OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

IMMIGRATION AND NATURALIZATION SERVICE, SAN DIEGO DISTRICT

SAN DIEGO, CALIFORNIA

Respondent

and

Case No.
SF-CA-41149

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2805, AFL-CIO

Charging Party

Yolanda Shepherd Eckford, Esq. For the General Counsel of the FLRA Dennis J. Smith, Western Region V.P. For the Charging Party

Joseph M. Ragusa, Esq. For the Respondent Before: SAMUEL A. CHAITOVITZ Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.* (Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. § 2411, *et seq.*, (FLRA Regulations).

Based upon an unfair labor practice charge filed by the Charging Party, American Federation of Government Employees (AFGE), Local 2805, AFL-CIO (Union and AFGE Local 2805), a Complaint and Notice of Hearing was issued by the General Counsel (GC) of the FLRA by the Regional Director for the San Francisco Region of the FLRA. The Complaint alleges that the

Immigration and Naturalization Service (INS), San Diego District, San Diego, California (Respondent and INS-SD District) violated §§ 7116(a)(1),(2) and (4) of the Statute when it discontinued its practice of allowing Union President Michael Magee to exclude all full days of official time spent on local Union activities from Administratively Uncontrollable Overtime (AUO). The Complaint also alleges that INS-SD District violated §§ 7116(a)(1) and (5) of the Statute when it made this change with respect to the computation of AUO without fulfilling its bargaining obligation with respect to AFGE Local 2805.

A hearing was held in San Diego, California. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The GC of the FLRA and Respondent filed briefs. The GC of the FLRA filed a Motion to Strike Portions of Respondent's Brief, because it contained reference to factual matters not in the record of this case. Respondent filed no opposition to this Motion. Accordingly, the Motion is **GRANTED** and the findings and conclusions herein will be based solely on matters found in the record. With this limitation, the briefs have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

A. Background and AUO

1. AFGE is the exclusive representative of a nationwide unit of Immigration and Naturalization Service employees, including employees in INS-SD District. AFGE Local 2805 is the agent of AFGE for the purpose of representing unit employees in INS-SD District.

2. Magee has been the President of the Union since 1992. Magee spends approximately 60 percent of his work time on Union official time. Magee is employed by INS-SD District as a Deportation Officer (DO). As a DO, Magee is responsible for the processing of deportable aliens' cases at INS-SD District.

3. Since December 1992, DOs at INS-SD District have been compensated based on a formula which takes into account Administratively

Uncontrollable Overtime (AUO). Compensation based on AUO grants employees a premium in acknowledgment of hours of overtime that employees are required to work on a regular basis, that may not be administratively controlled by the employer.[1] DOs at INS-SD District, including Magee, are paid a premium in addition to their salary, based on the amount of overtime they have worked in relationship to the number of days that the officer performed law enforcement duties. DOs at INS-SD District normally work two hours of AUO per day. The AUO premium is paid in 5 percent increments depending on the amount of overtime the officer has worked, with the maximum premium being 25 percent of the officer's base salary. At INS-SD District, such computations are made quarterly and salaries adjusted accordingly.

4. Because the AUO premium formula is based on the number of days that the officer was available to perform law enforcement duties, and worked overtime, certain days where the officer is not able to perform law enforcement duties are excluded by INS-SD District in computing an officer's eligibility. Section 1551.4A of a Department of Justice Administrative Order (DOJ Order) and § 2979.03 of the Immigration and Naturalization Service Administrative Manual (INS AM) address excludable days in computing an employee's AUO premium.[2] Section 1551.4A(11)(c) of the DOJ Order provides:

c. Computation of weekly averages. Weekly averages for purpose of eligibility and rate determination are computed by totaling all hours of irregular or occasional overtime worked during the computation period preceding the eligibility period for which the determination is to be made, dividing the total by the base workday figure of 120 and multiplying the result by 5. The base workday figure of 120 will be adjusted downward in units of a full day to exclude paid leave and holidays, leave without pay, temporary assignments of more than 10 consecutive days from authorized positions with discontinuance of premium pay, and training periods when administratively uncontrollable overtime was not performed. Leave for less than a full day and holidays for which holiday pay is received will be disregarded.

Section 2979.03(7)(a)(3) and (4) and (b) of the INS AM states the following regarding AUO excludable days:

(3) In addition to the excludable days specified in paragraph 11c, of Order DOJ 1551.4A, those days spent by employees serving as union representatives attending semi-annual or labor management consultations at the national and regional levels pursuant to labor-management

relations agreement are excludable. Those days spent by any Union representatives in addition to the number of representatives specified in the agreement are not to be excluded.

(4) Pursuant to 5 U.S.C. 7131(c), authorized official workdays spent participating in (sic) behalf of a labor organization in any phase of proceedings before the Federal Labor Relations Authority are excludable.

(b) The employee's supervisor is responsible for assuring that all days recorded on the employee's Time and Attendance Report (T & A), Form DO 296, as excludable AUO days, are in strict accordance with the provisions of this paragraph.

5. It is to the employee's advantage to have work days in which he can not work AUO hours, excluded from the computation of the AUO pay he is entitled to. By excluding such days the percentage of his pay for which he can receive AUO pay is increased, not to exceed 25 percent of his pay.

