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

DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, U.S. BORDER PATROL EL PASO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1929 Charging Party	Case No. DA-CA-01-0612

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **NOVEMBER 1, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

Dated: September 28, 2004
Washington, DC

UNITED STATES OF AMERICA

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

MEMORANDUM DATE: September 28, 2004

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
U.S. BORDER PATROL
EL PASO, TEXAS

Respondent

and Case No. DA-CA-01-0612

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1929

Charging Party

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

Enclosures

OALJ 04-44

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

DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, U.S. BORDER PATROL EL PASO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1929 Charging Party	Case No. DA-CA-01-0612

Robert H. Humphries, Esquire
William (Van) Balzer, LRS
For the Respondent

Bruce E. Conant, Esquire
For the General Counsel

James Stack, Representative
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed by the American Federation of Government Employees, National Border Patrol Council, Local 1929 (Union), against the U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol,[1] El Paso, Texas (Respondent), as well as a Complaint and Notice of Hearing issued by the Regional Director, Dallas Region of the Federal Labor Relations Authority (FLRA). The complaint alleged that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the

[1] Effective March 1, 2003, the Respondent merged with other agencies and its name was changed to United States Border Patrol, U.S. Customs and Border Protection, Department of Homeland Security.

Statute), 5 U.S.C. § 7116(a)(1) and (5) by its conduct in changing the grooming standards required of Border Patrol agents serving on plainclothes details at the Santa Teresa, New Mexico Border Patrol Station.

A hearing in this matter was held in El Paso, Texas. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. Both the General Counsel and the Respondent filed timely helpful briefs. On April 6, 2004, the General Counsel filed a Motion Requesting Remand of Case to Regional Director. On April 16, 2004, I issued an Amended Order on Motion to Remand, denying the motion but allowing the parties to submit supplemental briefs on the issues of whether the change in conditions of employment, if any, effected by the Respondent was *de minimis* and whether the ruling of the Authority in *Social Security Administration, Office of Hearings and Appeals, Charleston, South Carolina*, 59 FLRA 646 (2004) (*SSA*) should be applied retroactively. The Respondent timely submitted its Brief in Response to April 16, 2004 Order on May 5, 2004. Neither the General Counsel nor the Charging Party filed a supplemental brief in response to the April 16 order.

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

Statement of the Facts

The American Federation of Government Employees, National Border Patrol Council (Council) is the exclusive representative of a unit of employees appropriate for collective bargaining at the U.S. Border Patrol (Border Patrol). The American Federation of Government Employees, AFL-CIO, Local 1929 (Union) is an agent of the Council for purposes of representing employees at the Border Patrol, including employees at the El Paso Sector. (G.C. Ex. 1(d) and 1(f)).

There are twelve Border Patrol stations located throughout West Texas and New Mexico in the El Paso Sector. There are approximately 1000 to 1100 Border Patrol agents throughout the El Paso Sector. (Tr. 81) The Santa Teresa Station is located about 30 minutes from El Paso and has approximately 120 to 130 bargaining unit employees, with 15-20 supervisors. (Tr. 12-13, 97)

The parties have a master collective bargaining agreement (CBA), which expired in October 1998. The parties

still adhere to provisions of the collective bargaining agreement. Article 29 of the CBA (Jt. Ex. 1, page 42) deals with Grooming and Appearance.[2]

The parties are in agreement that uniformed Border Patrol agents are to have head and facial hair neatly trimmed and groomed, with no beards or goatees. James Stack, the president of the Union, asserted that employees working in plainclothes had no defined grooming standard and that any grooming standard evolved from sector to sector and varied from station to station.[3] (Tr. 13)

According to Stack, the majority of Border Patrol agents work in uniform at all times. There are a number of different types of plainclothes details that give agents a break from the typical work. Most details are typically worked Monday through Friday, with the weekend off, while uniformed agents perform shift work throughout the week. (Tr. 19) When working the plainclothes details, Border Patrol agents do not wear the standard uniform but instead wear civilian clothing. Such plainclothes details include prosecutorial details, in which the agents work closely with the U.S. Attorney's office; details with Border Patrol Criminal Alien Program (BORCAP), in which agents prepare forms and reports to remove/deport criminal aliens; vehicle maintenance details, in which agents coordinate various preventative and corrective maintenance of Station vehicles and work with the mechanics; and sensor details, which

