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 Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. WA-CA-50048

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 **SEPTEMBER 30, 1996**, and addressed to:

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

JESSE ETELSON

Administrative Law Judge

Dated: August 27, 1996
Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: August 27, 1996

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

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

Respondent

and Case No. WA-CA-50048

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

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 Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. WA-CA-50048

Thomas F. Bianco, Esquire
For the General Counsel

James E. Lewis, Esquire
For Respondent

T.J. Bonner, President
Deborah S. Wagner, Esquire (on the Brief)
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

An unfair labor practice complaint alleges that Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by implementing a policy concerning immigration officers' use of non-deadly force without first giving the Charging Party (the Union) an opportunity to bargain "to the extent required by the [Statute]."

Although Counsel for the General Counsel began his opening statement at the hearing in this case with the observation that "[t]his is a fairly simple case," the array of contentions presented by all three parties belies that hopeful representation. In fact, there appears to be so little mutual understanding of what the case is about that one approaches it much as one would approach the task of a witness to a police lineup, the initial task being to single out the case that is actually to be decided.

Findings of Fact[1]

The Union is the agent of the exclusive representative of a nationwide bargaining unit of employees employed by Respondent. As its agent, the Union represents employees of Respondent's Border Patrol, including Border Patrol Agents (the majority of the bargaining unit), criminal investigators ("Special Agents"), detention enforcement officers, garage mechanics, maintenance workers, secretarial and administrative assistants, and occupants of support positions such as communication assistants and radio dispatchers. Border Patrol operations are carried out in 21 geographical "Sectors."

Between October 1992 and January 1993 Respondent began to implement a policy concerning the use of a non-lethal weapon called a "side-handle baton." The policy is described in a document one and 1/3 typewritten pages in length that includes the training to be required, the manner of carrying and holding the baton, a requirement for reporting incidents involving the baton's deployment, guidelines for its use, and some specific applications designated as "not authorized." Implementation of the policy, and the training program that accompanied it, was the subject of an unfair labor practice proceeding, Case No. DA-CA-30370, that is currently before the Authority. The policy document itself identifies the employees who are to be trained to use the side-handle baton only as "Agents."

On November 3, 1993, Marylou Whelan, Respondent's Director of the Human Resources Policy Division sent the following letter to Union President T.J. Bonner.

> Enclosed is the New Immigration and Naturalization Service policy on Non-Deadly Force. While all pertinent aspects of the policy have been implemented through the implementation of the

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[1] As conceded by Respondent, the salient facts are undisputed. I take this to mean, and in any event I conclude, that all of the *material* facts are undisputed.

> Side-Handle Baton Program for Border Patrol Sectors and personnel, we are supplying the overall Service policy to you for comparison and to afford you the opportunity to comment on it. If you note any aspect of the Service's Non-Deadly Force Policy that would change the policies or procedures established through the Side-Handle Baton Program, please bring the matter to our attention so that it may be corrected.

The "Non-Deadly Force" policy statement accompanying Ms. Whelan's letter was a three-and-1/3 page typewritten docu-ment dated October 2, 1993, signed by Acting Immigration and Naturalization Service Commissioner Chris Sale. It overlaps the areas covered by the "Side-Handle Baton Policy" to some extent, but is more detailed, varies in some descriptive details, covers the use of devices in addition to the expandable side-handle baton described in the earlier policy, and, as hinted at in Whelan's letter, is applicable to several categories of employees other than border patrol agents.[2]

A new subject covered by the 1993 document is a list of non-deadly devices that are not authorized for use. Another new subject is a policy on storage and maintenance of non-deadly force devices, providing in part that each immigration officer who is authorized to use one or more of the listed devices is responsible for its safe storage, general care, and maintenance. In place of (or perhaps in addition to) the previous requirement for reporting deployments of the side-handle baton, the 1993 document requires that incidents resulting in injury or suspected injury be reported orally to a supervisor within one hour *and* in writing by the end of the employee's work shift. In addition, "proper and timely medical attention" is required, prior to "executing the reporting requirements," for "[a]ny suspect who claims injury or appears to be injured[.]"