6. In December 1992, DOs were added to the group of INS employees eligible for AUO premium pay. AFGE and INS at the national level negotiated a memorandum of agreement (MOA) regarding the addition of the DOs. The MOA does not address or mention excludable days or Union representatives whatsoever.

B. Magee and AUO

7. At INS-SD District, Magee has excluded all full days that he spent on Union official time since the implementation of AUO at INS-SD District for DOs. When AUO pay was implemented at INS-SD District, Magee was supervised by William Hutton. Magee was advised by Hutton to exclude full days of official time spent on Union representational activities, and Magee did so based on the instructions from Hutton. In October 1993, Charles Brinkman became Magee's first level supervisor. Magee continued to exclude full days of official time spent on Union representational matters from AUO computations while he was supervised by Brinkman, until May 1994. Both supervisors were aware and consented to

Magee's exclusion of his full days of official time spent on Union representational activities from his AUO computations during this period.[3]

8. In May 1994, Brinkman did research on AUO in preparation for a training session he was to conduct at INS-SD District's El Centro Processing Center. During his research he became aware of what he determined to be an error in the way days spent on local union affairs were being excluded from time computations for AUO purposes. This was apparently based on his reading of the INS AM, specifically § 2979.02, and the DOJ Order. Brinkman informed his first line supervisor, James Porter, of his suspicion concerning the error in the AUO application. Porter told Brinkman to research the matter. Porter apparently did not know that Hutton and Brinkman had been, in Brinkman's view, violating the INS AM.

9. Brinkman checked with the San Diego District Personnel Supervisor, Jan Rusnell, who in turn checked

with the Western Region Labor Management Relations Office. The officials in this latter office apparently told Rusnell that they should follow the INS AM. Rusnell instructed Brinkman to follow the INS AM. Brinkman also contacted the Assistant District Director for Detention and Deportation in San Francisco, Tony Marion, who advised Brinkman that the

San Francisco District was following the INS AM in the manner Brinkman felt it should be applied. Brinkman advised Porter of the result of the research.

10. Later in May 1994, Brinkman informed Magee that he could no longer exclude all full days of official time spent on local union activities from his AUO computations. Brinkman informed Magee that he was limited to excluding full days of official time where he had participated in national consulta-tions as described in the DOJ Order, or participated in FLRA proceedings. The Union was not given prior notice or the opportunity to bargain prior the implementation of the restriction.[4] Upon being notified of the restriction, Magee notified Porter that INS-SD District had a duty to bargain with the Union prior to changing working conditions, and requested to bargain regarding the change. Porter responded that INS-SD District could make the change, and was going to make the change unless it was stopped from doing so.

C. Magee's Union Activity

11. Magee has been an active Union official since becoming Union President in December 1992. The Union represents approximately 500 employees of INS-SD District. Magee spends about 60 percent of his work time on official time performing representational duties. Since becoming President of the Union in December 1992, Magee has filed over thirty grievances against the INS-SD District under the collective bargaining agreement and over twenty unfair labor practice charges against INS-SD District. Such unfair labor practice charges are served on the INS-SD District Director. Both Porter, Magee's second level supervisor, and Brinkman were aware of Magee's grievances and unfair labor practice charges. Rogers, the Acting District Director, also had knowledge of Magee's grievances and unfair labor practice charges. Magee has also participated in numerous negotiation sessions on behalf of the AFGE Local 2805 since becoming Union President.

12. Since November 1993, Brinkman's and Magee's work- ing relationship has been contentious, the source of such contention being Magee's activities on behalf of AFGE

Local 2805. In addition, Magee's relationship with Porter

has been contentious for the same reasons.

13. In November 1993, Magee took approved annual leave for a week in order to lobby Congress and testify before Congress. He had been granted official time for the following week in order to attend Union training. While in the Washington area, the President of the AFGE INS Council, Chuck Murphy, invited Magee to attend national consultations and the national contract signing ceremony. Magee contacted Brinkman, who refused to grant Magee official time on the basis that Magee was not a national officer and had not participated in the contract negotiations. Brinkman informed Magee that he would be charged AWOL if he did not return to work that Monday, as scheduled. Murphy and Magee met with the Chief of INS Labor Relations at INS Headquarters, Dennis Eckberg, regarding the matter. Eckberg indicated that there had

been a problem in San Diego, but that he had "straightened it out", and that Magee could attend the national consultations and contract signing ceremony.

14. When Magee returned to San Diego after this incident, the tenor of

the working relationship between Brinkman and Magee deteriorated. When Magee returned Brinkman would not talk to him. Whereas Brinkman had previously accommodated Magee's official time usage, as required by the Statute, Brinkman began denying all of Magee's official time requests. Magee filed several unfair labor practice charges, naming Brinkman regarding the denial of official time.

15. In December 1993, Brinkman and Magee had a discussion regarding Magee's work performance. During this meeting, Brinkman informed Magee that his productivity was down because of his Union activities. It is not disputed that also during this conversation, Brinkman informed Magee that if the standard for employees was to pick 40 oranges, Magee was expected to pick 40 oranges, regardless of approved official time for Union activities. In a January 1994 progress review, Brinkman again informed Magee that his productivity was down because he used so much official time for Union activities.

