MEMORANDUM DATE: April 20, 1995

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
SERVICE, WASHINGTON, D.C.

Respondent

and Case No. DA-CA-30370

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL BORDER PATROL
COUNCIL, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. DA-CA-30370

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 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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **MAY 22, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: April 20, 1995
Washington, DC

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, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. DA-CA-30370

Scott D. Cooper, Esquire
William C. Owen, Esquire
On Brief
For the Respondent

Christopher M. Feldenzer, Esquire
Susan Kane, Esquire
For the General Counsel

Mr. T.J. Bonner
Deborah S. Wagner, Esquire
By Brief
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

[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)".

and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns, quite narrowly, as stated in the allegation of Paragraph 14 of the Complaint that ". . . Respondent implemented the Training Program . . . [Side Handle Baton Training] while the matter was still pending before the FSIP."

This case was initiated by a charge filed on January 4, 1993 (G.C. Exh. 1(a)), but the Complaint and Notice of Hearing did not issue until December 10, 1993, for a hearing at a date to be determined (G.C. Exh. 1(b)). Notice of Hearing issued on May 20, 1994 (G.C. Exh. 1(d)), setting the date of hearing in this and three other cases for June 29, 1994; by Order dated June 14, 1994, the hearing was rescheduled for July 21, 1994 (G.C. Exh. 1(e)); and by Order dated July 7, 1994, the hearing was further rescheduled for August 10, 1994, (G.C. Exh. 1(f)), pursuant to which a hearing was duly held on August 10, 1994, in Washington, D.C., 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, although Respondent and General Counsel presented oral argument on Respondent's Motion to Dismiss, which was denied. At the conclusion of the hearing, September 12, 1994, was fixed as the date for the mailing of post-hearing briefs, which time was subsequently extended, upon timely motion of the Charging Party, to which the other parties did not object, for good cause show, to November 14, 1994. Respondent, Charging Party and General Counsel each timely filed, or mailed, an excellent brief, received on, or before, November 18, 1994, which have been carefully considered. Upon the basis of the entire record[2] I make the following findings and conclusions:

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[2] On my own motion, I have corrected the transcript and Exhibit file as follows: (a) The Index on page 3, of the Transcript is incorrect as to Respondent's Exhibits D and E which are shown as: "WITHDRAWN". They were "rejected" not withdrawn and Respondent's Exhibit F, which also was rejected, is not shown at all. Accordingly, the heading "WITHDRAWN" has been deleted and the heading "REJECTED" substituted. In addition, Respondent's Exhibit F has been added, Identified at p. 80 and Rejected at p. 80. (b) Rejected Exhibits D, E and F have been removed from the Exhibit File and placed in a "Rejected Exhibit File" as the Reporter was specifically directed to do but, instead, improperly included them in the Exhibit File.

Findings

1. The U.S. Department of Justice, Immigration and Naturalization Service (hereinafter, "INS") has recognized the American Federation of Government Employees, AFL-CIO (National Council of Immigration and Naturalization Service Locals and National Border Patrol Council) as the bargaining agent for all non-excluded personnel of the Immigration and Naturaliza-tion Service (Res. Exh. A, Art. 1). This case involves only the unit represented by the National Border Patrol Council (hereinafter, "Union") which consists of about 4,500 employees in 21 sectors, covering the continental United States and Puerto Rico (Tr. 21-22). For the purposes of this case, the Border Patrol, although a constituent part of INS, will be referred to as "Respondent".

2. INS and the Union entered into an Agreement covering the unit employees on September 30, 1976 (Res. Exh. A), which is still in effect (Tr. 35).

3. Before April, 1992, a Border Patrol agent's standard equipment consisted of a handgun, in a holster, on a gun belt, extra ammunition, handcuffs, in a holder and a portable radio, in a holder (Tr. 22). Optional equipment included: a four-inch knife, in a holder, a flashlight holder on their belt and a baton ring on their belt for a straight baton (Tr. 23-24). Although the straight baton was optional equipment (Tr. 25), training in the use of the straight baton was mandatory (Tr. 25).

4. By letter dated April 2, 1992 (G.C. Exh. 4)., Respondent advised the Union that it planned to, ". . . adopt as a standard intermediate use of force weapon the

Expandable Side-Handle Baton[3] . . . All Border Patrol Agents will be given a minimum of 12 hours training with the baton . . . and 8 hours of additional training each year to retain certification. Use of force with the Side-Handle Baton will be subject to a standard reporting procedure." (G.C. Exh. 4). Enclosed was a copy of Respondent's Side-Handle Baton Training Program. The letter closed with the statement that because Respondent believes this will be an important defensive tool, it, ". . . would like to be in a position to move ahead on this program at the earliest opportunity." (G.C. Exh. 4).

5. The Union responded by letter dated May 8, 1992 (G.C. Exh. 5), in which it set forth its concerns and asked questions. It concluded with its customary statement, "Pending the completion of negotiations . . . the Union also insists that the implementation of the proposed policy be held in abeyance."

6. Respondent replied by letter dated June 12, 1992 (G.C. Exh. 6), answered each question and concern of the Union and supplied for the Union's examination and evaluation a Side-Handle Baton and holder. Respondent concluded by saying, "We hope to have the Program fully instituted and the Expandable Baton in the hands of most Border Patrol Agents by the end of the Fiscal Year." (G.C. Exh. 6).

7. By letter dated July 24, 1992, for "Fax Delivery and Certified Mail" (G.C. Exh. 7), Respondent notified the Union of its intention to issue the enclosed telegram,

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[3] The baton in the closed position is roughly 14¼" from end to end; extended, it is roughly 24" from end to end - about the same length as the straight baton (Tr. 24). The center of the side handle is about 6½" from the butt end and about 5¼" from the barrel. It is made of aluminum, nylon and polycarbonate; has a hollow black aluminum frame, roughly 1¼" in diameter; and a black polycarbonate shaft, roughly 13¼" in length with a diameter of roughly 1". The side-handle, made of polycarbonate, has an overall length of about 5¼" and a grip of about 4¼". Total weight is 24 ounces. The holder is also made of polycarbonate, weighs approximately 1 oz. (G.C. Exh. 6, attachment, second page) will have a 360 2 5/6 swivel with 8 positions, and will fit both the Sam Browne Dress Belt and the Rough Duty Belt (G.C. Exh. 4, Side Handle Baton Training Program).

In use, the primary differences are that the side handle gives the ability to generate more force (Tr. 24-25) and affords a spinning technique (G.C. Exh. 4, Side Handle Baton Training Program).

". . . next week[4] to authorize the initiation of training on the Side-Handle Baton Program and the start of the implementation phase of the Program. . . ." (G.C. Exh. 7).

The enclosed telegram stated, inter alia,

> ". . . Currently the Border Patrol has 19 Side-Handle Baton Master Instructors in the following Sector locations: LRT-3, EPT-3, DRT-1, MCA-1, MAR-1, SDC-4, TCA-1, ELC-2, SPW-1, DTM-1, HVM-1. Each of these sector locations has authorization to initiate the training and program. . . ."

8. The Union responded the following day by letter, dated July 25, 1992 (G.C. Exh. 8), in which it sought further clarification and information and made certain proposals. In the penultimate paragraph, the Union stated,

> "As you are well aware, unilateral implementation of the training or program at this time would constitute an unfair labor practice. The Union therefore strongly recommends that the Service hold implementation of the program in abeyance pending the completion of bargaining . . . ." (G.C. Exh. 8).