[2] Article 29 states, in part:

> A. Subject to Section D of this Article and any applicable bargaining obligations under the CSRA, the Service retains the right to establish reasonable grooming standards for all employees. Any grooming standards so established for uniformed officers will be designed to promote their image as professional law enforcement officers.
>
> . . .
>
> D. Head and facial hair, including sideburns and moustaches, shall be neatly trimmed and clean, and shall neither interfere with the wearing of the required uniform nor constitute a safety hazard or an impediment to the employee's ability to properly perform his or her assigned duties. Beards shall not be permitted, except for medical and religious reasons. . . .

[3] This case does not involve grooming standards for unit employees who are working undercover assignments.

involve maintaining, moving and relocating sensors used to detect motion in the field. The time periods for these details can vary, but generally last 3 months, 6 months or one year. The vehicle maintenance detail can last as short as one pay period. (Tr. 19-22) At any given time approximately 25-30 agents at the Santa Teresa Station will be on some type of detail, with one-half of those as plainclothes details. (Tr. 97)

Jerry Armstrong has been the Deputy Chief Patrol Agent for the El Paso Sector since January 1999. (Tr. 77) It is Armstrong's responsibility to enforce the rules and regulations of the agency and to carry out the directions of Chief Patrol Agent Luis E. Barker. Barker has been Chief of the El Paso Sector since late 1998. (Tr. 78) Both Armstrong and Barker work in El Paso and are about 20-25 miles from the Santa Teresa Station office. (Tr. 88) Armstrong does not visit the Santa Teresa Station office very often. (Tr. 89) Armstrong denied that he was not aware of the actual grooming standards of the Border Patrol agents and indicated that he sees Border Patrol agents all of the time and if he sees someone out of compliance with the standard, he will speak to them and make sure they come into compliance. (Tr. 90, 94)

Armstrong indicated that the grooming standards at the El Paso Sector were based on management's interpretation of a section of the parties' collective bargaining agreement and had been consistent in his years with the Border Patrol. Uniformed employees will be clean-shaven, meaning no beards, with restrictions on mustaches, side burns, and length of hair. This standard also applies to agents on plainclothes details, with the exception of agents assigned to anti-smuggling and undercover. (Tr. 79). The policy is continuously disseminated through the ranks, from the Chief and the Deputy Chief to the Patrol Agents in Charge (PAIC) and the supervisory personnel. (Tr. 80) When agents are discovered pushing the policy, they are brought back into compliance. (Tr. 81) It may take awhile before such agents are caught, but they are brought back into compliance. Armstrong noted that agents on plainclothes details have greater flexibility and independence, but they are still expected to conform to the Border Patrol rules. (Tr. 81)

In mid-November 2000, Stack was informed by several employees at a Union meeting that management at the Santa Teresa Station had ordered a number of employees to shave their goatees and/or beards while performing plainclothes details. (Tr. 24) The Union had not been notified of this change by management. Stack called James Gonzalez, the Patrol Agent in Charge of the Santa Teresa Station, who

referred him to Sector management. (Tr. 25-26). Stack spoke with Jerry Armstrong, Deputy Chief Patrol Agent of the El Paso Sector, two or three times over a period of time, attempting to resolve the issue informally. When no resolution was reached, the Union filed the unfair labor practice charge at issue in this case. (Tr. 25-26) (G.C. Ex. 1(a))

Mike Kozak has worked as a Border Patrol agent at the Santa Teresa Station since April 1999. He also serves as the Union representative for the Sector. He never has personally worn a beard or a goatee, but testified that he has observed others doing so.[4] In particular he noted that Ed Llamas had a full beard when he was detailed to BORCAP and Ken Jorgenson had a goatee when he was detailed to BORCAP in early 2000. (Tr. 37, 39) Paul Carrasco was detailed to prosecutions in 1999 and had a goatee. Carrasco went to work at the Santa Teresa Station every morning to pick up a vehicle and any paperwork and then drove to the Las Cruces Station for the day. He sometimes stayed for the daily muster[5] although he was not required to be there. (Tr. 38). Scott Anderson would grow a goatee during firearms qualifications since he was detailed as a plainclothes instructor for two to three weeks every quarter. (Tr. 38) Ed Tallen was detailed to the sensor program and grew a goatee "off and on". (Tr. 38)