16. These performance-related matters, as well as Magee's performance appraisal which was issued after these statements were made, were the subject of unfair labor practice charges which were pending at the time Brinkman discontinued Magee's practice of excluding all full days of official time spent on Union labor-management relations (LMR) activities from AUO computations. These unfair labor practice charges were resolved prior to a hearing by way of a settle-ment in which the INS SD District Director, Brinkman's fourth level supervisor, agreed that Brinkman would re-issue the progress review and the performance appraisal without regard to Magee's protected activity.

17. Brinkman is rated on labor relations skills, and numerous unfair labor practices and grievances filed against him could affect his appraisal "if they had validity".

18. On March 12, 1994, Magee was called into a meeting with Brinkman regarding the manner in which he reported official time on his T&A sheet. Magee requested Union representation for the meeting. He was told to return to the meeting at 4:00 p.m. At the designated time, Magee returned to Brinkman's office with Eugene Hudson, an AFGE National Representative. Brinkman read a prepared statement to Magee regarding his T&A reports. Hudson attempted to ask a question. Confusion ensued. Brinkman, apparently angered by Hudson's attempt to participate in the meeting, leaned over and pointed at Hudson and stated repeatedly that Hudson could not speak. Brinkman then stood and began shouting repeatedly that Hudson was to "get out" of his office. When Hudson did not move, or did not move fast enough, Brinkman called the agency's detention facility and asked for GSA security. Magee and Hudson got up to leave and Brinkman pushed

Hudson out of the door and blocked Magee's exit. Detention Officers arrived on the scene as did Porter, Brinkman's supervisor. Magee asked Porter if he could be let out of the room, as Brinkman was still blocking his exit. Porter ordered Brinkman to let Magee out of the room.(5) Brinkman let Magee out of his office, only after being ordered to do so by Porter. Hudson asked Porter if he could meet with Magee and Porter agreed.(6)

19. In 1991, prior to Porter being named a supervisor, Magee was at the Regional Office at Laguna Niguel regarding an Equal Employment Opportunity (EEO) matter. Porter asked Magee if he was at the office "doing that Union shit." Magee informed Porter that he was at the Laguna Niguel office conducting a collateral EEO investigation. Porter replied, "EEO, Union, it's the same shit, it's all worthless."

20. In January 1993 a meeting was conducted between managers at INS-SD District Office and national level AFGE representatives regarding the labor relations atmosphere at the District Office. n addition, the parties discussed an unfair labor practice charge filed by Magee, the first unfair labor practice charge Magee had ever filed. When the topic of the conversation turned to the unfair labor practice charge, then Deputy District Director Rogers became very agitated and stated to Magee that Magee had stabbed him in the back by filing the unfair labor practice charge, and he would never forget it.

21. In August 1994, Brinkman stated to Magee in the context of a grievance meeting that Magee was a "chicken shit baby" for filing numerous grievances regarding official time.

22. The record establishes that at INS-SD District, in addition to Magee, Union Vice President Deborah LeBel had excluded official time spent on Union LMR activities from AUO computations. LeBel excluded official time spent on local LMR activities from AUO computations from December 1993 until October 1994, when LeBel was informed by her supervisor that she could no longer exclude official time from AUO computations. During the period December 1993 and October 1994, LeBel had excluded this official time from AUO computations under several supervisors. Also, on at least one occasion, Union steward Charlie Jones excluded a full day of Union official time from AUO computations, with his supervisor's approval.(7)

23. The record establishes additionally that union officials in the INS Houston District Office and at the

San Francisco and Honolulu District Offices exclude official time spent on union activities from AUO computations, regardless of the purpose for which official time is utilized.[8] The San Francisco District and the Honolulu District are under the Western Region of INS, as is the San Diego District.

24. Magee's AUO premium pay has decreased by 5 percent, since INS-SD District restricted him from excluding all his full days of official time spent on local Union LMR activities from AUO computations. This is the first time since the implementation of AUO at the INS-SD District in December 1992 that Magee has received less than a 25 percent AUO premium.

III. DISCUSSION AND CONCLUSIONS OF LAW

Section 7116(a)(1), (2), (4) and (5) of the Statute provides:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in

connection with hiring, tenure, promotion, or other conditions of employment;

. . .

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

A. Unilateral change in conditions of employment

The GC of the FLRA contends that INS-SD District unilaterally changed an existing term and condition of employment when it changed the way Magee treated his official time spent on Union local LMR activities for the purpose of computing AUO. The GC of the FLRA contends that INS-SD District made this change without sufficient advance notice to the Union and without affording the Union an opportunity to bargain about the substance of the change and about the impact and implementation of the change.

INS-SD District argues that somehow the collective bargaining agreement provides that the INS will comply with its regulations and the INS-SD District was not required to bargain about the change in the way time spent on union business was treated for AUO purposes because the practice was unlawful. With respect to INS-SD District's first argument, it must be rejected because the portions of the collective bargaining agreement sited and relied upon in its brief were not offered in evidence or made a part of the record in this case.