9. Respondent replied by letter dated August 19, 1992 (G.C. Exh. 9), responded to each of the matters raised by the Union in its letter of July 25 and proposed to meet for negotiations in Washington, D.C., on either the week of September 8 or September 25 and concluded with the sentence, "Please confirm your agreement to meet on either date with Dennis L. Ekberg . . . ."[5] (G.C. Exh. 9)

10. By letter dated September 1, 1992 (G.C. Exh. 10), the Union submitted thirteen ground rules proposals, including, inter alia, a proposal that the initial bargaining sessions be held in Fitzwilliam, New Hampshire.

11. Also on September 1, 1992 (G.C. Exh. 11), the Union sought further clarification and requested information pursuant to § 14(b)(4) of the Statute.

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[4] July 24, 1992, was a Friday so that "next week" would have been the week beginning Sunday, July 26, 1992.

[5] No meeting took place. Mr. Bonner couldn't remember not showing up after promising to be there (Tr. 40). Mr. Richard Moody, Ass't. Chief and Program Manager for the Side-Handle Baton Program (Tr. 50), testified that he was ". . . informed by Richard Linnemann and LMR that they [Union] would be there . . . and they were not." (Tr. 94).

12. Respondent reacted strongly to the Union's letters of September 1, 1992, by its letter of September 10, 1992 (G.C. Exh. 12), in which it stated, inter alia:

> (a) "The Service is willing to meet and discuss this issue [negotiations over the side-handle baton] with you however, due to demands of public safety and officer safety we have decided to begin immediate implementation . . . ."
>
> (b) "Effective September 15, 1992 we will commence the implementation of our side-handle baton policy. . . ."
>
> (c) "The demand to negotiate in Fitzwilliam, New Hampshire is quite a novel idea, but unacceptable to the Service. . . ."
>
> (d) "The discussions will center on the questions relating to impact bargaining as it relates to our bargaining unit. Since you chose not to submit any proposals with respect to these issues we are proceeding with implementation. . . ."
>
> (e) "The Service stands ready to meet with you in Washington, D.C. . . . However, we will not be subject to unnecessary delays or be held hostage 'pending the resolution of all attendant third party procedures' . . . ." (G.C. Exh. 12).

13. The Union received Respondent's letter of September 10, 1992, on Saturday, September 12, 1992, and over the week-end readied at least a trio of letters which it dis-patched on Monday, September 14, 1992. One was to Respondent (G.C. Exh. 13) in which the Union, inter alia, asserted that it had, in fact, submitted twelve bargaining proposals; that the assertion that it was not entitled to submit ground rules proposals under the contract was a serious misinterpretation of the Agreement and contrary to law; that it expressly rejected Respondent's offer to limit bargaining to post-implementation matters; that it insisted that Respondent honor its obligation to bargain prior to implementation; and that it had contacted the Federal Mediation and Conciliation Service and would seek the assistance of FSIP (G.C. Exh. 13).

A second letter was to the Federal Mediation and Conciliation Service (G.C. Exh. 14) in which it requested the assistance of FMCS to, ". . . expedite the bargaining

process concerning the ground rules and, subsequently, the proposed change . . . ." (G.C. Exh. 14).

The third letter was to the Federal Service Impasses Panel together with a Request For Assistance, to "consider a negotiation impasse." (G.C. Exh. 15). The Union stated, in part, that, "Since it is impossible to conduct negotiations prior to . . . implementation deadline imposed by the Agency, the Union has no choice but to submit the matter to the Federal Service Impasses Panel in order to fully preserve its bargaining rights. . . ." (G.C. Exh. 15).

14. On October 9, 1992, Respondent sent a telegram to all sectors (G.C. Exh. 21). This was substantially the same telegram Respondent had informed the Union it planned to send by its letter of July 24, 1992 (G.C. Exh. 7), but which was not sent.

Mr. Richard Moody, who prepared the October 9, 1992, telegram (Tr. 50), testified that the purpose was to inform each Sector that:

> ". . . the Border Patrol currently has 19 side handle baton instructor/trainers and lists the locations where they are located"; and that, ". . . each . . . sector . . . is authorized to initiate the training of managers, supervisors and those agents volunteering to be baton instructors." (Tr. 51).

Notwithstanding the authorization given on October 9, 1992, "to initiate the training of managers, supervisors and . . . agents volunteering to be baton instructors" and Mr. Henderson testified that, although the program was implemented "late in '92" (Tr. 72, 84), no training occurred between September, 1992, and the end of 1992 (Tr. 73), indeed, that the only training had been the June, 1992, training of the instructors listed on General Counsel's Exhibits 7 and 21, except Master Instructor Henderson who trained them (Tr. 71, 72, 73). Mr. Moody testified that the program was implemented on January 6, 1993 (Tr. 89).

15. Although the Union's request for FSIP assistance was made on September 14, 1992, the only response shown on the record is FSIP's letter dated October 28, 1992, to the Union and to Respondent in which it asserted jurisdiction (see, G.C. Exh. 20), stating: "After due consideration of the request for assistance . . . the Panel determines in

accordance with section 2471.6(a)(2) of its regulations[6] that during the 30 days following receipt of that letter, the parties should negotiate . . . over all remaining issues in dispute. . . ." (G.C. Exh. 16).

16. Pursuant to FSIP's letter of October 28, 1992, the parties met and negotiated on: November 5, 6, 9, 10, 12 and 13, the last two days, i.e., November 12 and 13, with a mediator from Federal Mediation and Conciliation Service (Tr. 32). Mr. Bonner testified that,

> ". . . At the conclusion of the final session on November the 13th, the Federal Mediator certified the parties to be at impasse." (Tr. 32).

17. The Union wrote Respondent by letter dated November 17, 1992 (G.C. Exh. 17), in which it: (a) listed the remaining areas of disagreement and its proposals concerning the areas of disagreement; and (b) proposed a Memorandum of Understanding concerning matters agreed to by the parties.

18. Respondent replied by letter dated December 8, 1992 (G.C. Exh. 18), in which it stated, inter alia,

> (a) ". . . With regard to your proposal concerning maintaining the status quo, the Service considers the implementation of the Side-Handle Baton program to be necessary to the functioning of the Service and is proceeding with implementation in accordance with our previous notice to you." (Emphasis supplied)
>
> (b) "Mandatory training is scheduled to proceed after January 5, 1993. The rationale for this implementation while the matter is pending at the Federal Service Impasses Panel has already been explained to you. A basic intermediate force

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[6] "§ 2471.6 . . .

"(a) Upon receipt of a request for consideration of an impasse, the Panel . . . will promptly conduct an investigation . . . After due consideration, the Panel shall either:

"(1) Decline to assert jurisdiction in the event that it finds that no impasse exists. . . .; or

"(2) Recommend to the parties procedures . . . for the resolution of the impasse and/or assist them in resolving the impasse. . . ." (5 C.F.R. § 2471.6(a)(1) and (2)).

weapon . . . has been determined to be essential." (Emphasis supplied)

(c) ". . . the factual assertions that you make are correct. The Baton will be carried by uniformed officers, and the Service is not currently making the . . . Baton a minimum qualification for employment, a performance element of the job, or a pass/fail requirement for the Border Patrol Academy." (Emphasis supplied).

(d) "The memorandum of understanding . . . will not be signed at present, although these matters were initialed . . . The memorandum of understanding does not represent a final agreement and we do not wish to submit the matter . . . for approval piecemeal." (G.C. Exh. 18).

19. On January 4, 1993, the charge was filed (G.C. Exh. 1(a), which, as material, alleged:

". . . On December 14, 1992, the Charging Party received notice . . . that the Respondent intended to proceed with the implementation of the policy on January 5, 1993.

