

**FEDERAL LABOR RELATIONS AUTHORITY** Office of Administrative Law Judges WASHINGTON, D.C.

U.S. CUSTOMS SERVICE WASHINGTON,  
D.C. Respondent

and NATIONAL TREASURY EMPLOYEES  
UNION Charging Party

Case No. WA-CA-00662

Nancy L. Elam, Esquire For the Respondent

Jeanne Marie Corrado, Esquire Richard Bernstein, Esquire For the General  
Counsel

Jonathan Levine, Esquire For the Charging Party Before: WILLIAM B. DEVANEY  
Administrative Law Judge

**DECISION**

**Statement of the Case**

This proceeding, under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, et seq. <sup>(1)</sup>, and the Rules and Regulations thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent violated §§ 16(a)(5) and (1) of the Statute by unilaterally issuing and implementing a memorandum, entitled, "Clarification of Issues Pertaining to the Turnover and Accountability of Seized Narcotics and Currency".

This case was initiated by a charge filed on August 18, 2000 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued on January 31, 2001 (G.C. Exh. 1(b)) and set the hearing for April 25, 2001, pursuant to which a hearing was duly held on April 25, 2001, in Washington, D.C., before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument, which each party waived. At the conclusion of the hearing, May 25, 2001, was fixed as the date for mailing post-hearing briefs, which time subsequently was extended, on Motion of Respondent, to which the other parties did not object, for good cause shown, to June 8, 2001. Respondent and General Counsel each timely mailed an excellent brief, received on, or before, June 12, 2001, which have been carefully considered. Upon the basis of the entire record <sup>(2)</sup>, I make the following findings and conclusions:

**FINDINGS**

1. The National Treasury Employees Union (hereinafter, "NTEU") is the exclusive representative of a nation-wide unit of employees of the U.S. Customs Service (hereinafter, "Customs").

2. Before July 14, 2000, Customs employed a "said to contain" policy with respect to seized narcotics, whereby at the time of initial seizure, the seizing officer would count and weigh the seized narcotics, in the presence of a witness, and then bag, box, etc., and seal the seized

narcotics and weigh the package, or packages, to determine the weight with packing (i.e., shelf weight). The sealed package, or packages, would be delivered to the Seized Property Specialist/Seized Property Custodian (hereinafter, "SPC") for storage in the vault. The SPC would weigh the sealed package, or packages<sup>(3)</sup>

, "said to contain", whatever had been stated by the seizing officer. The SPC did not open the, "said to contain", package and if the shelf weight "balanced" (within acceptable tolerances) the package, or packages, would be placed in the vault. If the shelf weight varied from acceptable tolerances, the variance would be reported to Internal Affairs. If criminally prosecuted, the package, or packages, would be tested; but if criminal proceedings were not instituted, the package, or packages, probably would not be tested. Eventually, narcotics are destroyed. At the time of preparation for destruction, the shelf weight is verified and if the same (within acceptable tolerances) could be destroyed without testing inasmuch as only 5-10 percent are opened and tested (Tr. 118).

Although not specifically stated (see, Tr. 174), the clear inference was that under such procedure, narcotics could be removed and something similar in appearance substituted before the, "said to contain", package, or packages, was sealed; the SPC would not open the package and if the shelf weight "balanced", an innocuous material could be stored in the vault and ultimately be destroyed without detection. The enormous "street" value of narcotics creates a great temptation to take narcotics, substitute something for it, and risk detection.

Mr. Vincent James Parolisi, Director of Narcotics and Currency Inspections, Office of Internal Affairs, prior to May, 1999, when he came to Customs (Tr. 157), had been the Internal Affairs Advisor to the Under Secretary of the Treasury (Tr. 158) and in that position had been tasked by the Under Secretary of Treasury to conduct a study and assessment of Customs' vulnerabilities to corruption, an assessment be made in a Report dated February, 1999 (Res. Exh. 1).

The Report states, in part, that,

"Although OPR (Office of Professional Responsibility) did not uncover any evidence of an organized network of corruption within Customs, OPR concluded that individual acts of corruption have occurred and continue to occur. . . . The large amounts of illegal drugs that pass through U.S. land, sea, and air ports of entry, and the enormous amounts of money at the disposal of drug traffickers to corrupt law enforcement personnel, places Customs and its employees at great risk to corruption. Given the fact, however, that corrupt employees and their accomplices operate under a veil of secrecy and deceit, and take precautions to avoid detection, the exact extent and level of corruption cannot be accurately determined. . . ." (id., p.2).

