

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

MEMORANDUM

DATE: August 29, 2003

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF HOMELAND SECURITY
BORDER AND TRANSPORTATION
DIRECTORATE, BUREAU OF CUSTOMS
AND BORDER PROTECTION

Respondent

and

Case No. WA-CA-02-0485

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

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

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. WA-CA-02-0485

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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 29, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, Suite 201
Washington, DC 20424-0001

PAUL B. LANG
Administrative Law Judge

Dated: August 29, 2003
Washington, DC

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

DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. WA-CA-02-0485

Beth Ilana Chandler
For the General Counsel

Nancy L. Elam
For the Respondent

Jonathan Levine
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed on April 23, 2002, by the National Treasury Employees Union (Union) against the United States Customs Service

(Respondent).¹ On November 27, 2002, the Acting Regional Director of the Washington Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by implementing a policy as to the use of personal cell phones and pagers without prior notice to the Union and without affording the Union the opportunity to bargain over the implementation of the policy or over appropriate arrangements for employees who were adversely affected. Alternatively, it is alleged that the Respondent committed an unfair labor practice by failing to inform the Union that it was necessary to implement the policy without prior bargaining because of an overriding exigency.

A hearing was held on March 26, 2003, in Washington, DC at which the parties appeared with counsel and were afforded the opportunity to present evidence and to cross examine witnesses. This Decision is based upon careful consideration of all of the evidence, the demeanor of witnesses and the post-hearing briefs submitted by the General Counsel, the Union and the Respondent.

Positions of the Parties

The General Counsel

The General Counsel maintains that on April 2, 2002, the Respondent implemented a policy entitled "Interim Guidelines on Cell Phones and Pagers in Primary and Secondary Inspection Areas" (Guidelines), thereby changing the working conditions of bargaining unit employees. The Respondent implemented the Guidelines without giving the Union advance notice or the opportunity to bargain over the impact and implementation of the policy or to propose appropriate arrangements to alleviate adverse effects on

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On March 1, 2003, the name of the Respondent was changed to the Department of Homeland Security, Border and Transportation Directorate, Bureau of Customs and Border Protection. The motion of the General Counsel to amend the Complaint to reflect the name change was initially denied because of uncertainty as to the exact new name of the Respondent. The Respondent has stipulated that the change of name does not deprive the Authority of jurisdiction. The General Counsel's motion is now granted and the case caption has been modified accordingly. This applicability of this Decision has not been affected by the change to the Respondent's name.

bargaining unit employees.² The Guidelines represented the Respondent's first formal nationwide policy on the use of personal cell phones and pagers by Customs Inspectors. Prior to its implementation there had been no uniform policy and a significant divergence of practice between the various ports.³

According to the General Counsel, the Guidelines have had a significantly adverse impact on bargaining unit employees because, since the implementation of the Guidelines, employees working in primary and secondary inspection areas⁴ are no longer able to receive calls from family members or to make arrangements for such matters as child care and medical treatment. Furthermore, bargaining unit members have lost the opportunity to perform overtime work because of their inability to learn of last minute opportunities. The adverse impact has been exacerbated by the lack of sufficient numbers of reliable land line telephones, radios and government issued cell phones for use in remote areas. Therefore, without the ability to use their personal cell phones and pagers, Customs Inspectors in the primary and secondary inspection areas cannot adequately respond to personal and work related issues.

The General Counsel also contends that the Respondent refused to bargain after the implementation of the Guidelines and did not respond to a letter from the Union in which it requested negotiations as well as the rescission of the Guidelines. Furthermore, the Respondent did not explain its rationale for implementing the Guidelines without providing the Union either with notice or an opportunity to bargain.

The General Counsel further maintains that the Respondent has not shown that there was an overriding exigency which justified the immediate implementation of the Guidelines.

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The General Counsel does not contest the proposition that the implementation of the Guidelines was an exercise of the Respondent's management rights as defined in § 7106 of the Statute.

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The term "ports" refers to ports of entry into the United States to which bargaining unit employees are assigned.