Bonner received Whelan's letter, with this enclosure, on November 9, 1993. On December 9 he responded with a letter containing "comments, concerns, questions, and proposals . . . submitted in response to the Services's instant proposal." The letter's contents were, for the most part, substantive proposals to replace or modify certain provisions in the policy document. Bonner followed this portion of his letter with the statement that "[t]he foregoing comments, concerns, questions, and proposals are

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[2] Although these additional categories apparently include employees who are outside the bargaining unit, there seems to be no dispute that some of them are within the unit.

not all-inclusive, and are subject to revision and/or augmentation at any time prior to the completion of bargaining." His concluding paragraph stated, in pertinent part:

> At this time the Union makes known its demand to bargain concerning the proposed policy on the use of non-deadly force to the fullest extent permissible under law and Executive Orders. Pending the completion of negotiations . . ., the Union also insists that the implementation of the proposed policy be held in abeyance.

The Union received no further communication from Respondent on this subject until May 19, 1994, when Bonner received a May 13 letter from Robert J. Okin, Acting Assistant Commissioner for Human Resources and Career Development. This letter announced the implementation, "for all Service officers who are not presently governed by its requirements," of a slightly revised version of the October 1993 "Non-Deadly Force" policy. The letter represents, as did Whelan's November 1993 letter to Bonner, that the policy "is already in effect for Border Patrol Agents and Detention Officers assigned to Border Patrol Sectors, because it was implemented for those officers through the Side-Handled Baton Program." Thus, according to Okin's letter, "the Service is immediately implementing the requirements of the . . . Policy for Special Agents (Criminal Investigators) [, who] are not covered by the Side-Handle Baton Program."

The Okin letter also informed Bonner that "[t]he Commissioner has determined that such implementation is necessary to the functioning of the agency because of the massive liability issues presented by the lack of Service policy on these matters, and because the public interest demands clear guidelines on the use of non-deadly force to guide our officers." Finally, Okin advised Bonner that implementation of the policy "is without prejudice to the right of the Union to enter into negotiations over application of this Policy to Special Agents in Sectors[,]" and he invited Bonner to send to him any "immediate questions and concerns about this matter[.]"

The policy, as implemented, varied from the October 1993 version substantively in that, as proposed by Bonner in his December 1993 letter, it added oleoresin capsicum (pepper) to the list of authorized non-deadly force devices.

The record is not clear as to which categories of bargaining unit employees, other than the Special Agents, covered by the 1994 policy had not been covered by the side-

handle baton policy. However, it is undisputed that the Special Agents were not. Further, despite the assertions in the Whelan and Okin letters (which I do not regard as evidence for this purpose) that the "Non-Deadly Force" policy had been implemented through the side-handle baton policy for those employees covered by the earlier policy, I credit Bonner's otherwise undisputed testimony that some of the requirements in the 1994 policy were new even to Border Patrol Agents.

Discussion and Conclusions

Issues Presented and Preliminary Disposition

Counsel for the General Counsel argues in his brief, initially, that Respondent violated sections 7116(a)(1) and (5) of the Statute by failing to respond to the Union's request to bargain. The complaint does not allege this as an independent violation, nor does the record of the hearing provide an adequate basis for determining that Respondent "nevertheless understood, or objectively should have understood" that this theory of the case was being pursued and required a defense. Therefore, I am not permitted to entertain this aspect of the General Counsel's case. *American Federation of Government Employees, Local 2501, Memphis, Tennessee*, 51 FLRA 1657 at 1660-64 (1996). However, the Union's request to bargain and the events that followed remain as part of the pattern of events that pertain to the other issues in the case.

The complaint alleges that Respondent violated sections 7116(a)(1) and (5) of the Statute by implementing the non-deadly force policy "without first giving [the Union] an opportunity to bargain to the extent required by [the Statute]." In his opening statement at the hearing, Counsel for the General Counsel gave notice that the bargaining obligation being litigated included, at least with respect to some aspects of the non-deadly force policy, an obligation to bargain, pursuant to Executive Order 12871 (October 1, 1993), over the substance of the changes that were made. However, the General Counsel's brief on the issue of unilateral implementation argues only that Respondent was obligated to negotiate over the impact and implementation of the new policy. On the other hand, the Union, in its brief, contends that Executive Order 12871 had the effect of requiring Respondent to negotiate over substantive Union proposals on the subject of "technology, methods, and means of performing work," which falls within section 7106(b)(1) of the Statute.