Of course, Customs was not alone in facing the danger of corruption through lax procedures in the handling of narcotics. In 1999, GAO examined the Department of Justice's Drug Enforcement Administration (DEA) and on November 30, 1999, issued its Report to Attorney General Reno (Res. Exh. 2). The GAO Report found weaknesses, inter alia, such as,

". . .(1) incomplete and missing drug evidence documentation . . . (2) inaccurate recordkeeping of drug and weapon evidence, and (3) improper accounting for drug weights . . ." (id., at 5)

...

"Upon receipt of evidence at the laboratory . . . The evidence custodian is not required to reweigh the evidence . . ." (*id.*, at 14).

...

". . . Properly documenting the weights at different stages (i.e., upon receipt or after analysis) and resolving discrepancies is critical if the exhibit is used as evidence in court and for decreasing the potential for theft. We found weakness with the recorded weights of drug exhibits, from the initial seizure by the agent through destruction by the laboratory. . ." (*id.*, at 19) (Emphasis in original).

In December, 1999, the Commissioner of Customs created the Seized Narcotics Task Force and the Task Force evaluated the findings of GAO concerning DEA as it, in turn, applied to the similar procedures used by Customs and observations of Customs' seized property program around the country. As a result, Mr. Parolisi testified that he concluded that the practice of not having seized property custodians verifying what they are accepting was a corruption vulnerability (Tr. 165) and recommended to "Everyone that would listen" that SPC's blind acceptance of seized property must be changed (Tr. 164). The urgent need for such change was further emphasized by an incident in Puerto Rico in March, 2000, when a discrepancy of over 20 pounds of cocaine was discovered one month after it reached the vault (9.7 kilograms) (Res. Exh. 3a). The report of investigation noted, in part, that:

". . . there are several integrity issues that should be reviewed . . . Of primary concern is the fact that the cocaine bricks were neither counted nor weighed upon entry into the custodian's custody. Accordingly, the Customs Service did not know how much cocaine it was taking into custody. . . ." (Res. Exh. 3c at p.3) (Emphasis in original).

Mr. Parolisi's stated that, "The initial investigation by Internal Affairs was inconclusive in that the investigating officers could not determine if, in fact, the weight loss was attributed to some climate changes in the vault or some dehydration of the drug . . . ." (Tr. 172), and accordingly, he had customs laboratory personnel in Washington, D.C. go to San Juan to conduct a scientific inquiry. The scientific examination concluded, ". . . that it would appear that the loss of weight was due to the evaporation of water rather than the removal of cocaine" (*id.*; see, also, Res. Exh. 3d).

### 3. With Congressional interest in Customs' efforts

to confront corruption and vulnerability to corruption (Tr. 185-186), the large number of investigations of weight discrepancies closed as unsubstantiated because we had

no baseline to fix the property received by the SPC (Tr. 165-166), the Puerto Rico (Tr. 171) and the Otay Mesa incidents (Tr. 179-180) et al. (Tr. 187, 189), Mr. Parolisi testified that ". . . there was an opinion shared by senior managers that the need for this change ("said to contain") was critical . . . ." (Tr. 189). Accordingly, Commission Kelly directed a Customs-wide initiative to discuss and review Customs' handling of narcotics and numerous conferences and meetings were held beginning in April, 2000, with a meeting in Seattle, Washington, of which Jonathan Levine, Esquire, the Union's Assistant Counsel for Negotiations, was

notified by letter dated March 3, 2000 (Res. Exh. 13), and the Union designated representatives for the conference (Res. Exh. 13, Attachment [E-mail]). The subject of the conference was the "Fines, Penalties and Forfeitures/Seized Property Handbook" (hereinafter, "Handbook"), one of the provisions proposed was the, ". . . issue of said to contain." (Tr. 178). Mr. Parolisi stated that over 100 people, including, ". . . seized property custodians and fines and penalties officers from throughout the country" (Tr. 178) were in attendance. Another conference on the Handbook was held on June 13-15, 2000, in Savannah, Georgia, and Ms. Cathy Montijo, an SPC in Douglas, Arizona, was present as the Union representative on the "said to contain" working group (Res. Exh. 12; Tr. 230). Mr. Dennis McKenzie, Director, Seized Property Systems, and in June, 2000, had been Branch Chief, Fines, Penalties and Forfeitures Branch (Tr. 219), stated that, after the Savannah meeting, his then supervisor, Ms. Sharon Mazur, directed him to take the matters ("said to contain", "milk runs", time of delivery to SPC and time to deliver seized property) and put them in a separate document which became the July 14, 2000, memorandum (Tr. 232, 233). Mr. McKenzie stated that either late in June or early July, 2000, a copy of the memorandum was issued for service on the Union and, ". . . We thought that it had been issued through LER and at some later point we were notified by LER that the memo had not, in fact, been sent to NTEU." (Tr. 235). Mr. Edwin Banks, Labor Relations Specialist, credibly testified that, in late June or early July, he was given a copy of the memorandum by Mr. Steve Schorr, supervisor in the Seized Property FP&F area (Tr. 276) and told to serve the Union (id.), that he drafted a letter of transmittal to the Union (Tr. 277); but he "dropped the ball" and just plain, "... lost sight of it and I did not send the notification." (id.). Mr. Banks said that Mr. Tom Whitlock, his former supervisor who had recently retired, called and told him that Mr. Levine had called him about the memorandum and that he, Banks, immediately, on July 24, 2000, sent a facsimile copy with a transmittal in which he said, in part:

"I was supposed to send you a letter around July 4, 2000. I can't give you a good reason why I did not send it. However, here is the signed copy [dated July 14, 2000] . . . ." (G.C. Exh. 2).

4. The memorandum dated July 14, 2000, provided, in part, as follows:

"The purpose of this memorandum is to issue interim instructions which are effective immediately and to amend certain provisions set forth in the attached Commissioner's memorandum entitled 'Maximum Time Limits for the Turnover of Seized Property to Customs Seized Property Custodians' . . . 'Processing Narcotic Drug and Controlled Substance Evidence' . . . ; and, Customs Directive CD 5310-14 'Currency/Monetary Instruments: Seizure, Inventory and Reporting Procedures' . . . This memo will be incorporated in the new FP&F/Seized Property Handbook.

"Clarifications to these policies are provided below.

## **"I. SAID TO CONTAIN**

## "A. Narcotics

"1) At the time of initial seizure (except for time critical controlled deliveries), the seizing officer will conduct a thorough count of the seized narcotics in the presence of a witness.

"2) Bags, boxes, etc., will be sealed by the seizing officer and initialed by both the seizing officer and the witness (unless delivered directly to the Seized property Specialist/Custodian (SPS/SPC) at the vault).

"3) The CF 6051 (Custody Receipt for Retained or Seized Property) will note exactly the contents of each bag or box. Example: If 200 lbs. of cocaine is seized and the cocaine is in 100 bricks, and the seizing officer then packages those bricks in five boxes, the CF 6051 line item will be filled out as follows: '100 bricks in five boxes total weight 200 lbs.' See Sample CF 6051 for seizing officer, attached.

"4) The delivering officer or the seizing officer will transport the seized narcotics to the SPS/SPC **within 72 hours** from the time of seizure. At the time of pick-up from the seizing officer and delivery to the SPS/SPC, the delivering officer will not re-confirm the contents of the sealed boxes, but only that he/she is transporting five sealed boxes. Upon delivery, he/she will sign the CF 6051 showing '100 bricks in five boxes total weight 200 lbs.,' confirming delivery on a 'said to contain' basis.

**(The delivering officer is the only party that signs the CF 6051 on a 'said to contain' basis.)** See sample CF 6051 for transporting officer, attached.

Note: The timeframe for delivering seized narcotics to the SPS/SPC is changed to 72 hours from 3 business days, as stated in the Commissioner's memorandum entitled 'Maximum Time Limits for the Turnover of Seized Property to Customs Seized Property Custodians' dated November 25, 1994.

"5) Upon delivery to the SPS/SPC, the SPC will open all containers and with the delivering officer/seizing officer as a witness will perform joint verification - checking seals, initials, etc. The delivering officer will also witness the SPS/SPC's re-counting, reweighing, and packaging (of narcotics) for permanent vault storage initialing the seals along with the SPS/SPC, as well as initialing the CF 6051 annotated by the SPS/SPC recording the count and weight. The SPS/SPC will note how many bricks are in each box, and mark each box to show how many bricks it contains. The CF 6051 will be annotated to show count, weight, etc. See sample CF 6051 for SPS/SPC, attached.

## "B. Currency

"1) Currency will be delivered on a 'said to contain' basis to the SPS/SPC, having been counted, packaged, and annotated on the CF 6051 by the seizing officer and verifier.

"2) However, while joint verification of seals, initials, etc., on the seizing officer packaging will be done, currency will not be re-counted upon delivery to the SPS/SPC. The 'second' count will be made at the time of deposit.

## "II. SPS/SPC 'MILK-RUNS'

"1) SPS/SPC will no longer make 'milk-runs' to pick up seized property from the place of seizure. The seizing officer or an agent in the seizing office designated by the Special Agent in Charge (SAIC) or case

initiator supervisor will deliver all high-risk seized property to the SPS/SPC location. This also applies to any non-high-risk property that is not picked up by the contractor.