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Primary inspection areas are used for the initial inspection of persons, vehicles and containers entering the United States. Secondary inspection areas are designed for more detailed inspections when they are deemed to be necessary.

The General Counsel acknowledges that the Respondent has engaged in pre-implementation bargaining with the Union over a proposed Customs Directive which is intended to replace the Guidelines and that, as of the time of the hearing, the dispute is under consideration by the Federal Service Impasses Panel (FSIP). The General Counsel considers that the negotiations over the Directive are irrelevant to the issue of whether the Respondent met its statutory obligation to bargain with respect to the Guidelines.

The Union

The position of the Union is largely identical to that of the General Counsel except that the Union contends that the issuance of the Guidelines was not a legitimate exercise of management rights as defined by the Statute. The Union also maintains that the Respondent has admitted that the implementation of the Guidelines caused a change in conditions of employment. The Union contends that a *status quo ante* remedy is warranted.

The Respondent

The Respondent maintains that it became necessary to issue and immediately implement the Guidelines after it was discovered that an Immigration Inspector in El Paso, Texas had used a personal cell phone to communicate with drug smugglers so that they could enter the United States without an inspection. That incident was of special concern to the Respondent because Immigration Inspectors are sometimes cross-designated to serve as Customs Inspectors. According to the Respondent, the language of the Guidelines is no more than a reaffirmation of its unwritten prohibition against the use and possession of personal cell phones and pagers in primary and secondary inspection areas. That fact, plus the existence of serious security concerns, required that the Guidelines go into effect without delay.

The Respondent states that it began drafting the permanent Directive at the same time that it was drafting the Guidelines. (Both the title and the language of the Guidelines indicate that it is temporary and that it would be superseded by a national policy.) That national policy was issued in the form of the Directive. Like the Guidelines, the Directive prohibits the use of personal cell phones and pagers in primary and secondary inspection areas. The Directive, however, contains more detailed definitions of the employees covered by the policy as well as more precise definitions of primary and secondary inspection areas. The Directive was sent to the Union on May 31, 2002.

The parties engaged in extensive bargaining until the Union declared an impasse and referred the matter to the FSIP where it is now pending. Meanwhile, the Guidelines are still in effect.

The Respondent further states that it decided not to give the Union advance notice of the Guidelines because Sandra Hasegawa, the Field Representative of the Respondent's Office of Field Operations, informed Tonia Brown, a Labor Relations Specialist, that the Guidelines were only intended as a reaffirmation of existing policy and that employees were aware of the prohibition against personal cell phones and pagers in primary and secondary inspection areas. After the Guidelines were issued Brown was informed that there might have been a change in working conditions because employees at certain locations had been allowed to use or carry personal communication devices in primary or secondary inspection areas. Brown then asked for input from the field labor relations office as to the practice in their respective locations. She received responses from only about four or five of the Respondent's twenty field labor relations offices and learned that, while employees were allowed to carry personal communication devices in some locations, the use of the devices was prohibited in the primary and secondary inspection areas in all of the locations from which she received responses. After the Guidelines were issued Hasegawa contacted Customs Management Centers and learned that, in one location, employees were allowed to use personal cell phones and pagers only in secondary inspection areas.

In view of the reports from the field, the Respondent decided to give the Union advance notice of the Directive to ensure that it fulfilled its obligations with regard to notice and bargaining.

The Respondent maintains that it had a well-established practice of requiring employees assigned to primary and secondary inspection areas to wait until they were on scheduled breaks or were relieved before making or receiving personal telephone calls. The Respondent also provided government land line telephones, cell phones and two-way radios in all of its ports. Furthermore, there were procedures to ensure that employees would be notified in the event of personal emergencies. The Respondent had not previously promulgated a written policy regarding cell phones and other personal electronic devices because the use of such devices has only recently become widespread.

The Respondent admits that, prior to the issuance of the Guidelines, there were isolated deviations from the

policy against the use of personal communication equipment in primary and secondary inspection areas. However, those deviations are insufficient to establish a past practice. Since there was no past practice to be changed, there was no change in working conditions such as to trigger an obligation to notify the Union or to bargain.