1. AUO computation, including what is excludable in computing AUO, is a working condition and is negotiable in substance.

A matter is a condition of employment depending on whether it pertains to bargaining unit employees and on the nature and extent of the effect of the matter on working conditions of unit employees. See, Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA 235, 236-237 (1986).

An agency has a duty to bargain to the extent of its discretion. U.S. Department of Labor, Washington, D.C. and U.S. Department of Labor, Employment Standards Administration, Boston, Massachusetts, et al., 37 FLRA 25, 36 (1990); Library of Congress, 15 FLRA 589, 590 (1984). Nothing in the Statute limits this duty to matters over which the agency has total

discretion. National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA 6, 10 (1986).

The method in which overtime is computed and the amount of time credited for overtime is a very basic part of an employee's working conditions. I conclude, in accordance with FLRA decisions, that computation of AUO is a condition of employment and INS has discretion with respect to the computation of AUO.[(9)] See National Border Patrol Council, American Federation of Government Employees, AFL-CIO and United States Immigration and Naturalization Service, 23 FLRA 106 (1986) (National Border Patrol Council). Certainly, INS' discretion in matters excludable from AUO computations is demonstrated by the exclusions that INS added in its INS AM "in addition to the days specified in 11c, of Order DOJ 1551.4A. . . ." INS AM, § 2979.03(7)(a)(3).

In this regard, the FLRA has specifically found that INS has the duty to bargain regarding the exclusion of official time from AUO computations. In American Federation of Government Employees, AFL-CIO, National Border Patrol Council and National Immigration and Naturalization Service Council, 42 FLRA 599 (1991) (AFGE) the Authority considered a proposal identical to the AUO policy as it was applied at INS SD District prior to the actions which are the subject of the Complaint in this matter. In that case, AFGE proposed that representatives not suffer loss of pay or benefits as a result of carrying out representational responsibilities. The proposal, as explained by the Union, "would exclude time spent on representational activity from the computation of [administratively uncontrollable overtime (AUO)] so that employees would be neither advantaged nor disadvantaged by having been engaged in representational activity in the computation of their 'average' (sic) number of hours of AUO worked[.]" AFGE at 618.

The Authority found the proposal to be within the duty to bargain. In so concluding the Authority stated:

The Agency has not established that Proposal 3 requires the payment of overtime compensation in a manner inconsistent with 5 U.S.C. § 5542. The Agency also has failed to establish that Proposal 3 is inconsistent with any other law governing the granting of official time. We find that by providing that employees engaged in representational activities shall receive the same pay and benefits that they would be entitled to if they were performing work in a regular duty status, Proposal 3 is consistent

with legal requirements concerning the payment of overtime compensation for representa-tional activities. See National Weather Service,

36 FLRA at 358; Warner Robins Air Logistics Center, 23 FLRA at 271.

. . .

Based upon the foregoing, we conclude that Proposal 3 is negotiable.

AFGE at 620.

Thus, I conclude that the manner of computing AUO and specifically matters excludable in computing AUO are within INS' duty to bargain.(10) Accordingly, any arguments AUO exclusions are outside the duty to bargain are rejected.

Id., see also, National Border Patrol Council.

2. Past practice involving a condition of employment creates an obligation to bargain about any change.

Where the evidence establishes that a past practice involving a condition of employment has been consistently exercised over a significant period of time and followed by both parties, the FLRA holds that management is obligated to provide the union with notice and an opportunity to request bargaining before it changes the practice. See, Defense Distribution Region West, Tracy, California, 43 FLRA 1539 (1992); U.S. Department of Labor, Washington, D.C., 38 FLRA 899, 908 (1990); Norfolk Naval Shipyard, 25 FLRA 277, 286 (1987).

In the subject case INS-SD District had permitted Magee to deduct days spent on Union local LMR matters from the computation of AUO. Magee had been permitted to do this from December 1992, until May 1994, when the practice was changed by Brinkman. When Magee was deducting the time spent on local union activities from the computation of his AUO, this prac-tice was known and approved by Magee's supervisors Hutton and Brinkman.

In light of the foregoing, I conclude the practice of permitting Magee to exclude all official time spent on Union local LMR matters in computing AUO constituted an existing term and condition of employment that could not be changed without affording the Union advance notice of the change and an opportunity to bargain about the substance of the change. See e.g., Defense Distribution Region West.

In the subject case Brinkman instructed Magee that he could no longer exclude the time spent on Union local representational matters when computing his AUO. This constituted a change in the then existing procedure for computing AUO and INS-SD District was obligated to give the Union advance notice of this change and an opportunity to bargain about the substance of the decision. INS-SD District did not provide such notice or opportunity to bargain to AFGE Local 2805.

INS-SD District contends that it had no discretion to bargain about the computation of the AUO because to compute it as it had been doing before the change was unlawful and it would have been unlawful to continue the practice. In its brief and at the hearing INS-SD District repeatedly stated that to continue to compute the AUO as they had been doing was unlawful, but then seemed to base the "unlawful-ness" on the contention that the AUO computation before the change violated the INS AM, the DOJ Order, and

5 U.S.C. § 5542.

INS-SD District has failed to demonstrate that the AUO computation method used before the change ("the old AUO computation method") violated 5 U.S.C. § 5542. AFGE.