"2) The following standard will apply for transportation of all high-risk property (narcotics, currency, and weapons).

"a) A minimum of two armed inspectors or agents will transport all high-risk property. They will be equipped with a radio, cell phone and body armor. Sector communications shall be notified of each transport.

"b) The Director, Field Operations (DFO), in conjunction with the Special Agent in Charge (SAIC), may develop a local high-risk transport policy above this minimum standard, based on a local risk assessment. The SAIC and the DFO will as part of this local risk assessment determine at what levels Special Agents will be required to participate in the transportation of very high-risk shipments (large quantities) where the SAIC is not the seizing office.

### "III. QUANTITY COUNTS - TABLETS/CAPSULES

"1) If packaged in factory-sealed containers, use count on container.

"2) If not packaged in factory-sealed containers, count the amount of pills up to 500.

"a) If the count is less than 500, use the actual count on the CF 6051, i.e., 459 pills would be identified as 459 tablets on CF 6051.

"b) If the count is over 500, use the following extrapolation methodology:

Weigh to determine total weight of all pills in seizure.

Count out 500 pills  
Weight the 500 pills

Divide result into total weight of all pills in seizure and multiply by 500 to get estimated pill count. "c) On the CF 6052, note both extrapolated unit of measure (UM) count and method of extrapolation.

"d) In SEACATS, enter only estimated UM (pill) count determined by extrapolation methodology.

"e) In the approximate weight block on the CF 6051 enter the net weight of the seizure regardless of the methodology used.

...

(G.C. Exh. 2, Attachment).

5. Mr. Levine responded to Mr. Banks' facsimile message of July 24, 2000, by letter the next day, July 25, 2000 (which was sent by facsimile) in which he stated as follows:

"...

"Re: Clarification of Issues Pertaining to the Turnover and Accountability of Seized Narcotics and Currency

"Dear Mr. Banks:

"Thank you for providing me with the letter from the Deputy Commissioner concerning the above-referenced matter. NTEU hereby requests to bargain on all negotiable issues related to this change. As you are aware, Customs has implemented these changes without first negotiating with NTEU. Based upon my review of the document and the many calls which I have been receiving from the bargaining unit, the 'clarification of issues' will result in a significant impact for all employees involved in the seized property process. Under these circumstances, NTEU requests that Customs issue a notice to employees informing them that the changes reflected in the July 14, 2000 memorandum will be held in abeyance pending negotiations with NTEU or the convening of a pre-decisional workgroup." (G.C. Exh. 3) (Emphasis supplied).

6. Mr. Banks replied by letter dated July 31, 2000, in which he stated as follows:

"...

"Re: Fines, Penalties & Forfeitures/Seized Property Handbook

"Dear Mr. Levine:

"You were provided a draft copy of this Handbook in March on an informational basis. While the final version enclosed has some differences, the basic document is the same. You also were provided opportunities on two occasions to designate representatives at FP&F Conferences in July of 1999 and 2000 at which Handbook issues were discussed. This Handbook includes the full memorandum entitled 'Clarification of Issues Pertaining to the Turnover and Accountability of Seized Narcotics and Currency', called informally, the 'Said to contain' policy.

"As you are aware, you received no notification concerning the Said to Contain policy. There was an error in the Labor Relations Office; otherwise, you would have received a copy of the draft on July 3, 2000. I am in receipt of your July 25, 2000 letter on this matter in which you have requested that Customs hold the Said to Contain Policy in abeyance until bargaining is completed. However, inasmuch as this Policy was issued because of serious deficiencies in our property management of narcotics and currency, we are not in a position to hold it in abeyance.

"We are prepared to offer you an opportunity to expedite negotiation of the Handbook. The Policy is part of the Handbook, which will provide you with an opportunity to address your concerns regarding the Policy expeditiously. There is a serious need to provide all of our FP&F and Seized Property Officers with overall guidance to protect them, the property, and the Customs Service from property related deficiencies. The issuance of this Handbook will do that.

"We are prepared to enter in negotiations with you immediately, if you request it. Please contact me . . . as soon as possible with your decision." (G.C. Exh. 4).

7. Mr. Levine attended an August 1, 2000, briefing on the Handbook (Tr. 39) and Mr. Banks wrote to Mr. Levine on August 1, 2000, stating, in part, as follows:

Thank you for attending the briefing on this Handbook. While we can understand your concerns and your request to pull back the Said to

Contain Memorandum, we cannot do that without risking future seized property deficiencies of the type that have already occurred, particularly with regard to narcotics or currency.

Therefore, we have offered you the opportunity to expedite bargaining on the Handbook in order to deal with your concerns as quickly as possible. While there hasn't been a discussion about specific weeks, we will make ourselves available any week this month. . . ." (G.C. Exh. 5).