Finally, the Respondent argues that the issuance of the Guidelines has not had adverse effects on bargaining unit employees. There is no evidence that employees have missed important personal messages or that they have been prevented from taking breaks to make important telephone calls. The single employee who testified as to having lost overtime opportunities did not state how often this had occurred. That employee could have made other arrangements by which he could have received notification. The Respondent contends that, in view of the lack of adverse effects, it was under no obligation to bargain as to appropriate arrangements.⁵

Findings of Fact

There is no dispute as to the following facts surrounding the issuance and implementation of the Guidelines:

1. The Guidelines were issued and went into effect on April 2, 2002.

2. The Respondent did not provide the Union with prior notification or the opportunity to bargain either as to the substance of the Guidelines, its impact and implementation or as to appropriate arrangements to avoid or alleviate adverse effects, if any, on bargaining unit employees.

3. The Respondent refused to enter into post-implementation bargaining concerning the Guidelines.

4. Prior to the issuance of the Guidelines the Respondent had no written policy regarding the use of personal communication equipment in primary and secondary inspection areas and did not respond to the Union's request that the Guidelines be rescinded pending the completion of negotiations.

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During the course of the hearing counsel for the Respondent stated that it did not intend to raise a *de minimis* defense (Tr. p. 86). Rather, it was relying on the proposition that the implementation of the Guidelines did not cause any changes in working conditions.

5. The Guidelines were issued after the Respondent discovered that an Immigration Inspector had used a personal cell phone in an attempt to allow drug smugglers to enter the United States without an adequate inspection.

6. Prior to the issuance of the Guidelines bargaining unit employees at some ports were allowed to carry and use personal communication equipment in primary and secondary inspection areas.⁶

7. On May 31, 2002, the Respondent issued a Customs Directive which was intended to supersede the Guidelines. The Directive has not been put into effect pending the completion of bargaining with the Union.

8. The Union declared an impasse in bargaining over the Directive and the dispute has been submitted to the FSIP. The FSIP had not issued a decision as of the date of the hearing.⁷

There is a substantial factual dispute as to the impact of the Guidelines on bargaining unit employees. The only direct evidence of adverse impact was the testimony of Thomas Keefe, a Customs Inspector and the President of the Union Chapter in Champlain, New York. Keefe devotes 40 hours a week to his duties as a Union officer; his work station is in the Union office at Respondent's Champlain facility where he has access to a telephone and is allowed to carry his personal communication equipment. Keefe also performs overtime work as a Customs Inspector.⁸ He is a non-custodial parent who communicates with his daughter on various subjects such as medical appointments and visitation. He also communicates with his siblings regarding his elderly mother who is in ill health. He calls his wife to discuss various matters including his overtime schedule.

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The evidence is unclear as to how many ports departed from the general prohibition against carrying and using personal communication equipment. Furthermore, there was apparently no uniformity as to the extent that the prohibition was modified in those ports.

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As of the date of this Decision I am unaware of a ruling by the FSIP.

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Keefe testified that he earned over \$35,000 in overtime during the past two years.

Before the Guidelines were issued Keefe and other Customs Inspectors in Champlain⁹ were allowed to carry personal communication equipment on their uniform belts and to use personal communication equipment in the primary and secondary inspection areas. It was generally understood that personal calls should be short in duration so as to minimize interference with work. Keefe also testified that, before the Guidelines were issued, government-issued radios were very limited, but that, since April 2, 2002, there are enough radios to go around on a shift. The radios are then handed off to personnel on the next shift. The agency also has a telephone system but the local telephone company in Champlain does not always have enough lines. When attempting to get an outside line he often hears a recorded message stating that all circuits are busy. He has been told by family members and co-workers that they have had the same experience when trying to contact him. Keefe did not state that he had ever missed emergency calls.

Keefe also testified that, since the issuance of the Guidelines, he had missed a number of opportunities to perform overtime work. Each lost opportunity cost him about \$400.¹⁰ Keefe identified three bargaining unit employees other than himself, all of whom presumably were assigned to Champlain, who carried personal communication equipment in primary and secondary inspection areas. Nevertheless, he testified in response to my question that he felt that his own experience was generally typical of that of all bargaining unit employees. Keefe did not testify as to practices and policies at ports other than Champlain. This is not surprising since his responsibilities with the Union were limited to that port.

