jurisdiction. Mr. Deloatch stated that the Union could agree to the proposal in principle, but he never heard more about it. On August 15, 2001, Mr. Deloatch was informed by the Port Director that the proposal was still being considered.

According to the affidavit of Robert Petrin, the executive vice president of the Union (General Counsel Ex. D), he met with management representatives on March 13, 2001, and was informed that the Respondent would no longer preschedule overtime for CEO's. There was some discussion as to alternative arrangements but no agreement was reached. Employees were informed of the termination of prescheduling by an e-mail message on March 16, 2001. On March 26, 2001,

Mr. Petrin sent an e-mail message to the Acting Branch Chief stating that negotiations had not yet been completed. The Acting Branch Chief responded on March 29, 2001, stating that he had assumed that Mr. Petrin was in agreement because he had not heard from him.

The Respondent's evidence is to the effect that the Union did not present it with specific bargaining proposals after protesting the impending change to the NIAP. However, as shown above, the revised NIAP does not specifically address or allude to the advance scheduling of overtime.

The totality of the evidence, when construed in a light most favorable to the Respondent, indicates that, while the Union might have acted more forcefully, it neither waived its right to negotiate nor led the Respondent to reasonably believe that it had acquiesced in the termination of the prescheduling of overtime.

The willfulness of the Respondent's conduct in failing to bargain. The undisputed evidence shows that the Respondent intentionally implemented a significant change in the procedure for scheduling overtime. The fact that it believed that it was under no legal obligation to bargain does not detract from the willful nature of its conduct, *U.S. Dept. of Energy and AFGE Local 3824*, 56 FLRA 9, 13 (2000).

The nature and extent of the impact upon adversely affected employees. The magnitude of the impact of the cessation of prescheduling on Inspectors and CEO's is self-evident and is not effectively rebutted by Respondent's evidence to the effect that employees have retained the option of trading overtime assignments and that there has not been an increase in the number of employees drafted for overtime. Respondent's evidence shows nothing more than that most employees have been able to accommodate the impact of the shortened notice but does not address the difficulties which they are experiencing in making their accommodations.

Whether, and to what extent, an SOA would disrupt the Respondent's operations. Taken in the most favorable possible light, the Respondent's evidence shows nothing more than that a considerable expenditure of time is spent on the scheduling of overtime, whether in advance or on a daily basis. That evidence also supports the conclusion that the resumption of the prescheduling of overtime would require an increased expenditure of time and effort to notify employees of subsequent changes to the schedule. However, the Respondent has failed to present evidence as to how much time was typically expended in such notification before and after the cessation of prescheduling.

In view of the foregoing evidence, the Respondent's showing of disruption is not sufficient to outweigh the impact on employees of its violation of the duty to negotiate.

Upon consideration of all of the relevant factors, it is determined that a *status quo ante* remedy is warranted so as to undo the effect of the Respondent's unilateral change in the procedure for the scheduling of overtime.

After careful consideration of the memoranda and evidence, I conclude that there is no material issue of fact and that the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5) by refusing to negotiate with the Union concerning the termination of the practice of prescheduling overtime.

In view of the above-stated conclusion, I recommend that the Authority adopt the following Order:

ORDER

IT IS ORDERED that the motion of the General Counsel for summary judgment be, and hereby is, granted.

Pursuant to § 2423.41 of the Rules and Regulations of the Authority and § 7118(a)(7) of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of the Treasury, U.S. Customs Service, San Diego District, San Diego, California:

1. Cease and desist from:

(a) Unilaterally implementing changes in working conditions of employees in the bargaining unit by eliminating the practice of scheduling overtime for Customs Inspectors and Canine Enforcement Officers at the San Ysidro, Otay Mesa and Airport/Seaport Ports of Entry two pay periods in advance without first notifying the National Treasury Employees Union, Chapter 105 of the proposed change and affording the

union an opportunity to bargain over the change prior to implementation.