8. By letter dated August 9, 2000, to Mr. Levine, Mr. Banks confirmed their telephone agreement that negotiations on the Handbook would begin September 12, 2000 (G.C. Exh. 6). Mr. Levine said that they did not reach agreement in the initial three day session but that he continued bargaining with Mr. Banks and, "... We reached an agreement on what are called the impact and implementation proposals. . . ." (Tr. 43).<sup>(4)</sup> The "Memorandum of Understanding Regarding Said to Contain" was signed by Mr. Levine and by Mr. Banks on March 15, 2001 (G.C. Exh. 7) and was approved and implemented by Respondent on May 9, 2001 (Res. Exh. 17).

Mr. Levine stated that

"Q And at the time of the signing of the MOU were there outstanding impact and implementation issues that the Union wanted to bargain?

"A No, at the time we signed the MOU, I intended this to be out [sic] impact and implementation agreement." (Tr. 46)

Later, I asked Mr. Levine about this and he responded as follows:

"JUDGE DEVANEY: Mr. Levine, let me ask you for my clarification. Did I understand you to say that you considered the March 15, 2001 agreement to be the complete I & I agreement?

"THE WITNESS: At the time, yes I did."

(Tr. 73).

9. The signed MOU (March 15, 2001) is General Counsel Exhibit No. 7 and is set forth hereinafter. The Agreement approval and implemented on May 9, 2001, is identical in all substantive provisions but the title and format was changed slightly to eliminate in Paragraphs 2-9 reference of the MOU to proposal numbers and bears no signatures or dates. The May 9, 2001, memorandum stated, in part, as follows:

". . . The clarification of our policy with regard to the term 'Said to Contain' resulted in Customs management and the National Treasury Employees Union (NTEU) bargaining over the impact and implementation of changes in procedures.

"Also attached is a document that repeats the agreement reached between management and NTEU . . . In those instances where the agreement differs from the provision of the July 14, 2000, memorandum, the agreement takes precedence. . . ." (Res. Exh. 17).

To provide a complete record, each is set forth, as follows:



"MEMORANDUM OF UNDERSTANDING

REGARDING SAID TO CONTAIN

"The parties below agree to the following procedural changes to the Said To Contain policy issued July 14, 2000. Agreement to the procedures below does not limit either party's right continue their statutory or contractual dispute with regard to those matters that have not been agreed to in this MOU.

"1. The CF 6051 (Custody Receipt for Retained or Seized Property) will be annotated by the seizing officer to show count, net weight, etc. For example, the CF 6051 line item (#20) will be filled out as follows:

20.a (line item no.) 1

20.b (description) 100 bricks cocaine net weight 200 lbs. Packed in 5 boxes gross weight 210 lbs.

20.d (type of container) boxes

20.e (u/m) lbs.

20.f (quantity) 210

"2. (the first sentence of your no. 2) Seized narcotics will be transported to the SPS/SPC within 3 calendar days from the time of seizure.

"3. (Your no. 7) Net weight equals weight of drug without any accompanying packaging unless such packaging cannot be separated from said drug without compromising the integrity of the seizure.

"4. (Your no. 8) Individual bricks do not require weight verification. For example, in a seizure of 1,000 lbs. of cocaine which is packaged in 100 bricks, the CF 6051 will show 100 bricks of cocaine, net weight of 1000 lbs.

"5. (Your no. 9) Exceptions to this policy, e.g., the 3-day calendar rule, SPS/SPC 'milk runs', can be submitted to Headquarters for approval.

"6. (Your no. 10) Nothing in this policy requires SPS/SPCs to be responsible for verifying that substance counted and weighed is a controlled substance. An SPS/SPC will be permitted to testify and/or represent that a particular controlled substance is what is determined by field or DEA testing.

"7. (Your no. 11) Inspectors will be provided the equipment identified in the policy.

"8. (Your no. 12) Customs will undertake a study to determine what, if any, personal protective equipment will be necessary for an SPS/SPC and the results will be provided to NTEU at the national level.

"9. (Your no. 13) Training in the new procedures will be provided to all employees and managers affected by the change. In addition, the SPS/SPC will be provided training on the safe handling of controlled substances.

Jonathan Levine 3/15/01 Edwin B. Banks 3/15/01

Signature NTEU Date Signature Management Date

(G.C. Exh. 7)

"AGREEMENT BETWEEN  
U.S. CUSTOMS SERVICE  
AND  
NATIONAL TREASURY EMPLOYEES UNION  
REGARDING  
SAID TO CONTAIN POLICY

"1. The 6051 (Custody Receipt for Retained or Seized Property) will be annotated by the seizing officer to show count, net weight, etc. For example, the CF 6051 line item (#20) will be filled out as follows:

20.a (line item no.) 1

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20.d (type of container) boxes

20.e (u/m) lbs.