The only other witness for the General Counsel and the Union was Jonathan S. Levine, the Union's Assistant Counsel for Negotiations. Levine had no direct knowledge of the effect of the Guidelines, but testified that he received telephone calls and e-mail messages from bargaining unit

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Customs Inspectors in Champlain are also assigned to other locations in the surrounding area that are considered part of the Champlain port of entry, although it is unclear whether all Inspectors rotate through the secondary locations. Those locations also have primary and secondary inspection areas.

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Keefe testified that the Respondent assigns overtime according to a "low earner" formula in an attempt to equalize earnings among Inspectors. He did not state whether his loss of overtime opportunities were eventually made up under that formula.

members around the country expressing their "concerns" with the Guidelines. Levine stated that, prior to the implementation of the Guidelines, bargaining unit employees were allowed to carry and use personal cell phones without limitation other than that the use had to be reasonable so as not to interfere with job performance. According to Levine, employees could also use government telephones for personal calls, presumably also subject to limitations as to reasonableness.

Levine did not state the basis of his impression of the Respondent's practice and policy prior to the issuance of the Guidelines. However, it may reasonably be assumed that he has acquired at least a general knowledge of the working conditions of bargaining unit members in the course of his employment by the Union. Nevertheless, Levine did not provide specific details as to variations, if any, in ports throughout the country.

The Respondent presented the testimony of Joseph J. Wilson, the Interim Port Director for Customs and Border Protection for the East Great Lakes, an area which encompasses between 20 and 25 ports from Champlain to the west of Buffalo, New York. Wilson testified that there are about 500 of Respondent's employees in the East Great Lakes area but did not state how many were in the bargaining unit. Prior to assuming his current position on March 1, 2003, Wilson was the Port Director in Buffalo, a position which he had held since 1995. Wilson disclaimed knowledge of the Respondent's national policy with regard to the use of telephones, but stated that employees in Buffalo were not allowed to use personal devices such as pagers and cell phones.¹¹ There was a "very informal arrangement" as to the use of government phones for personal business. Supervisors would receive incoming personal calls for employees. If the call was an emergency the employee would be called off of the inspection line and replaced by another employee. The reason for this practice was the same as the reason for the prohibition against personal communication equipment: the need for personnel in the inspection areas to remain totally

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Wilson also testified that such devices could not be worn on the uniform belt. (The bargaining unit employees affected by the Guidelines are Customs Inspectors and Canine Enforcement Officers who are required to wear uniforms on duty.) Employees were not searched to ensure that they did not carry the devices in their pockets, but it was understood that there was no good reason to have personal pagers or cell phones in the inspection areas other than perhaps to safeguard them.

focused on their work because of security concerns.¹² Wilson stated that the implementation of the Guidelines caused no change in the practice in Buffalo.

Robert Colbert, a Supervisory Customs Inspector who drafted the Directive, testified that he received the assignment prior to April 2, 2002, when the Guidelines were issued. Before he began to draft the Directive Colbert determined that there was no national policy regarding the use of personal communication equipment, although there were written policies concerning the use of government cell phones, radios and land line telephones. Colbert began his career with the Respondent in Laredo, Texas in 1978. He is not aware of any formal policy regarding the use of personal communication equipment since that time but his understanding is that employees have never been allowed to make or receive personal telephone calls in primary and secondary inspection areas. If necessary, employees can arrange for relief so that they can make or receive such calls; otherwise, personal telephone calls are to be made during break times.

The Uniform Handbook, issued in July of 2001, states that:

Only authorized uniform items officially approved by the Commissioner of Customs and the appropriate Assistant Commissioner as indicated in this handbook are authorized to be worn by Customs employees. (Resp. Ex. 9, p. 19).¹³

The above language obviously does not prohibit the carrying of personal items in uniform pockets and it is questionable whether the Respondent had cell phones and pagers in mind when it issued the Uniform Handbook. Nevertheless, the above-quoted language tends to corroborate the Respondent's contention that the practices at Champlain, as described by Keefe, were not typical of conditions throughout the country.