Respondent does not dispute that it implemented the non-deadly force policy or that, as a general proposition, the subject matter of the policy included conditions of employment affecting bargaining unit employees. Thus, the policy involved the technology, methods, and means of performing work, *see National Treasury Employees Union, Chapter 83 and Department of the Treasury, Internal Revenue Service*, 35 FLRA 398, 406-07 (1990), a subject matter ordinarily requiring notification to an exclusive representative and the opportunity to negotiate at least over the impact and implementation of changes. *U.S. Customs Service, Region I (Boston Massachusetts)*, 15 FLRA 309, 311 (1984). Rather, Respondent denies any bargaining obligation by virtue of a series of contentions that, for purposes of organization, I shall discuss under the heading of "Defenses."

Defenses

1. Public Policy Exclusion

Respondent's first defense contests the Authority's jurisdiction, asserting on public policy grounds that the matters included in the non-deadly force policy, irrespective of any "incidental" effect on conditions of employment, should be exempt from the Statute's bargaining requirements. This contention is grounded in part on *U.S. Dept. of Treasury v. FLRA*, 43 F.3d 682, 689 (D.C. Cir. 1994), where the court rejected the Authority's broad interpretation of "grievance" under the Statute to include a claimed violation of a law that was not directed toward working conditions but affected them only incidentally. Respondent also relies on the authority granted to the Attorney General and Respondent by the Immigration Act of 1990, Public Law 101-649, 104 Stat. 4978 (Immact90) to perform the functions necessary to implement the agency mission in a manner that preserves the constitutional rights of suspects. Respondent contends that Congress thus "removed from the sphere of 'conditions of employment' the policies and standards governing the use of force by immigration officers and employees" (Br. at 12).

Respondent does not identify any particular language in Immact90 that carves this area of agency activity out of the Authority's jurisdiction. Rather, it relies on the general policies asserted to be implicit in Immact90 and its legislative history. These policies, Respondent argues, preclude a role for collective bargaining in establishing the guidelines and procedures for its employees' use of force.

Even if the considerations cited by Respondent are accorded the maximum weight imaginable, however, they do not bring Respondent to where it seeks to be. Its goal here is avoidance of *any* bargaining obligation. But while these policy considerations might be persuasive with respect to bargaining over the substance of the policy changes, they echo rather faintly with respect to bargaining that is limited to the impact and implementation (I&I) of the changes. Such bargaining would not place anyone outside of agency management in the position of interpreting the requirements of Immact90. Nor would it enable the Union to participate in setting the policies and standards governing the use of force. The Union, given the opportunity, might have submitted I&I proposals that interfered with management rights and that impinged on the public policy matters cited above. However, it might have submitted proposals that did not. *See, for example, American Federation of Government Employees, National Border Patrol Council, Local 2544 and U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, Tucson, Arizona*, 46 FLRA 930, 953 (1992), *remanded on other grounds*, Nos. 93-70137 and 93-70293 (9th Cir. Sept. 8, 1993), *motion to vacate denied*, 49 FLRA 545 (1994). Therefore, Respondent was required at least to afford the Union that opportunity.

2. Asserted Nonnegotiability of Union's Proposals

Respondent argues further that it was relieved of any bargaining obligation because the Union submitted proposals that, Respondent contends, were all nonnegotiable. While both the General Counsel and the Charging Party submit that the proposals submitted (or at least some of them) were negotiable, I must first decide whether it is necessary to reach that issue in order to determine whether or not Respondent committed the alleged unfair labor practice(s).

In *Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 25 FLRA 541 (1987) (*Wright-Patterson*), Judge Arrigo rejected the contention that the complaint alleging a refusal to bargain should be dismissed because the union's proposals were not negotiable. Judge Arrigo noted that management had refused to negotiate for other reasons and had not made any reference, at the time of its refusal, to the negotiability of the proposals. He observed that "[p]roposals frequently change during the bargaining process, depending upon a variety of factors, and since no bargaining occurred, it is not possible to ascertain at this time what the Union's ultimate proposals would have been or indeed, what Respondent might have accepted if bargaining commenced." *Id.* at 555. The Authority agreed:

> Finally, in agreement with the Judge and for the reasons stated by him, we reject the Respondent's arguments that the Union waived its bargaining rights and that the Respondent had no bargaining obligation because the proposals submitted by the Union were nonnegotiable.