20.f (quantity) 210

"2. Seized narcotics will be transported to the Seized Property Specialist/Seized Property Custodian (SPS/SPC) within 3 calendar days from the time of seizure.

"3. Net weight equals weight of drug without any accompanying packaging unless such packaging cannot be separated from said drug without compromising the integrity of the seizure.

"4. Individual bricks do not require weight verification. For example, in a seizure of 1,000 lbs. of cocaine which is packaged in 100 bricks, the CF 6051 will show 100 bricks of cocaine, net weight of 1,000 lbs.

"5. Exceptions to this policy, e.g., the 3-day calendar rule, SPS/SPC 'milk runs,' can be submitted to Headquarters for approval.

"6. Nothing in this policy requires SPS/SPCs to be responsible for verifying that the substance counted and weighed is a controlled substance. An SPS/SPC will be permitted to testify and/or represent that a particular controlled substance is what is determined by field or DEA testing.

"7. Inspectors will be provided the equipment identified in the policy.

"8. Customs will undertake a study to determine what, if any, personal protective equipment will be necessary for an SPS/SPC; and the results will be provided to NTEU at the national level.

"9. Training in the new procedures will be provided to all employees and managers affected by the change. In addition, the SPS/SPC will be provided training on the safe handling of controlled substances." (Res. Exh. 17) (Attachment).

10. Ms. Ann Lynnette Prado, an SPC at Dallas (Tr. 75-76), testified that she had health concerns about opening packages containing narcotics retrieved from internal body parts of carriers and that her supervisor had given her permission, ". . . to accept the bag sealed said to contain and I've annotated the file to that effect." (Tr. 103).

Mr. Frank Feely, Senior Customs Inspector in Buffalo and Niagra Falls, New York and Chapter President of NTEU Chapter 154 (Tr. 124-125), testified that in August or September, 2000, he negotiated a local agreement on the assignment of work that arose from the July 14, 2000, memorandum (Tr. 151). Mr. Feely's testimony was ambiguous but he seemed to have said that it was agreed locally that the SPCs would still collect the seized property. This is what he said,

"Q And before you reached the agreement what was happening as far as the transporting?

"A The seized property people were still going out and collecting out the seized property. The past practice remained in effect in that the seized property people were the ones who were still going out and picking up the drugs and the merchandise." (Tr. 151).

Mr. Dennis McKenzie, Director, Seized Property Systems (Tr. 219), testified that Respondent's policy since at least July 2, 1992 (Res. Exh. 11) had been that the seizing officer would deliver the narcotics to the SPC (Tr. 245). Respondent's Exhibit 11, in this regard, stated:

"SEIZING OFFICER . . .

Immediately (within one business day notifies SPC . . . of seizure and delivers CF 6051, copy of S/A/S Report and property over to SPC . . . ; or, in coordination with the SPC. . . , arranges delivery of property; or coordinates early release, constructive seizure, or other initial storage location with SPC . . . ." (Res. Exh. 11, p.2).

### CONCLUSIONS

Respondent had the right under § 6(a)(1) of the Statute to determine its internal security practices, and it exercised that right when it determined to clarify issues pertaining to the turnover and accountability of seized narcotics and currency. In clarifying its practices, Respondent pinpointed, inter alia, four potential problems and took steps to correct them. First, for narcotics, but not currency, it eliminated SPC's (Seized Property Custodians) acceptance of sealed packages on a "said to contain" representation and SPCs were required, in the presence of the delivering officer, to open, count, re-weigh and then re-seal packages of narcotics. Second, SPCs were not to go out and pickup seized property. Third, when transporting narcotics greatly increased security was required, including the use of two armed inspectors equipped with body armor and cell phones. Fourth, time of delivery of seized property to SPC was changed from 3 business days to 72 hours.

Commissioner Kelly directed a Customs-wide initiative to discuss and review Customs' handling of narcotics and numerous conferences and meetings were held beginning in April, 2000, with a meeting in Seattle, Washington, of which NTEU was given notice and it designated representatives for the conference. The subject of the conference was Respondent's Handbook and the above four proposals, as well as many other ideas, were discussed. A further conference was held on June 13, in Savannah, Georgia, at which a representative of NTEU was present. Following the Savannah meeting, Respondent took the four items set forth above (elimination of "said to contain" policy for narcotics; elimination of "milk runs", i.e., SPCs going out to pick up seized property; time of delivery of seized property, i.e., from 3 business days to 72 hours; and increased security for transportation of all high-risk property) and incorporated them in the memorandum dated July 14, 2000 (G.C. Exh. 2, Attachment). There is no dispute that Respondent, in late June or early July, gave Mr. Edwin Banks, its Labor Relations Specialist, a copy of the memorandum with instructions to serve NTEU. Because of incredible negligence and lack of attention, after he had drafted a letter of transmittal, Mr. Banks failed to serve NTEU and the memorandum was implemented by Respondent on July 14, 2000.