With respect to contention that the old method of computing the AUO violated the INS AM and DOJ Order, that does not make the old method of computing the AUO unlawful. It merely means the old method might have violated some DOJ and INS directives. In this regard, even if the INS AM and the DOJ Orders were deemed "agency rules or regulations" within the meaning of § 7117(a)(2) of the Statute, INS-SD District is not freed of its bargaining obligation because no where in the record of this case has INS-SD District contended that there was a compelling need for either of these "agency regulations." See AFGE.

INS-SD District's argument that it had no discretion at its level regarding the subject matter of AUO exclusions, and therefore, even if it allowed certain AUO exclusions, it had no duty to bargain regarding the decision to terminate such exclusions lacks merit. Rogers, the Acting District Director, is responsible for the administration of the AUO policy at the INS-SD District. INS-SD District alone took the action to discontinue the practice of excluding certain types of official time from AUO computations at Respondent. There is no evidence that INS-SD District acted upon the direction of INS at the national level. Further, there is no evidence that INS-SD District even consulted with the INS national office regarding the decision to discontinue the practice of certain AUO exclusions, or even the appropriate interpretation of the INS regulation. While INS-SD District acted autonomously with respect to its actions in terminating the practice regarding AUO exclusions, it now asserts that it lacks discretion in the area of AUO. I reject this position.

Additionally, any contention by INS-SD District that requiring it compute AUO the old way interferes with its budget under § 7106(a)(1) of the Statute lacks merit. In this regard, the decision to pay AUO does not concern the question of whether or not the individual works overtime, an assignment of work or pay issue, but rather, how the overtime will be compensated. Cf. American Federation of Government Employees, AFL-CIO, National Joint Council of Food Inspection Locals,

9 FLRA 663 (1982). Since within the conditions set by law and regulation, INS has discretion as to how that overtime will be compensated, it is a matter which is fully negotiable.

Further, in order to establish that a matter impermissibly interferes with its right to determine its budget, an agency must demonstrate that providing the benefit at issue would require that: (1) its budget include specified programs or operations or specified amounts to be allocated to those programs; or (2) the matter at issue would lead to increased costs that are significant, unavoidable, and not offset by compensating benefits. U.S. Department of Health and Human Services, Social Security Administration, Region X, Seattle, Washington, 37 FLRA 880, 890 (1990). In this case, INS-SD District has not established that computing AUO the old way would entail significant and unavoidable costs which are not offset by compensating benefits to the agency. Therefore, it cannot be found that the decision to terminate the practice of Union officials at INS-SD District of excluding full days of official time spent on local LMR matters was an exercise of management's reserved right to determine its budget.

In light of all of the foregoing, noting that the decision to terminate the practice of Union officials at INS-SD District excluding full days of official time spent on local representational matters did not involve the exercise of any reserved management right, that the existing practice was not unlawful, and that the existing practice did not violate an agency regulation for which there was a compelling need, I conclude INS-SD District was obligated to notify AFGE Local 2805 and bargain with it regarding the decision, prior to implementing the change. Its failure to provide the AFGE Local 2805 with such notice and opportunity to bargain violated § 7116(a)(1) and (5) of the Statute. See Department of Labor, 37 FLRA 25 (1990).

B. DISCRIMINATION

In Letterkenny Army Depot, 35 FLRA 113 (1990), the FLRA held that in all cases involving alleged discrimination, whether the case is ultimately characterized as a "mixed motive" or a "pretext" case, to establish a violation a prima facie case must first be established. To establish a prima facie case it must be established that: (1) the person against whom the alleged discriminatory action was taken was engaged in protective activity; and (2) such activity was a motivating factor in the respondent's treatment of the individual. Letterkenny, at 118.

After the required prima facie showing of discrimina- tory action based on protected activity is established, a respondent will not be found to have violated section 7116(a)(2) only if it can demonstrate by a preponderance of the evidence, that there was a legitimate justification for its action and the same action would have been taken even in the absence of the protected activity. Letterkenny, at 118. Applying the Letterkenny analysis to the subject case, I conclude that the INS-SD District violated section 7116(a)(1) (2), and (4) of the Statute by taking retaliatory actions against Magee because of his exercise of protected activity, including the filing of unfair labor practice charges.

In the instant case, there is no dispute that Magee was engaged in protected activity and that Respondent had knowledge of this protected activity. Magee processed grievances and unfair labor practices almost continuously from the end of 1993 throughout early 1994. It is undisputed that supervisors in Magee's chain of supervision were aware of Magee's grievances and unfair labor practice charges. In fact, Brinkman, Magee's first level supervisor was named in a significant number of those actions.

The three supervisors in Magee's chain of command, Brinkman, Porter, and Rogers, made statements hostile to the Union and Magee's involvement with the Union. Brinkman stated that Magee was required to equal the quantitative performance of other employees regardless of time spent on approved official time for LMR activities, and Rogers' stated that he would "never forget" that Magee had stabbed him in the back by filing an unfair labor practice charge, are unrebutted. Both Brinkman and Rogers were involved in the decision to prohibit Magee from excluding official time from AUO computations.