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

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

(a) Resume the practice of scheduling overtime two pay periods in advance for Customs Inspectors and Canine Enforcement Officers at the San Ysidro, Otay Mesa and Airport/Seaport Ports of Entry as such practice existed prior to the changes implemented by the agency on or before January 1, 2001, and maintain that practice until completion of good faith bargaining on the impact and implementation of a discontinuation of the practice.

(b) Post at all facilities where employees are located at the U.S. Customs Service, San Diego District, San Diego, California, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. On receipt of such forms, they shall be signed by the Port Director and 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.

(c) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, San Francisco Region, of the Federal Labor Relations Authority in writing within 30 days of the date of this Order as to what steps have been taken to comply.

PAUL B. LANG

Administrative Law Judge

Dated: March 14, 2002

Washington, DC

NOTICE TO ALL MEMBERS AND EMPLOYEES POSTED BY ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Treasury, U.S Customs Service, San Diego District, San Diego, California violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

As ordered by the Federal Labor Relations Authority and to effectuate the purposes of the Federal Service Labor-Management Relations Statute, we hereby notify our employees that:

WE WILL NOT unilaterally implement changes in working conditions of employees in the bargaining unit by eliminating the practice of scheduling overtime for Customs Inspectors and Canine Enforcement Officers at the San Ysidro, Otay Mesa and Airport/Seaport Ports of Entry two pay periods in advance without first notifying the National Treasury Employees Union, Chapter 105 of the proposed change and affording the

union an opportunity to bargain over the change prior to implementation.

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

WE WILL resume the practice of scheduling overtime two pay periods in advance for Customs Inspectors and Canine Enforcement Officers at the San Ysidro, Otay Mesa and Airport/Seaport Ports of Entry as such practice existed prior to the changes implemented by the agency on or before January 1, 2001, and will maintain that practice until the completion of good faith bargaining on the impact and implementation of the discontinuation of the practice.

(Activity)

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 any of 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 94103-1791 and whose telephone number is: 415-356-5000.

1. § 7116(a)(1) prohibits an agency from interfering with, restraining or coercing any employee in the exercise of the rights conferred by the Statute. § 7116(a)(5) prohibits an agency from refusing to consult or negotiate in good faith with a labor organization.
2. § 7106(b)(2) provides that nothing in the Statute related to management rights precludes an agency and a labor organization from bargaining over procedures by which management authority is to be exercised.
3. The Agency is required to draft Inspectors for overtime in inverse order of their overtime earnings assuming that the low earners are not in one of the six protected categories by virtue of their work schedules or other factors.
4. This argument is at odds with Respondent's admission that it failed to bargain in good faith in violation of § 7116(a)(5).
5. The parties have been operating under a collective bargaining agreement which expired on September 30, 1999 (Respondent's Ex. 7).
6. Presumably the Respondent may also draft protected employees in reverse order of protected status if there is a greater than usual need for overtime.
7. The evidence is unclear as to whether the classes of protected status applicable to Inspectors also apply to CEO's. However, the issue is not critical to this decision.

8. The Respondent has not submitted evidence as to the amount of time typically spent on informing employees of changes or as to the cost associated with the failure to make such notification. Furthermore, there is no evidence of the savings, if any, in the total time spent in scheduling overtime for two pay periods since the cessation of prescheduling.

9. Executive Order 13203, which was issued on February 17, 2001, does not mandate any particular bargaining position by an agency. Furthermore it states that, "Nothing in this order shall abrogate any collective bargaining agreements in effect on the date of this order."

10. § 7106 of the Statute is entitled "Management Rights". § 7106(b)(1) provides that the section does not preclude an agency and a labor organization from negotiating

. . . at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work

11. A portion of the revised NIAP has been submitted by Respondent as Exhibit 4. The previous NIAP is Respondent's Exhibit 5.

12. The Perez affidavit acknowledges that employees are to be drafted for overtime in a certain order. The revised NIAP states that advance notice of overtime assignments is to be given to the extent practicable.