Although the evidence is not absolutely clear, I find that the General Counsel and the Union have not shown by a

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Keefe tacitly acknowledged the necessity of avoiding distractions in his testimony that he would only make personal calls from the inspection areas when it would not interfere with the performance of work.

¹³

Neither the General Counsel nor the Union contend that personal communication devices have been so authorized.

preponderance of the evidence, as required by § 2423.32 of the Rules and Regulations of the Authority, that, prior to April 2, 2002, the Respondent generally permitted bargaining unit employees to carry and use personal communication equipment in primary and secondary inspection areas. It may be argued that there was no uniformity of practice in either direction and that, by imposing uniformity through the Guidelines, the Respondent effected a change in working conditions by the elimination of the "local option." That argument is effectively rebutted by the weight of the evidence to the effect that, in spite of some divergence of practice, personal communication equipment was prohibited in primary and secondary inspection areas prior to the issuance of the Guidelines in all but a few of the locations to which bargaining unit employees are assigned. This factual finding is consistent with the uncontested proposition that it was generally understood that personal telephone calls were not to be allowed to interfere with the screening and inspection process.¹⁴

The Guidelines were promulgated in the form of a memorandum from the Assistant Commissioner, Office of Field Operations to Directors, Field Operations, Office of Field Operations. The second to last paragraph reads as follows:

This is provided as interim guidance. A national policy is forthcoming on this issue which will supercede (*sic*) this document once published.
(Joint Ex. 1, p. 2)

On April 4, 2002, Levine sent a memorandum (Joint Ex. 2) to Sheila Brown, Respondent's Director of Labor Relations, in which he requested negotiations on the "change" contained in the Guidelines and demanded that the Respondent rescind the change in writing. He also requested that the Respondent inform him whether it would rescind the change as requested.

The Respondent did not reply, either orally or in writing, to Levine's memorandum of April 4. However, by memorandum dated May 31, 2002 (Resp. Ex. 2(a)), the Respondent informed the Union through Levine that, on July 1, 2002, it would issue a Customs Directive on the use of wireless communication devices by "inspectional personnel in primary and secondary inspection areas of all ports of entry, crossings, or functional equivalents." A copy of the Directive (Resp. Ex. 2(b)) was enclosed with the memorandum. The Union was requested to respond no later than June 10,

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Keefe acknowledged that it was important to avoid distractions in the inspection areas.

2002. In the event that Levine had any questions, he was invited to contact Mike Wenzler, a Labor Relations Specialist, in the absence of Tonia Brown.

Levine responded by memorandum of June 5, 2002 (Resp. Ex. 3), in which he informed Wenzler that the Union wished to negotiate; he further requested that Wenzler contact him to schedule a briefing. The Respondent subsequently provided the Union with the requested briefing and with copies of documents which it had requested. On August 2, 2002, Levine submitted twelve written proposals to the Respondent (Resp. Ex. 4). It is undisputed that the parties bargained over the Directive between August and October of 2002, that they reached an impasse and that the matter is now before the FSIP. It is also undisputed that the Directive has not been implemented and that the Guidelines are still in effect (GC brief, p. 16).

Discussion and Analysis

The Purpose of the Guidelines

Neither the General Counsel nor the Union dispute the Respondent's contention that the Guidelines were issued and immediately implemented because an Immigration Inspector in El Paso had used a personal cell phone to communicate with drug smugglers. However, the Union maintains that the Respondent's action was not a legitimate exercise of its management rights under § 7106 of the Statute.

In support of its position, the Union maintains that the Respondent has failed to establish a reasonable nexus between the prohibition of the use and carrying of personal cell phones in inspection areas and its right to establish internal security procedures (Union brief, p. 13). According to the Union, employees who are intent upon unlawful conduct will still be able to carry out such intent by the use of government communication equipment and personal cell phones outside of the primary and secondary inspection areas. What the Union is really saying is that it disagrees with the method by which the Respondent is seeking to enhance security and that the Guidelines are not a valid exercise of management rights because they are not *more* stringent in restricting the use of personal cell phones.