Kozak further testified that in November 2000 several employees came to him as the Union representative and told him that they could no longer wear facial hair. He recalled three employees speaking to him - Ray Ruiz, who was detailed to prosecutions and grew a goatee; Robert Sendek, who served as an EEO counselor for 1 to 2 weeks at a time and grew a goatee during that time; and Scott Anderson. (Tr. 40) Kozak recalled that Sendek told him that Paul Wells, the field operations supervisor, told him to shave (Tr. 45, 46)

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4 Not everyone who was on a plainclothes detail during this period of time wore a beard or goatee. When employees are on a plainclothes detail, they are also able to volunteer for overtime work, in which they were required to wear a uniform and be clean shaven. (Tr. 46)

5 Daily muster occurs at the beginning of each shift and is run by the field operations supervisor, who informs those assembled about what is going on in the field and at the Border Patrol. The meetings last from 10 to 45 minutes, depending on the amount of information to be distributed. Employees on detail, such as Carrasco, did not have to attend the muster and they might or might not be present. (Tr. 42-44)

The other employees referred to management and that it came from the PAIC and Assistant Patrol Agent in Charge (APAIC). (Tr. 46)

Kozak spoke with management at the Sector but was told that they had never seen anyone wearing facial hair and that there was no change in working conditions. (Tr. 41)

Paul Gonzalez came to the Santa Teresa Station in January or February 2000 as the PAIC. Scott Luck was detailed to the Santa Teresa Station in 1999 and was named the APAIC in April 2000. (Tr. 45)

Edward Llamas has worked as a Border Patrol agent for the Santa Teresa Station for about 5 years. (Tr. 47-48). In 1999 he served on a 3 month detail for BORCAP at the INS District Office in El Paso. During his detail, which was from August 1 through November 6, 1999, he grew a full beard. He was not in uniform during the detail, but worked in plainclothes. He shaved the beard off on the last day of his detail, before he returned to uniformed Border Patrol duties. (Tr. 48, 55, 56) During the detail he visited the Santa Teresa Station from time to time, and checked his mailbox and to see if new uniforms had arrived. (Tr. 48)

In September 1999 a picnic was held by welfare and recreation for the Santa Teresa Station. Approximately 60 to 70 employees attended, with wives, girlfriends and family. About 5 to 6 supervisors also attended, including PAIC Art Brito. All the employees who attended the picnic were in a non-duty status. During the picnic Scott Anderson took photographs and the photograph album has been kept at the Santa Teresa Station. Two of the pictures show Llamas, with a full beard, with other employees, including one with Mike Renteria, a supervisor. Raul Carrasco was photographed with a goatee and he was on a detail to prosecutions at the time of the picnic. Craig Smith was also photographed with a goatee and he was a canine handler on detail to the airport and not required to wear a uniform. (Tr. 51-54, 63; GC. Exs. 2, 3, 4 and 5)

Llamas testified that he had a beard while he was on detail to the INS District Office in El Paso, Texas.[6] During this time he worked in an office which was close to the Sector Headquarters. He went to the Sector Headquarters to gas up the car. Sector managers for the Border Patrol did not go to the INS office, but would have seen Llamas when he gassed up the car. During the detail he was seen by

[6] Apparently INS bargaining unit employees have different grooming standards than Border Patrol employees. (Tr. 59)

Supervisor John Waggoner, stationed in Las Cruces, and Deputy District Director Robero Saenz of INS. (Tr. 54-55) While on detail, Llamas was introduced to Doris Meissner, the INS Commissioner, who was in El Paso at the time. (Tr. 55)

Llamas testified that he has also noticed other employees who grew facial hair. Carrasco grew a goatee when he was on an detail to the Anti-Smuggling Unit sometime in 2000-2001. Ed Tallen had a goatee when he was on sensor detail in 2000. Scott Anderson had a goatee as well as Rocky Ortega who had a goatee when he was on detail to prosecutions in 2000-2001. (Tr. 56-58)