"By the aforementioned actions, the Respondent is willfully violating the Statute by implementing changes in conditions of employment . . . while impasse procedures are pending . . . ." (G.C. Exh. 1(a)).

As noted hereinafter, the Complaint alleged, "14. On or about January 6, 1993, Respondent implemented the Training Program . . . while the matter was still pending before the FSIP." (G.C. Exh. 1(b)). When General Counsel Exhibit 21 was produced at hearing, General Counsel amended the Complaint to read,

"14. On or after October 9, 1992, Respondent implemented the Training Program . . . while the matter was still pending before the FSIP." (G.C. Exh. 1(b)).

20. The Union by letter dated January 5, 1993 (G.C. Exh. 19), wrote FSIP and reviewed the negotiations, at the conclusions of which an impasse had been certified by the mediator. The Union set forth each of its proposals and each of Respondent's proposals and/or statements of position and concluded by urging that, ". . . the Panel . . . assert jurisdiction over all issues . . . and take whatever actions are necessary to resolve the dispute." (G.C. Exh. 19).

21. Respondent concedes that it implemented the Program on January 6, 1993 (Tr. 89, 90), and Mr. Bonner testified that in early January, 1993, "The Agency began training all bargaining unit employees." (Tr. 34).

22. The FSIP by letter dated February 4, 1993 (G.C. Exh. 20), relinquished jurisdiction, stating, in part, as follows:

> "On October 28, 1992, the Panel asserted jurisdiction of the request for assistance in this case, but directed the parties to negotiate . . . during 30 days following receipt of the Panel's October 28, 1992, letter and notify the Panel of the results of their negotiations. After due consideration of the information submitted by the parties, the Panel in accordance with its regulations, 5 C.F.R. § 2471.6(a)(1), hereby relinquishes jurisdiction because it is unclear that an impasse exists within the meaning of 5 C.F.R. § 2470.2(e) of the regulations . . . ." (G.C. Exh. 20).

FSIP also noted that: Respondent had raised questions of negotiability concerning the Union's proposals; implementation had already begun and the Union had filed an unfair labor practice charge; and the Union had requested the Authority to seek a temporary restraining order.

23. There is no evidence that implementation of the program was required for the necessary functioning of Respondent. There is no dispute that the expandable side-handle baton is a greatly improved defensive weapon; that it can be beneficial and helpful to Agents using it; and that it is superior to the straight baton in two major respects: first, it generates more force (Tr. 24-25), and, second, it affords a spinning technique (G.C. Exh. 4). Obviously, because it can be collapsed, to about 14¼" in length, it would be feasible to wear it on the belt at all times, even when sitting in a car. Respondent's offers of proof (Tr. 78, 80), which were rejected (Tr. 79, 80), would have shown that the side-handle baton is a superior tool, indeed, as Mr. Henderson asserted, it, ". . . is the single most versatile and best police . . . tool that is available." (Tr. 79). Neverthe-less, nothing in the record shows that unilateral implementa-tion of the program while the matter was pending before the FSIP was required by the necessary functioning of Respondent. To the contrary, the record affirmatively shows it was not.

Here, when Respondent gave the Union notice of its plan to adopt to Expandable Side-Baton, it stated, "The Patrol feels that this will be an important defensive tool . . . ." (G.C. Exh. 4). Carrying the Baton will be optional; and training will be optional (G.C. Exh. 6, Attached responses) Respondent by letter dated July 24, 1992, gave notice of intent to issue a telegram to all Sectors authorizing the initiation of training (G.C. Exh. 7), action which it did not take following the Union's protest (G.C. Exh. 8). On August 19, 1992, Respondent in reply to further Union inquiries, stated in answer to the question, "Why is the Service proposing to withdraw the authorization to carry straight batons?",

> "(a) Currently, there is little if any refresher training offered with the straight baton. . . . "

Respondent further stated that with adoption of the Side-Handle Baton, the, ". . . training program is extensive and provides for refresher training and recertification." Respondent then stated the Side-Handle Baton, ". . . is more professional in use and appearance and will give uniformity to the USBP."

On December 8, 1992, Respondent, for the first time, asserted, ". . . the Service considers the implementation of the Side-Handle Baton program to be necessary to the functioning of the Service. . . ." (G.C. Exh. 18). Respondent further asserted, "A basic intermediate force weapon with accompanying policies has been determined to be essential." (G.C. Exh. 18). (Emphasis supplied) Respondent's crass effort to deny that it already had a basic intermediate force weapon was further well demonstrated by Mr. Henderson's testimony:

> "Q Prior to the adoption of the side handle baton, what, if any, intermediary (sic) force weapon did Border Patrol Agents have at their authorized level that they had for use?
>
> "A We had none.
>
> "Q None? At any time were Border Patrol Agents authorized to use a straight handle baton?
>
> "A There was no policies, no training and no consistent program within the Border Patrol.
>
> "Q Okay. Now, were people ever trained in Border Patrol in use of straight handle baton?

"A People who were members of the special teams, like the REACT teams, the Emergency Response teams, their Special Operations groups, they received training and . . . an introductory class . . . when you went through your basic academy training.

"Q Okay. Is this in any way an indication that they were authorized to use a straight handle baton?

"A No, they were not certified at any time and there was no certification program, there was no policies and there was no ongoing training program." (Tr. 69-70) (Emphasis supplied).

Mr. Henderson egregiously misrepresented the comparative merits of the straight-handle baton and the side-handle baton by implying that a straight-handle baton can't be used to block and blow, as follows:

"A There is a dramatic difference in the versatility of the tool and the use of the tool. A straight baton can only be used for striking people. The side handle baton can be used to block blows that are aimed at the agent. . . ." (Tr. 85).

By comparison, Mr. Bonner credibly testified, in part, as follows:

". . .
"They can have a baton ring on their belt, as an option.

. . .

"Q By JUDGE DEVANEY: Let me interrupt you a minute. Didn't I understand you to say that before the officers (sic) carried a baton?

"A Yes.

"Q What was that?

"A A straight baton, which is a three-quarter inch diameter impact weapon two feet in length, which was made either out of wood, or of polycarbonate.

. . .

"Q BY MS. KANE: Prior to April of '92, was a straight baton standard equipment for Agents?

"A It was optional equipment for all Agents, yes.

"Q Was there training in the use of the straight baton?

"A Yes, there was. I received several courses of instruction in the use of the straight baton from the Border Patrol.

"Q Was the training in the use of the straight baton mandatory?

"A Yes, it was.

. . ." (Tr. 24-25).

"Q BY MR. COOPER: Mr. Bonner, you stated that in the past you have seen people carry a straight baton, is that correct, a straight handle baton?

"A Well, there is no handle. It is called a straight baton.

"Q Okay. Of course, you know that a straight handle baton was never authorized by INS, or by Border Patrol, don't you?

"A No, I don't know that. They issued one. Actually, they issued me two of them. If they didn't intend for me to carry it, I don't know why they would issue it.

"Q Who issued you that?

"A My Station.

"Q Okay. So, one Station person issued it, but you weren't aware of the fact that under national policy side handle batons -- excuse me -- straight batons were always prohibited for use by Border Patrol Agents?

"A I have seen Border Patrol Agents all over the country who were carrying issued straight batons prior to this policy.

"Q But, you have no idea whether Border Patrol management ever authorized that? As far as you

know, the Stations could have given then out without authorization, correct?

"A I don't know why they would have trained me at the Border Patrol Academy, trained me at my Station, issued this to me if they did not -- if this were not authorized and they did not intend for us to carry those weapons.