Id. at 545. *See also Blue Grass Army Depot, Richmond, Kentucky*, 50 FLRA 643, 652-53 (1995).

Respondent would have it otherwise, noting the Authority's statement in another decision that "an agency's implementation of a change does not violate the Statute if 'all' of a union's proposals regarding the change are nonnegotiable." *National Weather Service Employees Organiza-tion and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service*, 37 FLRA 392, 396 (1990), citing *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 31 FLRA 651, 656 (1988) (*SSA, Baltimore*). The apparent conflict between this statement and the holding in *Wright-Patterson* demands resolution not only for purposes of the instant case but because parties and judges are entitled to know in what circumstances it is necessary to "litigate" negotiability issues in unfair labor practice proceedings.

I believe that the apparent conflict may be resolved by an examination of the Authority's subsequent applications of the proposition derived from *SSA, Baltimore*. Thus, in a representative statement of an agency's responsibilities when making changes in conditions of employment, the Authority has explained that:

> Where a bargaining obligation arises by virtue of an agency changing conditions of employment, the Agency is required to bargain only over negotiable proposals addressing those changes. *See, for example,* [*SSA, Baltimore*]. Where a union submits bargaining proposals and an agency refuses to bargain over them based on the contention that they are nonnegotiable, however, the agency acts at its peril if it then implements the proposed change in conditions of employment. If the union's proposal is held to be negotiable, the agency will be found to have violated section 7116(a)(1) and (5) of the Statute by implementing the change without bargaining over the negotiable proposal.

U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 39 FLRA 258, 262-63 (1991). *Accord: U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Hartford District Office, Hartford, Connecticut*, 41 FLRA 1309, 1317 (1991).

This reading of *SSA, Baltimore* places it in the context of a broader understanding of an agency's obligation when faced with bargaining demands and proposals. Thus, although an agency need not refrain from making proposed changes when presented with nonnegotiable proposals, first it must afford the union an opportunity either to modify its proposals, if their negotiability is being challenged, or to appeal the agency's allegation of nonnegotiability through the expedited procedure provided by section 7117(c) of the Statute.[3] Affording the first option harmonizes the agency's action with *Wright-Patterson*. The requirement to afford the second option would appear to follow from the proposition that a union has the option of using either the negotiability or the unfair labor practice procedure to obtain review of an allegation of nonnegotiability. *See Interpretation and Guidance*, 15 FLRA 564, 567-68 (1984), *affirmed sub nom. American Federation of Government Employees, AFL-CIO v. FLRA*, 778 F.2d 850 (D.C. Cir. 1985). In either case, unions need a timely indication that their agencies consider their proposals to be nonnegotiable.[4]

To permit Respondent to escape its bargaining obligation on the basis of the alleged nonnegotiability of the Union's proposals would be particularly inappropriate and prejudicial in the instant case. At the outset, Respondent neither offered the opportunity to negotiate nor invited proposals. Thus, when the Union submitted proposals, it was not in a position to anticipate Respondent's view of the issues that were negotiable. Then, the Union specifically informed Respondent that its proposals were "not all-inclusive" and were "subject to revision and/or augmentation" as negotiations progressed,

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[3] The procedural landscape may be even more complicated than this, but the above should suffice to illustrate the interests at stake here.

[4] Respondent also relies on *U.S. Dept. of Justice, I.N.S. v. FLRA*, 995 F.2d 46 (5th Cir. 1993). I find that decision to be inapplicable because, in that case, the agency promptly asserted its contention of nonnegotiability and because the court concluded that the changes management made, not merely the union's specific proposals, were nonnegotiable.

but Respondent gave the Union no indication that it considered its proposals to be nonnegotiable. As far as the record here shows (Tr. 95-100), Respondent first raised the issue of negotiability only at the unfair labor practice hearing. It would have been unreasonable to have expected Counsel for the General Counsel to be prepared at that point to "litigate" the issue of negotiability.