Roberto Sendek has been a Border Patrol agent at the Santa Teresa Station for about 5 years. (Tr. 67). It was his understanding that employees could have neatly trimmed and presentable facial hair, when they worked in plainclothes. He had seen several agents who had fully developed beards and goatees, including Edward Llamas (beard), Victor Ramos (goatee), Raul Carrasco (goatee), Scott Anderson (goatee) and Edward Tallon (not sure whether beard or goatee). (Tr. 68) Sendek had also grown a goatee once or twice, when he was assigned vehicle maintenance. That work did not last more than two weeks. (Tr. 69)

Sendek was a member of the Respondent's EEO Advisory Committee which met about once a month. He had been off for several days and had grown a goatee. He was scheduled to attend the EEO meeting on November 15 and came into the Santa Teresa Station to attend muster and pick up a vehicle. After muster, Paul Wells called Sendek into his office and asked about his goatee. Sendek said that it had never been an issue before and that he had grown a goatee several times before while in plainclothes. Wells told Sendek that according to PAIC Gonzalez it was now an issue and he had to shave off his goatee. It was no longer allowed. (Tr. 71-72, 75) Sendek was unable to return home to shave the goatee prior to the EEO Advisory Committee meeting, but he did shave his goatee following the meeting and before he came to work the next day in uniform. (Tr. 72)

The Respondent's Exhibit 1 relates to a grievance filed on behalf of Border Patrol Agent and Union representative John Derrah, when he was required to shave although he was performing inspections in his capacity as a health and safety officer for the Union. (Tr. 83) Armstrong and the Union representative who filed the paperwork disagreed over the issue of the grooming standards for employees on plainclothes details. (Tr. 84, 85) The step 2 decision on the grievance was issued October 12, 2000 and reiterates

Station policy on grooming standards, specifically stating the only agents who are not expected to routinely comply with the grooming standards are agents who are assigned to a task force and may have to work in an undercover capacity. (Tr. 85, R. Ex. 2) The grievance was not pursued beyond the second step.

James Gonzalez has been the PAIC at the Santa Teresa Station since January 2000 (Tr. 96, 105) He has worked for 24 years in the El Paso Sector. With regard to grooming standards, Border Patrol Agents are supposed to appear professional in every respect for the duties they are performing, and should be clean-cut, with no beards, no earrings, no long hair. (Tr. 96) Agents working in plainclothes have the same standards, except for anti-smuggling and undercover work. (Tr. 97) The Respondent's Exhibit 3 reiterates the grooming standard that has been in effect for at least the last 20 years. (Tr. 99) Grooming standards are brought up occasionally in morning briefings or musters. Most often supervisors will discuss any problems with agents directly, such as needing a haircut or that a tattered uniform needed to be replaced. (Tr. 97)

In November 2000 Gonzalez observed two agents, David Graham and Raymond Ruiz, before the morning muster. Both agents were assigned to the prosecutions unit and were working out of Las Cruces. He observed them on a Monday morning and both were starting to grow a beard. Gonzalez spoke to his APAIC and they told the supervisor to talk with the agents and tell them to shave. (Tr. 100) He denied ever seeing any of the other employees in an unshaved state.

Positions of the Parties

General Counsel

The General Counsel argues that the Respondent changed the grooming standards for Border Patrol Agents serving in plainclothes details in the Santa Teresa, New Mexico Station without providing the Union with advance notice and an opportunity to negotiate concerning the change. The General Counsel argues that the record evidence shows that prior to November 15, 2000, Border Patrol Agents serving on plainclothes details in the Santa Teresa Station were allowed to grow beards and goatees. On November 15, 2000, employees on such details who had facial hair were ordered by the Respondent to shave.

The General Counsel argues that the Respondent's defense that there has been no change to the grooming standard, and that its actions in November 2000 were to get

employees back into compliance with the grooming standard, must be rejected.

With regard to the grievance filed in August 2000, the General Counsel argues that it does not constitute a 7116(d) bar to the later filed unfair labor practice (ULP) charge inasmuch as the theories of the grievance and the ULP are not substantially similar. The grievance was primarily concerned with an alleged violation of Article 29 of the parties' collective bargaining agreement (CBA) while the ULP alleges a violation of the Statute. *U.S. Department of Health and Human Services, Indian Health Service, Alaska Area Native Health Service, Anchorage, Alaska,* 56 FLRA 535, 538 (2000) (*Indian Health Service*) (an alleged violation of a contract presents a different issue than an alleged violation of the Statute). Further the grievance and the ULP did not arise out of the same set of facts, since the grievance concerned an employee and official of the Union who worked in a different station and occurred prior to the fact situation of the ULP. Under these circumstances, the General Counsel argues that the grievance does not bar the later filed ULP under section 7116(d) of the Statute.