"Q But, you are making, again, assumptions. You have never seen anywhere any statement that straight batons were authorized, correct?

"A I have never seen a statement that said they were not." (Tr. 35-36).

Conclusions

As the Union submitted the dispute to the Panel on, or about, September 14, 1992, Respondent was obligated to maintain the status quo to the maximum extent possible, that is,

> ". . . to the extent consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action it deemed appropriate. See, for example, Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, Region II, 35 FLRA 940, 949-50 (1990). Failure to maintain the status quo, to the extent consistent with the necessary functioning of an agency, while a negotiation dispute is pending before the Panel violates section 7116(a)(1), (5) and (6) of the statute . . . ." Department of Health of Human Services, Health Care Financing Administration, 39 FLRA 120, 131 (1991), enf'd 952 F.2d 398 (4th Cir. 1991).

Respondent implemented the training program for the Side-Handle Baton while the dispute was pending before the Panel and thereby violated §§ 16(a)(1), (5) and (6) of the Statute unless, because of the defenses Respondent asserts, either it was permitted to do so or there are procedural defects which bar the finding of a violation. For the reasons set forth hereinafter, I find Respondent's defenses to be without merit.

1. Charge was not invalid as an anticipatory charge.

§ 18(a)(4)(A) of the Statute provides as follows:

> "Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority."

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in substantially identical language that,

> "Sec. 10(b) . . . Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . ." (29 U.S.C. § 160(b)).

Respondent, relying on cases such as: Leach Corporation, 312 NLRB 990 (1993); and National Labor Relations Board v. International Brotherhood of Electrical Workers, Local Union 112, 827 F.2d 530 (9th Cir. 1987) (hereinafter, "IBEW") (Fischbach/Lord Electrical Company, 270 NLRB 856 (1984)), asserts, that by the six months limitation of both § 18(a)(4)(A) of the Statute and § 10(b) of the NLRA, ". . . Congress clearly intended this provision to bar complaints based (sic) anticipatory charge filed before the alleged ULP." (Respondent's Brief, p. 9). These cases involved application by the Board and the Court, of the firmly established rule that, ". . . the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act." Leach Corporation, supra, 312 NLRB at 991; "The limitation period does not begin to run until the party filing the charge receives actual notice that an unfair labor practice has occurred." (IBEW, supra, 829 F.2d at 553). Indeed, the six months limitation of each of the statutory provisions concerns consideration of unfair labor practices before the filing of the charge - not of unfair labor practices after the charge is filed. Thus, in IBEW, supra, the Union had solicited "Travelers" to sign a statement requesting a voluntary layoff (ROF) in April and May, 1982; actual layoffs occurred between June 4 and 11, 1982; charge filed December 2, 1982. The Court held, "The Board reasonably concluded that the distribution and execution of the ROF cards did not provide unequivocal notice to the workers that their statutory rights were being violated. . . . Therefore, the Board reasonably concluded that the workers did not receive notice of an unfair labor practice until the dates of their respective layoffs, which ranged from between June 4 and June 11, 1982." (827 F.2d at 534). In Leach Corporation, the unfair labor practice was contract repudiation and the withdrawing of recognization upon relocation of operations. The Employer informed the Union that it would not abide by the contract as to

relocated employees and it had begun the transfer of employees on July 3 with the relocation of about 35 employees; however, it was not until September 17, when about 280 employees had been relocated to Buena Park, that transferees from the old plant constituted a substantial percentage – approximately 40 percent or more – of the new plant employee complement; and the charge was filed on January 21, 1992. The Administrative Law Judge had held that because there was clear and unequivocal notice to the Union that it would not abide by the contract as to relocated employees, followed by the relocation of employees on July 3, 1991, and the nonadherence to the contract, that portion of the complaint relating to contract repudiation was time-barred, i.e., it occurred on or before July 3, 1991, more than six months before the charge was filed. The Board reversed and stated, in part, that, "As of the July 3 date the judge selected, the transfer process was not 'substantially completed.' . . . Accordingly, it was an error for the judge to conclude that on July 3 'sufficient facts were in existence to sustain a finding of an unfair labor practice.' Indeed . . . the earliest date that the Union can be charged with knowledge of a violation of the Act is September 17, a date well within the 10(b) period . . . because . . . the relocation process was completed on September 17. . . ." (312 NLRB at 991).

Contrary to Respondent's assertions, and to any comments I may have made, Respondent plainly implemented the first stage of its training program on October 9, 1992 (G.C. Exh. 21), when, on that date, it, inter alia, authorized each sector:

> ". . . to initiate the training of managers, supervisors and those agents volunteering to be baton instructors . . . Sectors currently without instructors, which are presently ready to begin the respective training of managers, supervisors, and instructor volunteers should coordinate with their respective regional office . . . to schedule the detail of an instructor trainer.
>
> The basic courses are 12 hours in duration. Instructor courses are 40 hours in duration. . . ." (G.C. Exh. 21).

This telegram gave every sector immediate authority to begin the training program. Eleven of Respondent's twenty-one sectors had instructor trainers, which were set forth by sector in its telegram, and some had more than one, thus, Laredo and El Paso, Texas each had three; San Diego had four; and El Centro, California had two. Although Mr. Moody testified that the program was implemented ". . . on

January 6th, 1993" (Tr. 89; see, also, Tr. 96), Mr. Henderson testified that the program was implemented, ". . . late in '92. I am not sure of the exact date" (Tr. 72). On cross-examination the record shows, in relevant part, as follows:

> "Q . . . Now, you testified several minutes ago when asked on direct when the implementation of the Side Handle Baton Program took place, and you stated 'late 1992.' Is that correct?
>
> "A Yes, that is what I stated." (Tr. 84).

Further, Respondent, in its letter dated December 8, 1992, informed the Union that it was, ". . . proceeding with implementation in accordance with our previous notice to you. Mandatory training is scheduled to proceed after January 5, 1993. . . ." (G.C. Exh. 18). In its prior notice, dated September 10, 1992 (G.C. Exh. 12), it had made it clear that "mandatory training" meant the training of all agents. Thus, it had stated: "First, we will solicit volunteers to act as training instructors. Second, we will begin training our supervisors and managers . . . . Third, we will begin train-ing agents that volunteer . . . . Fourth . . . we will make training of all agents mandatory . . . ." (G.C. Exh. 12).

At the outset, Respondent misconceives the date triggering the bar of limitations under § 18(a)(4)(A) of the Statute, or § 10(b) of the NLRA, and the date a violation could lie. For example, in IBEW, supra, a charge could have been filed immediately after solicitation of the "ROF" cards and the extension of the cause of action to the date of actual layoff merely gave the employees the longest time possible under the limitation period to file. In the present case, Respondent by its December 8, 1992, letter told the Union it was "proceeding with implementation" and acknowledged that it was, indeed, implementing, "while the matter is pending at the Federal Service Impasses Panel. . . ." (G.C. Exh. 18). Respondent's announcement that it was proceeding with implementation constituted notice that an unfair labor practice had occurred, whether or not training pursuant to that notice had actually begun. U.S. Customs Service (Washington, D.C.); and U.S. Customs Service, Northeast Region (Boston, Massachusetts), 29 FLRA 891, 899 (1987). Accordingly, when the Union filed its charge on January 4, 1993 (Mr. Bonner had signed it on December 31, 1992), there was nothing anticipatory about it - Respondent had informed the Union that it was proceeding with implementation and further said it was doing so while the matter was pending before the FSIP. Moreover, while Respondent had not told the Union, Respondent had, on

October 9, 1992 (G.C. Exh. 21), already begun implementation by granting each Sector the authority to proceed immediately with the Baton Training Program. Accordingly, the charge alleged as an unfair labor practice - inter alia, implementation of changes in conditions of employment while impasse procedures were pending - which had occurred; was not an anticipatory charge; was timely and, whether bottomed on Respondent's declaration of December 8, 1992, or, as disclosed at hearing, Respondent's unilateral grant of immediate authority to each of its 21 Sectors on October 9, 1992, to begin the training program, reflected facts which had occurred.