3. "Privilege to Implement" Defenses

a. "Highest degree of insulation"; no agreement to restrict exercise of management right

Respondent also advances a battery of arguments that purport to show that, even assuming that its non-deadly force policy falls within the statutory term, "conditions of employ-ment," Respondent was privileged to implement the policy unilaterally. The first argument begins with the assertion that the matters covered by the policy concern the agency's internal security practices and its mission, and therefore occupy a place within the "category of core management rights" that entitle them to "the highest degree of insulation from outside interference under the Statute" (Br. at 15).

I find this, the first premise of the argument, to be unpersuasive. Determinations of an agency's mission and of its internal security practices are simply examples of the management rights accorded by section 7106(a) of the Statute. They occupy no exceptional status with respect to their being subject to subsection (b) of section 7106, which subsection has been interpreted to require I&I bargaining.

Respondent's argument goes on to urge, if I understand it correctly, that being subject to subsection (b) restricts a management right only to the extent that bargaining results in an agreement to restrict that right. Subsection (b) thus does not restrict the exercise of a management right pending the outcome of bargaining. Whatever intrinsic merit this distinction may possess, Respondent appears ultimately to concede that the Authority does not recognize it (Br. at 18- 20). Conceded or not, the Authority does normally require maintenance of the *status quo* pending the outcome of negotiations. *Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA 9 (1981). As discussed below, the Authority does, however, take account of unusual circumstances in which a delay of implementation while negotiations run their course would adversely affect the agency's operations.

b. Permission by contract

A related argument appears to be that unilateral implementation of the non-deadly force policy was authorized by the still-applicable management rights provisions of the parties' expired collective bargaining agreement. The expired agreement was executed in 1976 (preceding enactment of the Statute) and, as described in its preamble "in accordance with Executive Order 11491, as amended, and Department of Justice Order 1711.1C." The first set of contractual management rights provisions cited by Respondent is found in Article 4.C, which contains precisely those management rights provisions required by section 12 of Executive Order 11491. The second excerpt cited, Article 5.A of the agreement, virtually tracks the language of section 11(b) of Executive Order 11491. Nothing in these provisions purports to relieve Respondent of any obligation, to which it otherwise would be subject, to negotiate over the I&I of changes made pursuant to its management rights, and the Authority has not so construed such provisions. *See American Federation of Government Employees, Local 217 and Veterans Administration Medical Center, August, Georgia*, 21 FLRA 62, 64-65 (1986). I therefore reject this argument as well.[5]

c. "Necessary for functioning of agency"

Still another basis asserted for permitting Respondent to implement the policy in advance of bargaining is that the action was "necessary for the functioning of the agency" (Br. at 24-27). Respondent concedes that an agency must be prepared to provide affirmative support for such an assertion. Yet it argues that the Authority should assume a deferential posture with respect to such an assertion, and to employ only the limited scrutiny consistent with a "rational basis" test. This, however, has not been the Authority's approach. Rather, the Authority has applied a rather demanding standard for establishing the kind of necessity that is asserted here, requiring "evidence that an overriding exigency existed which required immediate implementation." *U.S. Department of the Air Force, 832D Combat Support Group, Luke Air Force Base, Arizona*, 36 FLRA 289, 300 (1990); *accord OLAM Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California*, 51 FLRA 797, 826-27 (1996); *Defense Logistics*

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[5] Having disposed of the contractual defense on this basis, I find it unnecessary to pass on the "mandatory" versus "permissive" nature of any of the expired contract's provisions to determine whether they were still enforceable.

Agency, Defense Industrial Plant Equipment Center, Memphis, Tennessee, 44 FLRA 599, 615-18 (1992).[6] Nor is the choice of a "rational basis" test supported by decisions such as *Patel v. I.N.S.*, 638 F.2d 1199 (5th Cir. 1981), which deal with the deference due to an agency's formal *adjudications*.