Respondent

The Respondent asserts that the current grooming standards for agents on plainclothes details has been in place since the current collective bargaining agreement went into effect on February 6, 1995. The grooming standard is periodically reiterated to agents at daily musters. The Respondent denies that it failed to enforce grooming standards for agents on plainclothes details. It argues that agents on such details operate more independently than uniformed agents and they can easily avoid detection. When they are detected not conforming to the grooming standards, they are told to conform. The Respondent argues that enforcement of the grooming standard by management when employees are found not to be in compliance, is not a change in working conditions or a violation of the Statute.

The Respondent also argues that the grievance filed by the Union on behalf of John Derrah acts as a 7116(d) bar to this unfair labor practice charge. Although Derrah did not work in the Santa Teresa Station, the grooming standard applies to all agents within the El Paso Sector and is not just limited to Santa Teresa.

Further, in its Response to the April 16 Order, The Respondent argues that the Authority's decision in *SSA,* 59 FLRA 646, should be applied retroactively and this matter dismissed as *de minimis.* The Respondent asserts that a

relaxed grooming standard effecting only a few employees is a relatively minor issue and has no impact on pay, benefits, work location, work hours or the performance of duties.

Jurisdiction

In order for an unfair labor practice charge to be barred from consideration under section 7116(d)[7], by an earlier-filed grievance, the following must occur: (1) the issue that is the subject matter of the ULP must be the same as the issue that is the subject matter of the grievance; (2) such issue must have been earlier raised under the grievance procedure; and (3) the selection of the grievance procedure must have been at the discretion of the aggrieved party. *See, Indian Health Service,* 56 FLRA at 538 and *U.S. Department of Veterans Affairs, Medical Center, North Chicago, Illinois*, 52 FLRA 387, 392 (1996) (*VA North Chicago*). In determining whether a grievance and a ULP charge involve the same issue, the Authority examines whether the ULP charge and the grievance arose from the same set of factual circumstances and whether the legal theories advanced in support of the ULP charge and the grievance are substantially similar. *VA North Chicago*, at 392-393.

The grievance was filed in August 2000 by the Union and on behalf of John Derrah, a bargaining unit employee and Union steward, who was required to shave his beard when he was engaged in protected activity. The grievance alleges that the Respondent's conduct violated the collective bargaining agreement, particularly Article 29 which relates to grooming standards for Border Patrol agents. The unfair labor practice, which was also filed by the Union, asserts that the Respondent has violated sections 7116(a)(1) and (5) of the Statute by changing the grooming standards for Border Patrol agents at the Santa Teresa Station. It is clear that the Union is the same aggrieved party in both the grievance and the unfair labor practice and both were filed at the Union's discretion. The issues of both the grievance and the ULP relate to the grooming standards of Border Patrol agents, although the specific facts of the grievance and the

[7] Section 7116(d) of the Statute states that issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

ULP involve different bargaining unit employees, different time frames and different locations. However, the grievance alleges a violation of the collective bargaining agreement and the basis of the ULP allegation is a violation of the Statute. Accordingly, the grievance and the ULP are based on different legal theories. The grievance, therefore, is not barred by section 7116(d) of the Statute. *See, Department of Defense, U.S. Army Reserve Personnel Command, St. Louis, Missouri,* 55 FLRA 1309, 1313 (2000)*; U.S. Department of Housing and Urban Development, Denver, Colorado*, 53 FLRA 1301, 1316-18 (1998).

Analysis

Counsel for the General Counsel asserts that there has been a change in bargaining unit employees conditions of employment without notice to and bargaining with the Union. Specifically the General Counsel asserts that the policy of relaxed grooming standards for Border Patrol officers working plainclothes details in the Santa Teresa Station was changed when those employees were ordered to shave facial hair. The Respondent asserts that there has been no change; that such employees were never allowed to wear facial hair; and that the November 2000 announcement about facial hair was merely getting isolated employees back into the existing policy.