Plainly, Respondent violated §§ 16(a)(5) and (1) of the Statute by its failure to give NTEU notice and an opportunity to bargain on the impact and implementation of the changes made by the memorandum of July 14, 2000, inasmuch as the record is devoid of evidence that implementation of the changes, without bargaining, were necessary for the functioning of the agency. U.S. Department of Justice, Immigration and Naturalization Service, 55 FLRA 892, 904 (1999). Indeed, the record shows that none of the changes, individually or collectively, was necessary for the functioning of the agency so as to warrant unilateral implementation without bargaining. For example: (a) Respondent intended to give NTEU notice and to afford NTEU the opportunity to bargain before implementation, which was thwarted only by the inexcusable neglect of Mr. Banks and his disregard of instructions; (b) after implementation, on July 14, 2000, Respondent negotiated local modification of the "said to contain" policy at Dallas (Tr. 103) and to the pick-up of narcotics "milk runs" by SPCs in the Buffalo area (Tr. 151); (c) Mr. Feely, President of Chapter 154, which represents employees in Buffalo, Niagra Falls, Rochester and Syracuse, New York, and a Customs Inspector for 27 years (Tr. 124-125) testified that, ". . . The primary concern for us was the net weight, the weight of the actual drugs or particularly under this directive narcotics. So I mean the weight of the narcotics was the controlling, was the important thing." (Tr 141); Mr. Parolisi's OPR report stated, ". . . OPR (Office of Professional Responsibility) did not uncover any evidence of an organized network of corruption within Customs. . . ." (Res. Exh. 1, p. 2); the GAO report on DEA pointed to: "Upon receipt of evidence at the laboratory . . . The evidence custodian is not required to reweigh the evidence . . ." (Res. Exh. 2, at 14), the need to, ". . . properly documenting the weights at different stages. . . ." (id., at 19); (d) after implementation, Respondent and NTEU negotiated an I&I agreement (G.C. Exh. 7; Res. Exh. 17, Attachment).

The record clearly demonstrates that the changes, both individually and collectively had more than a de minimis impact on the employees' conditions of employment. For example, the elimination of the "said to contain" policy meant that the SPCs, ". . . will open all containers . . . The delivering officer will witness . . . re-counting, reweighing, and packaging (of narcotics) for permanent vault storage. . . ." (G.C. Exh. 2, Attachment; Tr. 87,

88). In addition, the SPC had a new, "Quantity Counts - Tablets/Capsules" policy which required, if the material were not in factory-sealed containers, to count pills up to 500; if count is over 500, to weigh 500 pills, divide result into total weight of all pills, and multiply by 500 to get estimated pill count (Tr. 93-94, 95). The SPC was doing a variety of tasks not previously performed, the SPC was exposed to airborne drug vapors or narcotic powders (Tr. 88-89), the delivery officer had to witness the SPC's re-weighing, re-counting and re-packaging of narcotics, initial seals etc., none of which had he been required to do previously.

The change on the time of delivery of seized narcotics to the SPC from three work days to 72 hours meant, inter alia, that delivery could, and would, on some occasions fall on holidays and/or Saturdays and Sundays when, generally, the fewest Inspectors were available and Inspectors would have to be called in on overtime to make such deliveries to the SPC and, in turn, SPCs had to be on duty when, otherwise, they would not be working (Tr. 90-91).

Elimination of "milk runs", i.e., SPCs going out to pick-up small seizures, for example, different terminals at JFK or Dallas (Tr. 91, 92), meant that the seizing officers had to bring the narcotics to the SPC which creates personnel staffing shortages. In addition, outlying ports such as Tulsa and Oklahoma have to bring narcotics seizures to Dallas (Tr. 93), so to transport a narcotics seizure with two armed guards, ". . . they're basically shuttling that port down for the day." (Tr. 93).

Required use of two armed Inspectors equipped with radio, cell phone and body armor, to, ". . . transport all high risk property (narcotics, currency, and weapons)." (G.C. Exh. 2, Attachment II 2), a)) while commendable security strains available manpower at points of seizure to comply (Tr. 92, 93).