Respondent's objections to allowing General Counsel to amend Paragraph 14 of the Complaint to allege that, "On or after October 9, 1992,[7] Respondent implemented the Training Program", are without merit. Respondent is wholly in error that the document produced at hearing (G.C. Exh. 21) is identical to General Counsel Exhibit 7. General Counsel Exhibit 7 was a letter dated July 24, 1992, which enclosed a telegram it planned to send to each of its Sectors. However, following the Union's response of July 25, 1992, the telegram proposed was never sent. Without belaboring the matter, it was not until General Counsel Exhibit 21 was produced at hearing that either the Union or General Counsel had any knowledge that Respondent had sent a telegram on October 9, 1992, substantially like the earlier proposed telegram, granting each of its Sectors immediate authority to begin the training program. By amending the Complaint to reflect the earlier October 9, 1992, date of implementation, as disclosed by General Counsel Exhibit 21, the cause of action was not changed one iota. The charge had alleged, in part, that Respondent was, ". . . violating the Statute by implementing changes in conditions of employment . . . while impasse procedures are pending. . . ." (G.C. Exh. 1(a)). The Complaint had alleged the date of implementation as January 6, 1993. By amending the Complaint to reflect the earlier, October 9, 1992, date of implementation, disclosed by Respondent's production, at hearing, of its October 9, 1992, telegram (G.C. Exh. 21), the unfair labor practice alleged, namely, "violating the Statute by implementing changes in conditions of employment . . . while impasse procedures are pending . . . ." (G.C. Exh. 1(a)), was not changed in any manner; obviously, the amendment was timely; and the amendment merely accords with the proof.

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[7] Originally, the Complaint had alleged, "On or about January 6, 1993, Respondent implemented the Training Program. . . ." (G.C. Exh. 1(b)).

2. Respondent unilaterally implemented the program while the matter was pending before the FSIP

Respondent's assertion that the Union did not properly invoke the services of the Panel and its reliance on Department of the Air Force, Scott Air Force Base, Illinois, 33 FLRA 532, 546 (1988), is misplaced. Here, the Union did invoke the services of the Panel and the Panel asserted jurisdiction. For reasons set forth hereinafter, it is also clear beyond cavil that the Panel had jurisdiction at the time Respondent unilaterally implemented the program.

Section 19 of the Statute, entitled, "Negotiation impasses; Federal Service Impasses Panel", provides, in part, as follows:

> "(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. . . .
>
> "(b) If voluntary arrangements . . . fail to resolve a negotiation impasse –
>
> > "(1) either party may request the Federal Service Impasses Panel to consider the matter, or
>
> . . .
>
> "(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.
>
> . . .
>
> > "(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either –
> >
> > > "(i) recommend to the parties procedures for the resolution of the impasse; or
> >
> > > "(ii) assist the parties in resolving the impasse . . . ." (5 U.S.C. § 7119)

The statute does not define "impasse"; however, the Regulations do, as follows:

> "(e) The term 'impasse' means that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement." (5 C.F.R. § 2470.2(e)).

As previously noted, § 2471.6 of the Regulations (5 C.F.R. § 2471.6) provides that upon receipt of a request for consideration of an impasse, the Panel shall either:

> "(1) Decline to assert jurisdiction in the event it finds that no impasse exists . . .; or
>
> "(2) Recommend to the parties procedures . . . for the resolution of the impasse . . . ." (5 C.F.R. § 2471.6(a)(1) and (2)).

Where, as here, an agency proposes to change existing conditions of employment, the Union requests bargaining on the impact and implementation of the proposed change, but the agency gives notice of intent to implement, in my judgment, the Panel has jurisdiction to find that an impasse exists and suggest that the parties engage in negotiations, as it did in the present case (G.C. Exh. 16), even though there has been no formal bargaining. The Union's request to bargain, its submission of proposals and Respondent's replies, and Respondent's notice of intended unilateral implementation afforded ample basis for the Panel to conclude, as it did, that a negotiation impasse existed. Nothing in the Statute or the Regulations makes the existence of negotiations a condition precedent to there being a negotiation impasse. To the contrary, the Regulations define "impasse" as that point in the negotiations "at which the parties are unable to reach agreement, notwithstanding their efforts to do so . . ."; the Statute mandates the Panel to investigate any impasse presented to it; and the Regulations give the Panel discretion to: (1) decline to assert jurisdiction if it finds that no impasse exists; or (2) recommend procedures for the resolution of the impasse. Where, after investigation, the Panel finds that a negotiation impasse exists, it has jurisdiction to provide assistance to resolve that impasse even if there have been no negotiations. Here, in point of fact, the extended written dialogue between the parties which included, inter alia, Respondent's complete

proposed training program; the Union's numerous questions and requests for clarification; Respondent's answers; some Union proposals; etc.; constituted a "sort" of bargaining, preliminary though it was. Neverthe-less, the Panel had a great deal more before it than a simple agency proposal, a request to bargain and an agency notice of intent to implement, from which to conclude, as it did, that a negotiation impasse existed between the parties.

I am aware, of course, that the United States Court of Appeals for the District of Columbia Circuit, in, Patent Office Professional Association v. FLRA, 26 F.3d 1148 (D.C. Cir. 1994) (hereinafter, "POPA"), held that,

> ". . . We first hold that the Authority erred in finding that the interest arbitrator had jurisdiction to award proposals over which the parties never bargained. . . ." (id. at 1150)
>
> . . .
>
> ". . . the interest arbitrator lacked jurisdiction to award the proposals over which PTO claims it has no duty to bargain. . . . Because these proposals were awarded in the absence of jurisdiction we hold that they are not part of Article 19, regardless of their negotiability . . .
>
> . . .
>
> ". . . before the Panel can employ its power, there must first be an impasse. . . . The Statute does not define a 'negotiation impasse,' but the Authority's regulations define the term . . . . Clearly, the Panel's jurisdiction is premised on the parties being 'unable to reach agreement, notwithstanding their efforts to do so.' . . .
>
> "It is indisputable that the parties never bargained over several of the new proposals . . . . Clearly, when the interest arbitrator turned his attention to these particular proposals, the parties had never negotiated over them, let alone reached and impasse, and thus the arbitrator had no authority to award these proposals as part of the contract.[2/]

2/ The Agency's refusal to bargain cannot be construed as an impasse which the arbitrator

> could rightfully resolve. The Agency's refusal to bargain was premised . . . on a threshold claim that the proposals were not negotiable. So long as these negotiability issues remained unresolved . . . there could be no impasse . . . Thus, there was nothing to be considered . . . for . . . an interest arbitrator cannot resolve negotiability issues. . . ."
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> Therefore, as to proposals 20, 23, 24, 26 and 42, the Authority committed reversible error in ruling that the interest arbitrator had jurisdiction. . . ." (id. at 1153-1154).