Contrary to the Union's assertions, there is a reasonable link between the prohibition of personal cell phones in inspection areas and the Respondent's legitimate security concerns. Therefore, the Guidelines meet the standard established by the Authority in *American Federation*

of Government Employees, Local 987 and U.S. Department of the Air Force, Robins Air Force Base, Georgia, 37 FLRA 197 (1990), a case cited by the Union. In the words of the Authority:

To establish that a particular plan or policy falls within the scope of the right to determine internal security practices, an agency must show that there is a reasonable link between the plan or policy and the security of its operations. In determining the negotiability of a proposal that arguably interferes with an agency's right to determine its internal security practices, the Authority will not inquire into the extent of the measures employed to achieve the objective as long as they reasonably relate to the purpose for which the particular security plan or practice is adopted. (Id. at 200; emphasis supplied.)

To accept the Union's position would be tantamount to penalizing the Respondent for attempting to strike a balance between the need for security and the personal needs of its employees. It may be true, as contended by the General Counsel and the Union, that personal cell phones were also used for agency business. However, the decision to enhance security at the expense of efficiency is clearly within the Respondent's management rights. Government agencies may not avoid their bargaining obligations merely by calling each decision a management right. Nevertheless, actions taken in the legitimate exercise of management rights are not subject to review by the Authority.

The General Counsel correctly asserts that the Respondent was not entitled to exercise even a management right without notice and bargaining in the absence of an overriding exigency, *United States Department of the Air Force, 832nd Combat Support Group, Luke Air Force Base, Arizona, 36 FLRA 289, 300 (1990)*. The issue of an overriding exigency is distinct from the issue of the legitimacy of an alleged exercise of a management right. However, in this case the circumstances which caused the Respondent to issue the Guidelines also justified their immediate implementation.

Although the Respondent is not entitled to invoke the events of September 11, 2001, as a blanket excuse for unilateral action, those events, at the very least, justify its increased concern for security. The evidence shows that the Respondent immediately implemented the Guidelines in order to close what it calls a serious "loophole" in border security. It cannot seriously be doubted that the smuggling

of weapons, if not of drugs, is a realistic and urgent security concern. The arguments to the contrary of the General Counsel and the Union are not persuasive. While it is true that the prohibition of cell phones in inspection areas will not eliminate the loophole and that the Respondent could have taken action much earlier, there is no merit to the proposition that it should further delay its efforts to eliminate or at least reduce the possibility of a serious security problem.

The Effect of the Guidelines

The only witness with purportedly direct experience of conditions prior to the issuance of the Guidelines was Keefe. As a Union officer on 40 hours of official time a week, Keefe performed his duties as a Customs Inspector only when on overtime. Therefore, his own experience can hardly be deemed typical, even for the port of Champlain. Furthermore, Keefe only named three other employees who used cell phones in inspection areas.

Both the General Counsel and the Union acknowledge that, prior to the issuance of the Guidelines, the Respondent had no formal policy which either allowed or prohibited the carrying or use of personal communication equipment in inspection areas. Therefore, their case must depend upon the existence of a past practice. In *U.S. Patent & Trademark Office*, 57 FLRA 185, 191 (2001) the Authority held that, in order to establish the existence of a past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other.

The facts pertinent to this case are analogous to those in *U.S. Department of Labor, Office of Workers' Compensation Programs, Boston, Massachusetts*, 56 FLRA 598, 603 (2000) (*Dept. of Labor*), in which the Authority found that evidence of a series of *ad hoc* decisions by management representatives was insufficient to prove the existence of a past practice. Even when viewed in the most favorable light, the evidence presented by the General Counsel and the Union shows no more than that, in an unspecified number of ports, bargaining unit employees were allowed to carry, and perhaps use, personal communication equipment in some, but not necessarily all, inspection areas. As in *Dept. of Labor*, such isolated incidents do not amount to a past practice.