"Necessity" is, in this context, a term of art. Respondent presented evidence that on its face showed a "need" for the new policy, but whether any delay in implementing the policy would have seriously hampered the agency is another matter. Respondent is in a disadvantageous position in seeking to demonstrate this "necessity" because (1) it never gave the Union the opportunity even to *begin* negotiations prior to implementation and (2) more than seven months elapsed between the issuance of the first and the final versions of the policy. Thus, Respondent is unable to show that the pace of negotiations warranted the fear of a long delay before completion. It is also unable to support, by its own actions, its asserted belief in the urgency of implementing these changes. While it may be unfair to conclude that Respondent did nothing to advance the process of implementing the policy during those seven months, it is a fact that the final version differed only marginally from the first version. As it is, there is little basis for finding a reasonable expectation that providing the Union with an opportunity to negotiate prior to implementation would have resulted in any substantial further delay. I therefore conclude that the "necessary functioning" defense has not been established.

Ultimate Conclusion and Remedy

Bargaining Obligation to be Enforced

Having rejected all of Respondent's defenses, I conclude that Respondent violated sections 7116(a)(1) and (5) of the Statute by making changes in conditions of employment that affected employees in an appropriate unit without giving their exclusive representative an opportunity to bargain about any aspect of those changes. Since the changes were implemented before giving the Union *any*

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But cf. Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Laredo, Texas, 23 FLRA 90, 93, 103 (1986) (necessity was shown where changes were "deemed necessary by Respondent's officials, based on the best intelligence available, to effectively stop the maximum number of illegal aliens").

opportunity to bargain, it was not necessary to decide, up to now, whether the bargaining obligation included the obligation to bargain over the substance of the changes or was limited to bargaining over their I&I. In order to fashion an appropriate bargaining order, however, this issue must now be addressed.

All parties apparently concur that the matters covered by the Non-Deadly Force policy fall within section 7106(b)(1) of the Statute and thus are negotiable, as to substance, only at the election of the agency unless the elective nature of these matters, for statutory purposes, has been changed by Executive Order (E.O.) 12871. Several of my colleagues have dealt with the question of the effect of E.O. 12871. I agree with the result they reached on this issue but shall not rehash the process by which they arrived at that result. As I stand on the shoulders of giants, I need not tread in their footsteps.

Originally proposed by the General Counsel, but here advanced only by the Union, the argument for an expanded statutory obligation arising from the operation of E.O. 12871 is that, by ordering the agency heads to "negotiate over subjects set forth in [section] 7106(b)(1), and instruct subordinate officials to do the same," the President has elected, on behalf of the agencies, to negotiate over those subjects. Some have concluded that the Authority rejected this argument in its decision in *National Association of Government Employees, Local R5-184 and U.S. Department of Veterans Affairs Medical Center, Lexington, Kentucky*, 51 FLRA 386, 393-94 and n.12 (1995) (*VAMC, Lexington*). If the Authority has spoken on this issue, nothing remains for me. However, any statement in *VAMC Lexington* with respect to the merits of the E.O. 12871 argument has eluded me. Federal Service Impasses Panel Member Gee, acting as an arbitrator in *Department of the Army, Army Corps of Engineers, Portland District, Portland, Oregon and Local 7, National Federation of Federal Employees*, Case No. 95 FSIP 169 (April 12, 1966), Panel Release No. 386, was similarly unenlightened by *VAMC Lexington*.

I do not curse the darkness, but merely acknowledge it. Thus I go to encounter the reality of the gloom and to assist the forging of a resolution to this issue. As it turns out, the E.O. 12871 argument has a literary forerunner, flowing from the pen of the great satirist and collaborator of composer Sir Arthur Sullivan, W.S. Gilbert. For in that classic G&S opus, *The Mikado* (1885), the following occurs.

Ko-ko, "a cheap tailor," is (by a set of curious chances) appointed by the Mikado to the rank of Lord High Executioner, described by Ko-Ko himself as a height that few can scale (save by long and weary dances). Soon afterward, the Mikado demands that someone be beheaded within a month. Ko-ko thinks he will have no trouble in finding a suitable beheadee. (He's got a little list.[7]) Abetted by a series of events almost as complicated as the procedural options available to parties to negotiability disputes, Ko-ko conspires to *simulate* the execution of a young man. The former tailor and his co-conspirators fabricate (out of whole cloth, so to speak) an elaborate description of the beheading, whereupon it is discovered that the faux corpse is/was the son of the Mikado. He, therefore, must promptly be, and is, brought back to life.