Respondent misrepresents the Union's position. Contrary to Respondent's assertion, the Union did not admit, ". . . that it went to FSIP before the parties had reached impasse" (Respondent's Brief, p. 15). To the contrary, Mr. Bonner specifically stated, ". . . I don't necessarily concede that we were not at impasse . . ." (Tr. 46). Mr. Bonner stated, "There was no bargaining. I think that is a fair statement." (Tr. 47), although he acknowledged that there had been ". . . active attempts to bargain . . . and . . . no indication whatsoever that either side was unwilling to bargain. . . ." (Tr. 47). POPA, supra, is distinguishable from the present case in various critical, and I believe controlling, respects: First, in the present case, Respondent proposed changes in conditions of employment. Second, in the present case, Respondent gave notice of implementation without first bargaining on the Union's demand to bargain. Third, in the present case, Respondent made no claim that the Union's demand to bargain on I&I was not negotiable. Fourth, in the present case, Respondent's notice of intent to implement its training program without bargaining on the Union's request for I&I bargaining did constitute a negotiation impasse which the Statute mandates the Panel consider and the Regulations direct the Panel, inter alia, recommend procedures for the resolution of the impasse.

Nevertheless, if, as Respondent understandably argues, POPA stands for the unqualified proposition that FSIP was without jurisdiction when the Union filed its request for assistance, on, or about, September 14, 1992 (G.C. Exh. 15), or on October 28, 1992, when the Panel asserted jurisdiction (G.C. Exh. 16), Respondent did not challenge the Panel's jurisdiction. To the contrary, Respondent acknowledged the Panel's jurisdiction (G.C. Exh. 18) and, in compliance with the Panel's determination of October 28, 1992, bargained with the Union and reached agreement on a number of issues.

Indeed, Respondent's sole asserted reason for "implementation while the matter is pending at the Federal Service Impasses Panel" was its representation that implementation was "necessary to the functioning of the Service" (G.C. Exh. 18). If the Panel was without jurisdiction through October 28, 1992, because no bargaining had then taken place, there is no doubt whatever that it had jurisdiction on and after November 13, 1992, when, at the conclusion of negotiations, an impasse was certified by the mediator. The Union's request for assistance was still pending, bargaining had occurred, the Federal Mediation and Conciliation Service had assisted the parties and on November 13, 1992, had certified that the parties were at impasse.

Consequently, when Respondent by its letter dated December 8, 1992, gave the Union notice that it was "proceeding with implementation" (G.C. Exh. 18) and on, or about, January 6, 1993, Respondent began training all bargaining unit employees (Tr. 34, 89, 90), it did implement the side-handle baton training program while it was pending before the FSIP.[8]

3. Implementation had more than a de minimis effect on bargaining unit employees.

Respondent certainly is correct that in response to the contention that use of the side handle baton was "consistent with the necessary functioning" of the Service, I did state that,

> ". . . I do not believe that this is a type of weapon that it (sic) is a (sic) new -- in fact, I understand it is different from the standard baton, but I think the difference is only one of

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[8] For reasons indicated, I believe FSIP had jurisdiction of the Union's request for assistance from September 14, 1992, when it was made, because Respondent's announced intent to implement without bargaining created a negotiation impasse. In that event, Respondent's first stage implementation of the program on October 9, 1992, by its delegation of authority to each sector to begin training also occurred while the matter was pending before the FSIP. If it should be determined that FSIP's jurisdiction was inchoate until November 13, 1992, when, plainly, it had ripened to full, undenied jurisdiction pursuant to POPA, supra, then delegation of authority to each sector on October 9, 1992, to implement training, which, in any event, Respondent stated was not exercised, did not constitute implementation while the matter was pending before the FSIP.

degree and I do not think it is that much of a change.

. . .

". . . I think it is a lot of hokum if you are going to try to prove otherwise. Each, essentially, is a baton and you can hit a person pretty hard with -- I don't care whether it has a side handle or not.

MR. COOPER: . . . the determination as to what is the most effective weapon and what is necessary is one that is made and entrusted by Congress to INS. . . .

JUDGE DEVANEY: I understand this. I am not questioning that, Mr. Cooper. So, it is a management decision to do it. . . . The only question is whether you fulfilled your obligation on I&I bargaining. . . ." (Tr. 64).

This discussion had absolutely nothing to do with the impact of the new training program on bargaining unit employees.

The record demonstrates beyond doubt that implementation of the new program would have more than a de minimis impact on bargaining unit employees. At the outset, while training in the use of the straight baton was mandatory, there was no written policy, no program of certification and no fixed requirement for refresher training. The training program for the side-handle baton established many new conditions of employment, by way of example, as follows: the new training program was detailed (G.C. Exh. 4); established a certifica-tion requirement; required 12 hours of training for initial certification; required annual recertification with 8 hours of training; the program applied uniformly throughout the Service. Under the new program, completion of the required 12 hours of instruction for initial certification and 8 of instruction hours for recertification did not assure certifi-cation. Each agent must make a passing grade on an examina-tion for certification or recertification. While carrying the side-handle baton was to be optional, training, which Respondent initially stated was optional (G.C. Exh. 6), was mandatory (G.C. Exh. 12) and failure to attain certification: (a) resulted in withdrawal of authorization to carry the baton; and (b) retraining in order to attain certification. The side-handle baton, absent justification for use of deadly force, was not to be used to strike any part of the body except torso, arms and legs, and below the chest area, but not in the groin, solar plexus, kidneys or spinal column

(G.C. Exh. 4, attachment, p. 5). All uses of force with a side-handle baton were required to be documented; all injuries to subjects because of the use of the baton must be reported. These new conditions of employment had more than a foreseeable de minimis impact on bargaining unit employees.

4. I&I bargaining was not "covered by" the Agreement of the parties.

While I reject General Counsel's assertion, that because the parties' Agreement was negotiated in 1976, before enact-ment of the Statute, that the Authority's "covered by" policy could not, for that reason, be applied, General Counsel's Brief, pp. 26-28, nevertheless, I find Respondent's argument wholly without merit. First, there is nothing in Article 15, entitled "Development and Training", which addresses, or purports to address, the impact or implementation of any training program. For example: Subparagraph A provides, in part, that "The Agency and the Union agree that training and development of employees . . . is a matter of primary importance . . . . The Agency agrees to develop and maintain forward-looking effective policies and programs . . . ."; Subparagraph B, provides that, ". . . each employee is responsible for applying reasonable effort, time, and initiative in increasing his potential value . . . through self-development and training. . . ."; Subparagraph C provides, "The nomination of employees to participate in training . . . shall be based on Agency needs but will be free of personal favoritism"; Subparagraph D, provides that, "The Agency agrees to make available to employees, training opportunities . . . ." Because the Agreement does not address the impact or implementation of training programs the subject matter is not covered by the agreement and Respondent was not relieved of the obligation to bargain.

Moreover, Article 3, Section G of the Agreement specifically addresses circumstances where, as here, Respondent changes existing working conditions and provides, in relevant part, as follows:

> "G. The parties recognize that . . . during the life of the agreement, the need will arise requiring the change of existing . . . working conditions . . . The Agency shall present the changes it wishes to make to . . . existing practices to the Union in writing. The Union will present its views (which must be responsive to . . . the impact of the proposed change) . . .

"If disagreement exists, either the Agency or the Union may serve notice on the other of its interest to enter into formal negotiations . . . ." (Res. Exh. A, Art. 3, Section G) (Emphasis supplied).

Accordingly, the Agreement of the parties, rather than foreclosing negotiations, specifically provides for notice of any change of existing conditions of employment and the opportunity to bargain on the impact of any such proposed changes.

Finally, fully in agreement with the General Counsel, I find that Respondent never asserted to the Union that the side-handle baton program was covered by the Agreement (General Counsel's Brief, p. 26); that, to the contrary, Respondent gave the Union notice of its proposed program, responded to the Union's inquiries; negotiated with the Union and initialed off on various issues upon which the parties reached agreement, all of which shows that Respondent did not view the program as being covered by the Agreement.