The principal thrust of Keefe's testimony is that he needed his cell phone to make and receive personal telephone calls which, while arguably important, could not legitimately be described as of an emergency nature. Even if that were not so, the Guidelines state that:

DFOs and Port Directors must ensure that procedures are in place to make emergency notifications to employees through the Shift Supervisor in cases where this notification is necessary (Joint Ex. 1, p. 2).

Although Keefe testified that the land line telephone system in Champlain was unreliable and that it was difficult to communicate to and from remote areas, there was no evidence that any employee, in Champlain or elsewhere, had missed a call or was not allowed to leave an inspection area to receive such a call. More significantly, there was no evidence of a grievance arising out of the Respondent's alleged failure to institute procedures for emergency notification or to provide access to telephones for use during authorized breaks. The most that can be said of the effect of the Guidelines is that it is now more difficult for employees to make and receive personal calls in inspection areas, a practice that was either prohibited or discouraged. It has not been alleged that bargaining unit employees are not able to access their cell phones during breaks.

Keefe testified that the prohibition against the use of personal cell phones has made it more difficult for bargaining unit employees to communicate regarding work-related matters. However, there is no evidence that anyone has been subject to discipline or any other personnel action because of a lack of communication.

Keefe also testified that he has lost a number of opportunities to work overtime because he could not be reached due to the prohibition against personal cell phones. He did not provide details as to where he was when these incidents occurred.¹⁵ According to Keefe, the Respondent assigns overtime according to a "low earner" formula whereby employees with the lowest earnings are given priority for

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According to Keefe, he spends all or most of his time during the regular work day in the Union office where he is allowed to use his personal cell phone. He is in the primary and secondary inspection areas when he is already working overtime.

such assignments.¹⁶ He did not state whether he was given an opportunity to make up for the lost overtime or, if not, whether he initiated a grievance to recover the loss.

When measured against the applicable legal standards, the evidence does not support the proposition that the issuance of the Guidelines caused a change in working conditions or adverse effects on bargaining unit employees.

This finding is not contrary to what the Union characterizes as an admission by the Respondent that the Guidelines caused a change in working conditions. That characterization is based upon the testimony of Tonia Brown to the effect that the Guidelines were issued without notification to the Union based upon the assumption that they were a reaffirmation of existing policy and practice. According to Brown, the Respondent gave the Union advance notice of the Directive after learning that the Guidelines had in fact changed the working conditions of bargaining unit employees. Although Brown's testimony was not totally consistent, it does not amount to an admission. She stated, in response to my questioning, that the Respondent learned that employees in some locations were allowed to carry, but not use, personal communication devices in primary and secondary inspection areas (Tr. 163). Even without the clarification, Brown, as a Labor Relations Specialist, does not have the apparent authority to make such an admission on behalf of the Respondent.

The Duty of Pre-Implementation Notification and Bargaining

The General Counsel and the Union correctly assert that, regardless of whether the Guidelines are an exercise of a management right, the Respondent was not absolved of its obligations to notify the Union prior to implementing the Guidelines and to bargain to the extent required by law, *United States Department of the Air Force, 913th Air Wing, Willow Grove Reserve Station, Willow Grove, Pennsylvania*, 57 FLRA 852, 855 (2002). Furthermore, an agency acts at its peril when it refuses to bargain because of its belief that

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The parties are operating under an expired collective bargaining agreement which states, in pertinent part:

Section 12. The extra compensation earnings of all employees in each participating group who are qualified and available for participation shall be equalized on a port-wide (area-wide) basis

(GC Ex. 2, p. 155)

it has no duty to do so, *United States Department of Housing and Urban Development*, 58 FLRA 33, 34 (2002).

It is also true that the duty to bargain requires, at the very least, a response to a demand to bargain and an explanation of the reason for an agency's refusal to negotiate, *Army and Air Force Exchange Service, McClellan Base Exchange, McClellan Air Force Base, California*, 35 FLRA 764, 769 (1990) (*Army and Air Force*).