Now comes the relevant part. The son's reappearance elicits a demand for an explanation of the deceit. Ko-ko provides it:

> When your majesty says, "Let a thing be done, it's as good as done - because your Majesty's word is law. Your Majesty says, "Kill a gentleman," and a gentleman is told off to be killed. Consequently, that gentleman is as good as dead -- practically, he *is* dead -- and if he is dead, why not say so?

The Mikado responds: "I see. Nothing could possibly be more satisfactory."[8] Here I must part company with the Mikado, with the Union, and with Panel Member Gee, who opined that the President, by his directive in E.O. 12871, had exercised the agency's "right of election" under section 7106(b)(1).

In my view, the President did no such thing. He merely said, to paraphrase W.S. Gilbert, "Let the thing be done." This is a directive to the agency to negotiate. It is not a statement that the President "elects" to negotiate, on behalf of the agency, for section 7106(b)(1) purposes. The

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[7] Candor dictates the disclosure or reminder, as the case may be, that a prominent occupant of this list is "that *nisi prius* nuisance who just now is rather rife, the judicial humorist."

[8] The quirkiness of the Mikado's ideas about governing in general and the administration of justice in particular had already been demonstrated. His object (all sublime) was to achieve, in time, to make the punishment fit the crime (etc.). In pursuit thereof, he would resort to extraordinary remedies such as housing convicted billiard sharks in cells equipped with twisted cues and elliptical balls.

"thing" in question was not done; it was not even "practically" done. I need not speculate on the manner in which a recalcitrant agency may be compelled to obey the directive. It is sufficient to note, as others have, that section 3 of E.O. 12871 specifically negates the inference that the Order creates "any right to administrative or judicial review" enforceable against an agency. Who would argue that this means something other than what it appears to mean -- that the Authority, among others, lacks jurisdiction to enforce the duty to negotiate over section 7106(b)(1) subjects -- must at least explain what other purpose section 3 serves. I conclude, therefore, and consistent with the main thrust of the General Counsel's argument on the merits here, that Respondent's bargaining obligation was limited to the I&I of the changes.

Status Quo Ante

Counsel for the General Counsel and the Charging Party contend that the bargaining order should be coupled with a restoration of the *status quo ante* pursuant to the factors set forth in *Federal Correctional Institute*, 8 FLRA 604, 606 (1982) (*FCI*). Among the familiar *FCI* factors, the Union was given notice of Respondent's intention to implement the policy, but was not invited to negotiate. In fact, although the Union submitted a timely request to negotiate, Respondent failed to respond and, after a long delay, implemented the policy, with minor changes. Further, I find Respondent's failure to discharge its bargaining obligation to have been willful, notwithstanding its bare assertion that it acted "in good faith, albeit erroneous, reliance on the untimeliness of the [U]nion's response" to the notice. And, while little evidence was presented as to the nature and extent of the *actual* impact experienced by adversely affected employees, certain new requirements, particularly those concerning the reporting of incidents and the responsibility for insuring medical attention carry with them a considerable potentiality for disciplinary action as well as for increasing work load.

The final *FCI* factor, the potential disruptive effect of a *status quo ante* remedy, presents a novel twist in the circumstances of this case.[9] Under ordinary circumstances, restoration of the *status quo ante* here would mean rescission of the non-deadly force policy that was implemented in 1994 and that superseded, to some extent, the side-handle baton program. Thus, the side-handle baton

[9] Although, in *FCI*, the Authority identified five factors that it stated it would consider, "among other things," no other factors that might be applicable here have been brought to my attention.

program, to the extent that it was previously applicable, would go back into effect. However, in Case No. DA-CA-30370, noted above, there is currently before the Authority the recommended order of Judge Devaney that directs Respondent to rescind the Side-handle Baton Training Program, which includes aspects of the use of that baton transcending employee training. So, in making a judgment about the effects of a *status quo ante* remedy in the instant case, where should one assume that such a remedy would leave the parties? That is, am I to anticipate the effects of a restoration of the side-handle baton program or of a restoration of the policies that preceded it? And where am I to seek help in dealing with these unusual circumstances?