Rogers' statement that he was never going to forget Magee for stabbing him in the back by filing an unfair labor practice charge was a veiled threat to get even with Magee. The person who initiated the change, however, was Brinkman. By May 1994, when the change was implemented regarding Magee's AUO hours, Brinkman's hostility toward Magee and Magee's Union activities was significant.

In November 1993, Brinkman, a new supervisor called upon by his superiors in Washington D.C., and persuaded to grant official time to Magee under circumstances where Brinkman had threatened Magee with AWOL if he did not return. Clearly, this did not please Brinkman. From that point on, Magee and Brinkman were engaged in warfare. Brinkman, by taking actions against Magee regarding his performance and official time usage; Magee by responding to Brinkman's actions by filing unfair labor practice charges and grievances. In March 1994, the unpleasant confrontation occurred in Brinkman's office and in the presence of Brinkman's supervisor. Brinkman insisted that Hudson, Magee's Union representative in a meeting, not speak.[(11)] When Hudson attempted to speak, Brinkman became angry and ordered Hudson out of his office. When Hudson did not leave, or did not leave as quickly as Brinkman would have liked, Brinkman became even angrier and began shouting, and called for building security to have Hudson removed from his office. Brinkman was angered by the incident and he blamed Magee.

INS-SD District's reliance upon the INS AM and the DOJ Order to justify changing the old method for computing AUO is a pretext. INS-SD District contends that DOJ Order 1551.4A and section 2979.03 of the INS Manual required the action that it took against Magee. As discussed above, INS-SD District was required to give the Union notice and an opportunity to bargain about the change.

A review of those documents shows that INS-SD District was not required to make the change in computing AUO. DOJ Order 1551.4A, section 11(c)

lists certain items that are excludable in AUO computations, such as training, paid leave, holidays and leave without pay. The INS Manual lists items that are excludable, in addition to those named in the DOJ Order, such as time spent by employees attending semi-annual consultations at the national and regional level, and time spent by employees participating in FLRA proceedings. Neither document specifically precludes the exclusion of official time spent on local union representative duties. The FLRA has held that the method of computing AUO and time that is to be

excludable from employee regular time in order to compute AUO are negotiable. See AFGE.

Further proof that Magee's protected activity was the true reason behind the restriction placed on Magee's AUO computations is demonstrated by the discriminatory way INS-SD District enforced this supposed new discovery of Agency regulation which prohibited the exclusion of official time spent on local LMR duties from AUO computation.(12) The record establishes that two Union officials continued to exclude local Union representative duties from AUO computations after Magee was prohibited from doing so. As late as April 1994, Union representative Charlie Jones was allowed to exclude official time used for reasons not specified in the INS Manual or DOJ Order from AUO computation. Union Vice President Deborah LeBel excluded official time spent on local LMR activities from AUO computations from December 1993 until October 1994, after the charge in the present matter was filed.(13) Further this agency-wide regulation, which INS-SD District determined should be interpreted in a manner adverse to Magee, is interpreted elsewhere at INS in a manner which allows the same exclusion that Magee had taken. At other District Offices in INS Western Region, INS-SD District's region, the regulation has not been interpreted and/or applied in the manner that INS-SD District applied the regulation so as to adversely effect Magee. In this regard I note that there is no evidence to indicate INS-SD District ever contacted the INS national office to get a ruling as to exactly how the national office interpreted the INS AM and the DOJ Order. In fact even the purported contacts between INS-SD District and the INS Western Region were by telephone and seemed very brief, informal and somewhat ambiguous.

From the timing of the restriction INS-SD District placed on Magee's AUO exclusions I infer the unlawful motivation. United States Customs Service, Region IV, Miami District, Miami, Florida, 36 FLRA 489, 495-496 (1990). Magee filed several unfair labor practice charges in December

1993, which were processed between December 1993 and May 1994, when the action was taken. On March 4, 1994, INS-SD District Director entered into a settlement agreement with Magee in resolution of four unfair labor practice charges regarding official time. The San Francisco Regional Director of the FLRA issued a Complaint against INS-SD District on March 31, 1994, based on Brinkman's statements to Magee regarding the effects of his official time usage on his performance rating. On May 7, 1994, Magee notified INS-SD District that he intended to file an unfair labor practice charge alleging that Brinkman had retaliated against him because of his exercise of protected activity by lowering his performance appraisal. Interspersed between these actions were grievances that Magee filed and processed between January 1994 and May 1994, some of which specifically named Brinkman. When viewed in the light of INS-SD District's managers hostility towards Magee because he exercised protected activity, including the filing of unfair labor practices, and the pretextual reasons for its decision, I conclude that INS-SD District's decision to restrict Magee's AUO exclusions was motivated solely by Magee's exercise of protected activity.