The Respondent acted at its peril when it implemented the Guidelines with no advance notice to the Union. As it happens, the Respondent did not violate the Statute by failing to give advance notice to the Union or to bargain because there was no change in working conditions, *United States Department of the Air Force, 6th Support Group, MacDill Air Force Base, Florida*, 55 FLRA 146, 152 (1999).¹⁷ However, the Respondent did fail to bargain in good faith by failing to respond to the Union's demand for rescission of the Guidelines and its request to bargain. This was not, as suggested by the Respondent, a "technical violation" that does not require a remedy. In ostensibly ignoring Levine's memorandum of April 4, 2002, the Respondent deprived the Union of information necessary for the effective representation of the bargaining unit, *Army and Air Force, supra*.

The position of the General Counsel and the Union is not enhanced by the fact that the Respondent provided the Union with advance notice of the Directive (which was intended to replace the Guidelines) and has not implemented the Directive pending the resolution of the impasse by the FSIP. The Respondent had immediately implemented the Guidelines at its peril, see *HUD, supra*, and did not wish to take the same risk again. That decision was reasonable in view of the fact that the Guidelines were already in effect and that the Directive was intended to make the prohibition against personal communication equipment more specific. To construe the Respondent's subsequent actions as proof of a prior violation of the Statute would be to penalize it for engaging in good faith bargaining. It has not been alleged that the Respondent acted improperly with regard to the Directive.

The Duty of Post-Implementation Bargaining

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Since the Respondent was entitled to implement the Guidelines immediately, it follows that it had no duty to give the Union advance notice of its reliance on an overriding exigency.

The General Counsel's contention that the bargaining over the Directive is of no consequence to the issues in this case is inconsistent with the language of § 7103(a)(12) of the Statute which defines "collective bargaining" as:

. . . the performance of the mutual obligation . . . to consult and bargain in a good-faith effort to reach agreement with respect to . . . *conditions of employment*
(Emphasis supplied.)

The condition of employment at issue in this case is the use and carrying of personal communication equipment in primary and secondary inspection areas. That is the subject of the Directive as well as of the Guidelines; the title of the document by which the subject was addressed has no bearing on the issue of good faith bargaining. It would serve no useful purpose to require the Respondent to bargain over an interim policy when the parties have already engaged in extensive bargaining over a final policy which was proposed shortly thereafter.

Upon consideration of the evidence and of the post-hearing briefs of the parties I conclude that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute by failing to respond to the Union's request to bargain and to inform the Union of its contention that the implementation of the Guidelines prior to bargaining was necessary due to an overriding exigency. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of Homeland Security, Border and Transportation Directorate, Bureau of Customs and Border Protection, shall:

1. Cease and desist from:

(a) Failing to respond to requests to bargain by the National Treasury Employees Union.

(b) Failing to inform the National Treasury Employees Union in the event that it deems it necessary to implement changes in conditions of employment prior to bargaining because of an overriding exigency.

(c) 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:

(a) Respond to requests to bargain by the National Treasury Employees Union.

(b) Inform the National Treasury Employees Union in the event that it is deemed necessary to implement changes in conditions of employment prior to bargaining because of an overriding exigency.

(c) Post at all of its facilities in the Central Region copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Commissioner of Customs, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

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

Issued, Washington, DC, August 29, 2003

PAUL B. LANG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Homeland Security, Border and Transportation Directorate, Bureau of Customs and Border Protection 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 to respond to requests to bargain by the National Treasury Employees Union.

WE WILL NOT fail to inform the National Treasury Employees Union in the event that we deem it necessary to implement changes in conditions of employment prior to bargaining because of an overriding exigency.

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

WE WILL respond to requests to bargain by the National Treasury Employees Union.

WE WILL inform the National Treasury Employees Union in the event that we deem it necessary to implement changes in conditions of employment prior to bargaining because of an overriding exigency.

(Agency)

Dated: _____

By: _____

(Signature)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Washington Regional Office, whose address is: Federal Labor Relations Authority,

Tech World Plaza, 800 K Street, NW, Suite 910, Washington,
DC 20001, and whose telephone number is: 202-482-6700.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CA-02-0485 were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Beth Ilana Chandler
2393

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Dated: August 29, 2003
Washington, DC