5. Implementation while the matter was pending before the FSIP was not consistent with the necessary functioning of Respondent.

In Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA 466 (1985) (hereinafter, "ATF") the Authority stated, in relevant part, as follows:

". . . a policy existed under the Executive Order that where parties reached an impasse in their negotiations and one or both of the parties timely invoked the services of the Panel, the parties were required to adhere to established personnel policies and practices and matters affecting working condi-tions to the maximum extent possible, i.e., to the extent consistent with the necessary functioning of the agency, in order to permit the Panel to take whatever action was deemed appropriate. [footnote omitted] Neither the Statute nor its legislative history suggests that a different result should be reached under the Statute. Rather, the Authority finds that by requiring the parties to maintain the status quo to the maximum extent possible after an impasse in negotiations has been reached and the services of the Panel have been invoked in a timely manner, [footnote omitted] the purposes and policies of the Statute will be effectuated by permitting the

> parties an opportunity to utilize the impasse resolution procedures of the Statute . . . . It should be emphasized that the foregoing policy requiring maintenance of the status quo to the maximum extent possible once the Panel's processes have been timely invoked would not preclude agency management from taking action which alters the status quo to the extent that such action is consistent with the necessary functioning of the Agency. [footnote omitted] Thus, such policy also is consistent with and furthers the intent of Congress set forth in section 7101(b) of the Statute that the provisions of the Statute 'be interpreted in a manner consistent with the requirement of an effective and efficient Government.' To repeat, then, the Authority finds that once parties have reached an impasse in their negotiations and one party timely invokes the services of the Panel, the status quo must be maintained to the maximum extent possible, i.e., to the extent consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action is deemed appropriate. A failure or refusal to maintain the status quo during such time would, except as noted above, constitute a violation of section 7116(a)(1), (5) and (6) of the Statute." (id. at 468-469).

The Authority has consistently adhered to this position. See, for example: Department of Health and Human Services, Social Security Administration, and Social Security Administration, Field Operations, Region II, 35 FLRA 940, 949-950 (1990) (hereinafter, "SSA"); Department of Health and Human Services, Health Care Financing Administration, 39 FLRA 120, 131 (1991), enf'd, 952 F.2d 398 (4th Cir. 1991); U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., 44 FLRA 1065, 1072 (1992) (hereinafter, "Immigration and Naturalization"), enf't denied in part[9], granted in part, 995 F.2d 46 (5th Cir. 1993). The Authority has also consistently held that this duty, to maintain the status quo while matters are

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9 Unilateral implementation of a change determined to be nonnegotiable held not an unfair labor practice. As the Court previously had determined that the Union's Proposal 5 was not negotiable, Dept. of Justice, INS v. FLRA, 975 F.2d 218 (5th Cir. 1992), enforcement was, accordingly, denied with respect to Proposal 5 (995 F.2d at 49) but was granted with respect to the negotiable parts of Proposals 1 and 2 (id.).

before the Panel, is not affected by the ultimate action of the Panel. Thus, in SSA, supra, the Authority stated,

> "We find no basis on which to conclude that this requirement is, or should be, affected by whatever action the Panel eventually takes regarding the impasse. Indeed, . . . the purpose of the requirement is to facilitate the Panel's consideration of negotiation impasses and allow the Panel to take whatever action it deems appropriate to resolve disputes. Allowing an agency to implement a change based on its speculation as to what action the Panel will take after implementation would, in our view, undermine the important role played by the Panel in collective bargaining under the Statute. Thus, we reject the Respondent's contention that it was not obligated to maintain the status quo because the Panel declined jurisdiction after implementation." (35 FLRA at 950).

This has been reiterated in various cases, for example, Department of The Air Force, Scott Air Force Base, Illinois, 42 FLRA 266, 273 (1991); Immigration and Naturalization, supra, 44 FLRA at 1073.

Respondent misapplies Authority's use of efficiency ("to effectively" act) in Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Laredo, Texas, 23 FLRA 90 (1986) (hereinafter, "Border Patrol, Laredo"), where the Authority stated, in part, as follows:

> "We find, as did the Judge, that the changes in the shift and rotation schedules which involved the exercise of management's section 7106(b)(1) rights were necessary for the Respondent to perform its mission; that is, the changes were consistent with the necessary functioning of the agency. As noted by the Judge[10] in his decision, the Respondent is engaged in law enforcement

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10 Indeed, the Judge, in his decision, had emphasized that,

> ". . . the shift changes made . . . were perceived by Respondent as necessary in order to permit the Laredo Station to effectively police the border and to perform its duties most effectively. They were not just desirable changes, they were changes deemed necessary . . . based on the best intelligence available, to effectively stop the maximum number of illegal aliens." (id., at 103.)

activities. The changes made were deemed necessary 'to permit the Laredo Station to effectively police the border and to perform its duties most effectively.' Therefore, the Respondent's conduct in making these particular changes during the pendency of a question concerning representation was not violative of section 7116(a)(1) and (5) of the Statute." (id. at 93).

In Defense Distribution Region West, Lathrop, California, 47 FLRA 1131 (1993), (hereinafter, "Defense Distribution"), Respondent, as pertinent here, was held to have violated §§ 16(a)(1) and (5) by prohibiting the playing of radios and the use of headsets at the Sharpe Army Depot during the pendency of a question concerning representation. Respondent had asserted that safety considerations and a lowering of productivity made elimination of radios and headsets necessary for the functioning of the agency. The Authority held, in part, that:

"We agree with the Judge that the Respondent violated section 7116(a)(1) and (5) of the Statute by changing conditions of employment during the pendency of a QCR. . . .

[in footnote 3, the Authority further stated, in part, '. . . We find nothing in the instant proceeding that requires a reassessment of the Authority's long-standing policy . . . that an agency is obligated to maintain existing conditions of employment during the pendency of a QCR, to the maximum extent possible, unless changes are required consistent with the necessary functioning of the agency." (id. at 1134)]

. . .

". . . the Judge evaluated the . . . claim concerning the increased automation and mechanization . . . and found that, although the safety concerns were legitimate, no change was necessary for the functioning of the Respondent . . . the Judge rejected the Respondent's arguments that the ban on radios and headsets was consistent with the necessary functioning of the Agency either because of productivity considerations or the need for a consistent policy among the Respondent's facilities. In sum, the Judge addressed each of the Respondent's concerns and the Respondent has not persuaded us that the Judge erred in

concluding that the change was not necessary to the functioning of the Respondent." (id. at 1134-1136) (Emphasis supplied).