Respondent's violation of §§ 16(a)(5) and (1) of the Statute ordinarily obviously would call for a status quo ante remedy, Federal Correctional Institution, 8 FLRA 604, 606 (1982); U.S. Department of Justice, Immigration and Naturalization Service, 55 FLRA 892, 902-903 (1999). Indeed, the Authority's "Holy Grail" in determining the appropriateness of a status quo ante remedy, is whether there is evidence that a status quo ante remedy, ". . . would be disruptive to the operations of an agency. . . ." U.S. Department of Justice, Immigration and Naturalization Service, 56 FLRA 351, 359-360 (2000).

Nevertheless, a status quo ante remedy is inappropriate in this case for the reason that NTEU and Respondent have already negotiated a "Memorandum of Understanding Regarding Said To Contain" (G.C. Exh. 7). Mr. Levine, who negotiated the agreement for NTEU, testified,

". . . We reached an agreement on what are called the impact and implementation proposals. . . ." (Tr. 43).

. . .

"A . . . at the time we signed the MOU, I intended this to be out impact and implementation agreement." (Tr. 46).

(See, also the colloquy between me and Mr. Levine (Tr. 73)).

Consequently, because the purpose of a status quo ante remedy is to restore conditions as they existed before the illegal implementation, while impact and implementation (i.e., § 6(b)(2) and (3) issues) are negotiated, such remedy is not appropriate here where the parties have already negotiated a full and complete I&I agreement. The MOU was signed on March 15, 2001 (G.C. Exh. 7) and, although submitted for approval before the date of the hearing (April 25, 2001), it was not approved until May 9, 2001, at which time it was implemented by Respondent. Respondent specifically stated, ". . . In those instances where the agreement [MOU] differs from the provisions of the July 14, 2000, memorandum, the agreement [MOU] shall take precedence. . . ." (Res. Exh. 17).

Having found that Respondent violated §§ 16(a)(5) and (1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(c), and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the United States Customs Service, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing and refusing to give the National Treasury Employees Union (hereinafter "NTEU"), the exclusive representative of its employees, notice of any change in conditions of employment and affording NTEU the opportunity to bargain to the extent required by the Statute, which, with regard to § 6(a)(1) changes relating to internal security, requires bargaining on the impact and implementation of such changes.

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

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

(a) Post at all of its facilities nation-wide where bargaining unit employees represented by NTEU are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commissioner, U.S. Customs Service, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director, Washington Region, Federal Labor Relations Authority, Tech World Plaza, 800 K Street, NW, Suite 910N, Washington, DC 20001, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

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WILLIAM B. DEVANEY Administrative Law Judge

Dated: November 2, 2001

Washington, DC

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF THE**

**FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the U.S. Customs Service, Washington, D.C., violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** fail and refuse to give the National Treasury Employees Union (hereinafter "NTEU"), the exclusive representative of our employees, notice of any change in conditions of employment and affording NTEU the opportunity to bargain to the extent required by the Statute, which, with regard to § 6(a)(1) changes relating to internal security, requires bargaining on the impact and implementation of such changes.

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

DATED: \_\_\_\_\_ BY: \_\_\_\_\_

Commissioner

United States Customs Service

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Washington Region, Federal Labor Relations Authority, whose address is: Federal Labor Relations Authority, Tech World Plaza, 800 K Street, NW, Suite 910N, Washington, DC 20001, and whose telephone number is: 202-482-6700.

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71", of the statutory reference, i.e., Section 7116(a)(5) will be referred to, simply, as, "§ 16(a)(5)".

2. On June 8, 2001, Respondent filed a Motion to Supplement the Record by admitting as Respondent's Exhibit 17, a memorandum issued May 9, 2001, which implemented the Memorandum of Understanding reached in March, 2001 (G.C. Exh. 7). Neither the General Counsel nor the Charging Party filed an opposition; however, Respondent stated that, ". . . they [G.C. and Counsel for the Charging Party] do not agree the document is relevant . . ." (Res. Motion p.3). For the reasons stated by Respondent and in light of General Counsel's Exhibits 7 and 8, I find the proffered exhibit relevant and, accordingly, Respondent's Exhibit 17 is received and incorporated as part of the record.

3. At Otay Mesa, Southern California Fines, Penalties and Forfeiture Office, a March, 2000, inspection showed that SPCs were not even verifying the shelf weight of seized property (Res. Exh. 4, p. 10).

4. Mr. Levine further stated,

". . . We did not reach agreement on my methods of performing work proposals and as a result I filed a separate grievance . . . on their violation of the contract by refusing to bargain on the method proposals." (Tr. 43).

This issue, of course, is not before me.