While I do not regard this as an ideal route to the solution to this problem, ultimately I rely on the lack of a credible worst-case scenario, depicting the effects of a *status quo ante* remedy, that is so persuasive as to outweigh those factors that arguably make *status quo ante* relief appropriate. Thus, Respondent's argument against such relief focuses on the exposure of the agency and its employees to civil liability if the previous policies are restored, on a constitutional requirement for minimum guidelines to govern law enforcement, and on the agency's belief that implementa-tion of the new policy was necessary for the functioning of the agency. Sidestepping the merely conclusionary aspects of this argument, I find, first, that the argument in general is undermined by the long delay between Respondent's development of the near-final form of this policy and its implementation. Further, rescission of the policy to the extent that it operates to affect conditions of employment does not necessarily preclude the temporary use of its most essential features as guidelines for handling of the kinds of situations the policy addresses, as long as failure to adhere to those guidelines carries no risk of employment-related discipline.

Such a state of affairs may be objected to as being confusing and inviting of further labor disputes. This, of course, would be unfortunate. However, it must be emphasized that *status quo ante* is a temporary solution to the problem of facilitating negotiations when one party has had to be forced to the bargaining table. Such facilitation may not occur if *either* party feels too comfortable with the *status quo.* In the case of *these* parties, there may be a particular need for encouragement to seek an end to this temporary situation.

Thus, these parties have an extraordinarily rancorous bargaining history (note, for example, their chronic inability to replace the expired 1976 collective-bargaining

agreement). One becomes afflicted with the impression that their mutual reluctance to get on with the business of dealing with the issues that divide them compares to what occurred at the Paris peace talks (to end the war in Vietnam) as those talks compared to what occurs at a family discussion to decide on an evening's entertainment. A *status quo ante* in which there is at least some degree of uncertainty as to what actions are permissible might not be the worst interim solution here. Of course, as noted above, this kind of remedy has other points to recommend it as well. *Cf. U.S. Department of Justice, Immigration and Naturalization Service, Washington,* D.C., 44 FLRA 1065, 1075 (1992), *enforcement denied in part on other grounds sub nom. U.S. Department of Justice, Immigration and Naturalization Service v. FLRA*, 995 F.2d 46 (5th Cir. 1993) (*FCI* factors applied to determine that *status quo ante* was appropriate remedy as to changes in Manual firearms procedures). Accordingly, I recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the U.S. Department of Justice, Immigration and Naturalization Service, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain with American Federation of Government Employees, National Border Patrol Council, AFL-CIO (NBP Council), the exclusive representative of a unit of its employees, over the impact and implementation of its decision to implement a new non-deadly force policy.

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

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

(a) Rescind the Non-Deadly Force policy implemented in 1994 to the extent that it applies to employees represented by NBP Council.

(b) Notify and, upon request, bargain with NBP Council over the impact and implementation of any new or revised policies on the use of non-deadly force.

(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 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, Washington Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., August 27, 1996

_____
JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of Justice, Immigration and Naturalization Service violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT fail and refuse to bargain with American Federation of Government Employees, National Border Patrol Council, Local 2366, AFL-CIO, the exclusive representative of a unit of our employees, over the impact and implementation of its decision to implement a new non-deadly force policy.

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 Statute.

WE WILL rescind the Non-Deadly Force policy implemented in 1994 to the extent that it applies to employees represented by National Border Patrol Council.

WE WILL notify and, upon request, bargain with National Border Patrol Council over the impact and implementation of any new or revised policies on the use of non-deadly force.

_____

_

(Agency or 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, Washington Regional Office, Federal Labor Relations Authority, whose address is:

1255 22nd Street, NW, Suite 400, Washington, D.C. 20037-1206, and whose telephone number is: 202-653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. WA-CA-50048, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Thomas F. Bianco, Esq.
Counsel for the General Counsel
Federal Labor Relations Authority
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James E. Lewis, Esq.
Department of Justice
Immigration and Naturalization
Section
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Washington, DC 20536

T.J. Bonner, President
National Border Patrol Council
American Federation of Government
Employees
29520 Primrose Drive
Campo, CA 91906

Deborah S. Wagner, Esq.
Attorney for Charging Party
1500 W. Cañada Hills Drive
Tucson, AZ 85737

REGULAR MAIL:

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

Dated: August 27, 1996
Washington, DC