There was no evidence whatever, either received or offered, that implementation of the side-handle baton training program was necessary to the functioning of Respondent. It has been assumed from the outset that the side-handle baton is a greatly improved defensive weapon and that it is superior to the straight baton - indeed, as Mr. Henderson asserted, it, "is the single most versatile and best police, or law enforce-ment type tool that is available." (Tr. 79). Nevertheless, it was not thereby necessary to the functioning of Respondent. Respondent made an offer of proof that the side-handle baton, ". . . will allow them to do their job safely and effectively. That is what he [Henderson] would testify." (Tr. 79); but accepting this assertion does not show that it was necessary to the functioning of Respondent. Not only did Respondent utterly fail, ". . . to provide affirmative support for the assertion that the action taken was consistent with the necessary functioning of the agency. . . ., U.S. Department of Housing and Urban Development and U.S. Department of Housing and Urban Development, Kansas City Region, Kansas City, Missouri, 23 FLRA 435, 437 (1986), but the affirmative evidence wholly refutes such assertion. Respondent, despite its attempted subterfuge, already had an equivalent intermediate force weapon, namely the straight baton, which it had issued and required that all agents be trained in its use. All claimed uses of the side-handle baton could readily be performed with the straight baton except, presumably, the spinning mode of the side-handle baton. To be sure, the side-handle baton was an improved version of the baton, was more efficient, certainly, because of its collapsibility, was more convenient to carry; but by no stretch of the imagination was the side-handle baton necessary to the functioning of Respondent. Moreover, Respondent's actions plainly showed that it was not. For example, initially, Respondent stated that its use would be optional, training would be optional, and the baton would be an important defensive tool; that it was not currently contemplated that certification would be a performance element or, even, that certification would be a pass/fail element of the Border Patrol Academy (G.C. Exh. 17 and 18). Indeed, Respondent did not make the assertion until December 8, 1992, which, in light of the record, plainly was a naked semantic ploy resorted to in an effort to support by self-serving innuendo its announced intent to implement the program while the matter was pending before the FSIP; but saying so does not constitute any proof whatever that the program was necessary to the functioning of Respondent. The mendacity of Respondent's position was shown by its denial

that had an intermediate force weapon - the straight baton; and by its misrepresentation of the comparative capabilities of the side-handle versus the straight baton. Respondent's desire for a consistent policy throughout the Border Patrol governing the use of its intermediate force weapon, while commendable, was not necessary to the functioning of Respondent. Defense Distribution, supra.

Accordingly, because implementation of the program was not necessary for the functioning of Respondent, it violated §§ 16(a)(1), (5) and (6) of the Statute by implementing the program while it was pending before the FSIP. General Counsel requests a status quo ante order (General Counsel's Brief, p. 28); but Respondent asserts that, "Assuming, arguendo, that Respondent has violated the Statute a status quo ante remedy would not be appropriate" (Respondent's Brief, p. 29). Respondent is certainly correct that, "No . . . remedy . . . could undue the . . . training already completed." (Respondent's Brief, p. 29). Nor, it might be added, should any certification granted be affected in any manner.

I have considered the factors stated in Federal Correctional Institution, 8 FLRA 614, 606 (1982), and Respondent's comments as to each factor. It is correct that Respondent gave the Union notice of its proposed program and it is also true that Respondent answered the Union's inquiries and supplied information and data, including a side-handle baton for the Union's evaluation. The record shows that Respondent believed the Union failed to attend a scheduled meeting (Tr. 82, 91), but Mr. Bonner did not remember not showing up (Tr. 40); nevertheless, it is certainly clear that the parties did not "get down to business" and negotiate until after the Panel's "suggestion" on October 28, 1992, following which they negotiated. Respondent's desire for prompt action on its proposal is understandable; but in its desire for action it demonstrated impatience, if not studied indifference, with its responsibilities under the Statute. For example, on September 10, 1992, it informed the Union, inter alia, that it would commence implementation on September 15, 1992; that four months, before "beginning mandatory training", would be sufficient to conclude bargaining; and that "we will not be subject to unnecessary delays or be held hostage 'pending the resolution of all attendant third party procedures' which is a veiled threat to hold the negotiations hostage." (G.C. Exh. 12). Although it stayed its intended implementation of September 15, it proceeded with precisely that action, surreptitiously, on October 9, 1992 (G.C. Exh. 21). Finally, it implemented the program while the matter was pending before the FSIP.

Implementation of the program, which was not necessary for the functioning of Respondent, while the matter was pending before the Panel, thwarted operation of the Panel's processes and interfered with the collective bargaining process. SSA, supra, 35 FLRA at 948. Respondent implemented, as part of its training program, a policy which, inter alia, prohibited, absent justification for use of deadly force, using the side-handle baton to strike any part of the body of a subject except the torso, arms and legs, and below the chest area, but not in the groin, solar plexus, kidneys or spinal column (G.C. Exh. 4, Attachment, p. 5), and, in turn, employees were subject to internal investigation and disciplinary action for any violation of this policy. In like manner, the policy implemented subjected employees to various other actions, including disciplinary actions, for violation, or alleged violation, of requirements such as reporting all injuries, reporting uses of the baton, etc. Implementation of this policy without completion of I&I bargaining posed serious adverse impact to employees.

On the other hand, there is nothing in the record that would even suggest that withdrawal of the training program, including its policy declarations, pending the completion of the bargaining process would disrupt or impair Respondent's operation in any manner. Respondent is free, of course, to permit its employees to carry the baton and the fact that it can not place into effect its training program nor resume the certification or annual recertification until the bargaining process has been completed will not affect its operation in any significant manner and to the extent there is any effect it is greatly outweighed by the need to assure to the bargaining unit employees protection of their right under the Statute to engage in collective bargaining.

I fully agree with Respondent that General Counsel's request for "make whole relief to employees who were injured or suffered other losses as the result of the unilaterally implemented training" is without merit. There is nothing in the record to indicate that any employee was adversely affected so as to entitle them to any compensation. Moreover, as federal employees they are covered by compensation laws governing any injury incurred in the course of their employment and would be entitled to no more.

Having found that Respondent violated §§ 16(a)(1), (5) and (6) of the Statute by implementing its side-handle baton training program while the matter was pending before the FSIP, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing and refusing to cooperate in impasse proceedings by unilaterally implementing its Side-Handle Baton Training Program while the matter was pending before the Federal Service Impasses Panel.

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

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

(a) Rescind and withdraw its Side-Handle Baton Training Program, which it implemented on October 9, 1992, on December 8, 1992, and on, or about, January 6, 1993.

(b) Notify the American Federation of Government Employees, National Border Patrol Council, AFL-CIO (hereinafter, "Union"), the exclusive representative of its employees, of any intention to implement a Side-Handle Baton Training Program and, upon request of the Union, negotiate in good faith concerning the impact and implementation of any Side-Handle Baton Training Program.

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

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington, D.C. Region, Federal Labor Relations Authority, 1255 22nd Street, N.W., 4th Floor, Washington, D.C.

20037-1206, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: April 20, 1995
Washington, DC

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to cooperate in impasse proceedings by unilaterally implementing the Side-Handle Baton Training Program while the matter is pending before the Federal Service Impasses Panel.

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

WE WILL rescind and withdraw the Side-Handle Baton Training Program, which we implemented on October 9, 1992, on December 8, 1992, and on, or about, January 6, 1993.

WE WILL notify the American Federation of Government Employees, National Border Patrol Council, AFL-CIO (hereinafter, "Union"), the exclusive representative of our employees, of any intention to implement a Side-Handle Baton Training Program and, upon request of the Union, will negotiate in good faith concerning the impact and implementation of any Side-Handle Baton Training Program.

(Activity)

Date: By:
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Washington, D.C. Region, whose address is: 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, and whose telephone number is: 202-653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. DA-CA-30370, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Christopher M. Feldenzer, Esquire
and Susan Kane, Esquire
Federal Labor Relations Authority
1255 22nd Street, NW, 4th Floor
Washington, DC 20037-1206

Scott D. Cooper, Esquire
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Ariel Rios Building, Room 5207
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Washington, DC 20530

William C. Owen, Esquire
Assistant Director of Personnel
Labor Management Relations
U.S. Department of Justice
Washington, DC 20530

T.J. Bonner, President
National Border Patrol Council
American Federation of Government
Employees, AFL-CIO
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Campo, CA 91906

Deborah S. Wagner, Esquire
Attorney for Charging Party
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REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: April 20, 1995
Washington, DC