The evidence does not establish that INS SD District would have taken this action in the absence of Magee's protected activity. What is most telling is the treatment of other Union officials at Respondent, whom Respondent did not take action to restrict accordingly. Also, it is a bit coincidental that it is only after Magee began to engage in such a high level of protected activity that it was "discovered" that he was excluding days in his AUO computations that supposedly were prohibited by INS regulation. This was after Magee had been exercising such an exclusion for approximately 2½ years, with Respondent's knowledge and express approval.

INS-SD District may not rely upon its pretextual reason for restricting Magee's AUO exclusions as establishing that it would have placed the restriction upon Magee in the absence of protected activity. Thus any assertion by INS-SD District that it would have relied upon the regulation in the absence of protected activity must be viewed as speculative. That is true in the subject case where it has been concluded that INS-SD District was not required by the INS AM or the DOJ Order to make the change in computing AUO with respect to Magee. The evidence establishes that protected activity was the reason for the action against Magee and any INS SD District representation that it would have taken the action in the absence of protected activity is rejected. Cf., American Federation of Government Employees, Local 1857, AFL-CIO, 44 FLRA 959, 966-967 (1992).

Accordingly, the imposition of the restriction on Magee's AUO exclusions by INS-SD District is found to be an unfair labor practice in violation of section 7116(a)(1) and (2) and (4) of the Statute. Letterkenny, Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts, 43 FLRA 780 (1991).

C. Remedy

In light of all of the foregoing I conclude INS-SD District violated §§ 7116(a)(1),(2), (4), and (5) of the Statute.

When management changes a condition of employment negotiable in substance, the FLRA holds that a status quo ante remedy is appropriate absent special circumstances. U.S. Immigration and Naturalization Service, 43 FLRA 3 (1991). The FLRA has concluded that a status quo ante remedy is necessary in order to ensure that the obligation to bargain is not rendered meaningless:

. . . [W]here an agency has violated the Statute by refusing to negotiate over its decision to change working conditions, the Statute requires the imposition of status quo ante remedies, absent special circumstances, in order not to render meaningless the mutual obligation under the Statute to negotiate concerning changes in conditions of employ-ment. See Veterans Administration, West Los Angeles Medical Center, Los Angeles, California,

23 FLRA 278 (1986).

Department of the Interior, Bureau of Reclamation, Lower Colorado Regional Office, Boulder City, Nevada, 33 FLRA 671 (1988).

INS-SD District has offered no special circumstances warranting deviation from the issuance of status quo ante relief. Consequently, INS-SD District will be ordered to reinstate the practice of allowing Union officials to exclude full days of official time spent on local LMR matters from AUO computations.

In addition to reinstating the policy regarding AUO exclusions, INS-SD District shall make Magee and any other employee whole for any loss of

pay suffered as a result of the change in the method of computing the AUO premium at Respondent. The record establishes that as a result of the change in the method of calculating his AUO premium, Magee has suffered a loss in pay. Accordingly, a back pay award is appropriate in this case. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and U.S. Department of Health and Human Services, Social Security Administration, Hartford District Office, Hartford, Connecticut, 37 FLRA 278, 292-293. (1990).

ORDER

Pursuant to § 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and § 7118 of the Statute, it is hereby ordered that Immigration and Naturalization Service, San Diego District, San Diego, California, shall:

1. Cease and desist from:

(a) Discriminating against R. Michael Magee, President of American Federation of Government Employees, Local 2805, AFL-CIO, or any other employee, by precluding him from excluding whole days spent on labor-management relations activities from the computation of administratively uncontrollable overtime (AUO) because of his exercise of activities protected by the Federal Service Labor-Management Relations Statute and because of his filing unfair labor practice charges.

(b) Changing conditions of employment of employees in the bargaining unit represented by American Federation of Government Employees, Local 2805, AFL-CIO, including no longer permitting employees to exclude whole days of official time spent on labor-management relations activities from the computation of AUO, without first affording the Union notice and an opportunity to bargain concerning any proposed change.

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

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

(a) Reinstate the practice of permitting employees in the San Diego District to exclude whole days of official time spent on labor-management relations activities from the computation of AUO.

(b) Make R. Michael Magee, or any other employee, whole for any loss of pay or overtime pay, with interest, suffered as a result of the unilateral change in the method of the computation of AUO.

(c) Notify the American Federation of Government Employees, Local 2805, AFL-CIO, the exclusive representative of its employees, concerning any future proposals to change any condition of employment, including the method of computing AUO.

(d) Upon request, negotiate with American Federation of Government Employees, Local 2805, AFL-CIO, the exclusive representative of its employees, concerning the substance of any proposed change in any condition of employment, including any change in computing AUO.

(e) Post copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority at its facilities in the San Diego District where bargaining unit employees represented by American Federation of Government Employees, Local 2805, AFL-CIO, are located. Upon receipt of such forms, they shall be signed by the District Director, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including 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.

(f) Pursuant to § 2423.30 of the Federal Labor Relations Authority's Rules and Regulations, notify the Regional Director of the San Francisco Region, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, California 94103-1791, in writing within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 11, 1995

SAMUEL A. CHAITOVITZ

Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES:

WE WILL NOT discriminate against R. Michael Magee, President of American Federation of Government Employees, Local 2805, AFL-CIO, or any other employee, by precluding him from excluding whole days spent on labor-management relations activities from the computation of administratively uncontrollable overtime (AUO) because of his exercise of activities protected by the Federal Service Labor-Management Relations Statute and because of his filing unfair labor practice charges.

WE WILL NOT change conditions of employment of employees in the bargaining unit represented by American Federation of Government Employees, Local 2805, AFL-CIO, including no longer permitting employees to exclude whole days of official time spent on labor-management relations activities from the computation of AUO, without first affording the Union notice and an opportunity to bargain concerning any proposed change.

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

WE WILL reinstate the practice of permitting employees in the San Diego District to exclude whole days of official time spent on labor-management relations activities from the computation of AUO.

WE WILL make R. Michael Magee, or any other employee, whole for any loss of pay or overtime pay, with interest, suffered as a result of the determination that employees could no longer exclude labor-management relations activities from the computation of AUO.

WE WILL notify the American Federation of Government Employees, Local 2805, AFL-CIO, the exclusive representative

of our employees concerning any future proposals to change

any condition of employment, including the method of

computing AUO.

WE WILL upon request, negotiate with American Federation of Government Employees, Local 2805, AFL-CIO, the exclusive representative of our employees, concerning the substance of any proposed change in any condition of employment, including any change in computing AUO.

_____

(Activity)

Date: _____

By: _____

(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, San Francisco Region, 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is: (415) 356-5000.

1. 5 C.F.R. Ch. 1, § 550.51 provides:

> An Agency may pay premium pay on an annual basis, instead of other premium pay prescribed in this subpart (except premium pay for regular overtime work, and work at night, on Sundays, and on holidays), to an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty. Premium pay under this section is determined as an appropriate percentage, not less than 10 percent nor more than 25 percent, of the employee's rate of basic pay. . . .

2. INS is part of the Department of Justice (DOJ).

3. Magee's Time & Attendance sheets (T&As) during this period reflected his exclusion of full days of Union official time from AUO computations. Both Brinkman and Hutton signed Magee's T&As during this period, thereby certifying Magee's

> T&As as correct.

4. Magee's version of his conversation with Brinkman differs from Brinkman's version. I credit Magee's version. I found him to be a more forthcoming and believable witness than Brinkman. Further with respect to this conversation and other incidents, Magee's versions were more consistent with the versions of other witnesses and the surrounding circumstances.

> With respect to this conversation, under either version, Brinkman advised Magee he could no longer exclude the union activities for AUO computation. It was a *fait accompli* and not subject to bargaining.

5. Porter testified that he "(did) not recall" whether he had ordered Brinkman to let Magee out of the room. Porter's testimony was more consistent with Magee's version of this incident than with Brinkman's.

6. Again, as discussed above in n.4, I find Magee a more credible witness than Brinkman and credit Magee's version of this incident. Also, I note that Brinkman admitted on cross examination that this incident angered him and that he views Magee, who involved Hudson in the meeting as his Union representative, as being responsible for the incident.

7. As is the case with other T&A sheets, Jones' T&A sheet wherein he excluded a full day of official time is certified as correct by a supervisor. McGowin, the Deputy Area Port Director viewed Jones as knowledgeable on the subject matter of AUO, and referred other employees to Jones when they had questions regarding AUO.

8. In fact, with respect to AFGE INS Council Western Region Vice President Dennis Smith the record evidence demonstrates that when Smith was away due to official time, his supervisor would fill out his T&A sheets to reflect AUO exclusions without inquiring about the purpose of his official time during the excluded day.

9. The existence of the MOA demonstrates that generally, INS has the ability to bargain regarding changes in the INS Manual. It should be pointed out that the MOA does not in any way touch upon AUO exclusions or the application of AUO to Union officials on official time, it may not be concluded that the subject matter of AUO exclusions or the exclusion of official time from AUO computations is "covered by" the MOA, and that therefore no bargaining obligation exists regarding the change of policy which is the subject of the Complaint. See U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993). In any case, even if the subject matter of AUO exclusions were "covered by" the MOA, Respondent should be precluded from raising such a defense as it did not raise this defense in response to the Union's request to bargain, thereby affording the Union the opportunity to file a grievance regarding the matter.

10. Ironically, in AFGE, INS conceded that the application of the AUO policy as it was being applied to Magee prior to May 1994 would not be inconsistent with the requirements in law and regulation concerning the payment of AUO. AFGE at 620.

11. Brinkman's attitude toward the representative's role in the meeting is likewise indicative of his attitude toward the Union.

12. The employees at El Centro had been on AUO since 1992. Notwithstanding employees having been on AUO for such an extensive period of time at El Centro, the employees at that location needed to be trained on AUO, thereby coincidentally, resulting in Brinkman's "discovery" that Magee was not eligible to exclude his local LMR duties from AUO computa-tions, at least based on Brinkman's interpretation of the INS AM and the DOJ Order. It is additionally noteworthy that though Brinkman was "knowledgeable" about AUO, and had been on AUO his entire career, it was not until Magee engaged in extensive protected activity that such a "discovery" was made by Brinkman.

13. The charge was filed on August 24, 1994.