The Authority has determined that before implementing changes in employees' working conditions, an agency must provide the exclusive representative with notice and an opportunity to bargain over aspects of the changes within the duty to bargain. *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas,* 55 FLRA 848 (1999) and *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79 (1997). Where an agency has failed to fulfill its obligation to bargain concerning a change in working conditions, it violates section 7116(a)(1) and (5) of the Statute. *Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 35 FLRA 153 (1990).

If there is a change in policy that effects bargaining unit employees, there is a duty to bargain. Here the evidence is clear that the Union became aware in November 2000 that the some employees in the Santa Teresa Station were told to shave. Further although the Union requested to bargain over this alleged change, the Respondent did not bargain. Thus, if there has been a change in policy over which there was an obligation to bargain, the Respondent would have failed in its duty to bargain and there would be a violation of the Statute. However, if there was no change, then there would be no duty to bargain and therefore

no violation of the change. The issue therefore to be resolved concerns whether or not there was a change in policy at the Santa Teresa Station.

I have determined that there was no change in policy and therefore no duty to bargain and therefore no violation of the Statute. I base this conclusion on the following: although the parties' collective bargaining agreement only deals with the facial hair while in uniform (Jt. Ex. 1), and the parties are in agreement that while in uniform a Border Patrol agent is clean-shaven under the terms of the agreement, the evidence is also clear that the El Paso Sector has had a long-standing policy that bargaining unit employees in most plainclothes details were also to remain clean-shaven according to the terms of the agreement. In this regard I credit the testimonies of Chief Barker and Deputy Chief Patrol Agent Armstrong that there was a long standing policy across the El Paso Sector. The Santa Teresa Station is one of twelve stations scattered across West Texas and New Mexico. Neither the General Counsel nor the Union offered evidence that contradicted the Respondent's credible testimony that there was in fact a Sector wide policy.

With regard to the actual practice at the Santa Teresa Station, the evidence fails to demonstrate that there was a relaxed grooming standard in effect. Rather the evidence shows that a few of the employees on plainclothes details took advantage of limited supervisory presence to grow beards and goatees. The witnesses did not assert that their supervisors in the Santa Teresa Station were aware of their appearance on a daily basis, but rather seemed to argue that they should have known they were not clean-shaven even when they were away from the Station or only there on a limited basis. Employees on details were not required to attend daily musters and no evidence was presented that they did, in fact, attend such musters. While the Union officials who were not stationed at Santa Teresa testified regarding the alleged practice of attending muster, the actual bargaining unit employees were not so positive. Since only a few employees out of the entire Santa Teresa Station were on details at any time at issue, I do not find the evidence sufficient to establish a change in the overall policy. Therefore, when the Santa Teresa PAIC required that employees shave their beards for their plainclothes detail, no change occurred and therefore the Respondent was under no obligation to bargain.

The General Counsel did drop a footnote in his brief explaining that the complaint in this case pled an illegal change rather than a change in past practice. He did argue

that all the elements of a change in past practice had been met, stating that the change concerns a condition of employment which was followed by one party and not challenged by the other over a substantially long duration and citing to *U.S. Department of the Treasury, Internal Revenue Service, Louisville District, Louisville, Kentucky*, 42 FLRA 137, 142-143 (1991) (citation omitted). No other argument or explanation of this theory was offered by the General Counsel.

With regard to whether a past practice has been established in this case, it is axiomatic that the General Counsel bears the burden of establishing each and every allegation of the alleged unfair labor practice in order to establish a violation of the Statute. *See U.S. Department of Commerce, Patent and Trademark Office*, 54 FLRA 360, 370 (1998). In order to show that a past practice existed herein it was necessary to demonstrate that there was a practice which was consistently exercised or followed over an extended period of time with the knowledge and express or implied consent of responsible management officials. *Defense Distribution, Region West, Tracy, California*, 43 FLRA 1539 (1992); *U.S. Department of Labor, Washington, D.C.*, 38 FLRA 899 (1990). As stated above, I find the evidence proffered by the General Counsel insufficient to show by a preponderance of the evidence that a past practice existed in this matter.

Since I have not found a change with regard to the grooming standards for bargaining unit employees, it is not necessary to determine whether the Authority's decision in *SSA, supra*, should be retroactively applied in this matter. However, assuming that such a change had been found, I would apply the standards as set forth in *SSA* and find that this matter was *de minimis* and therefore should be dismissed. In *United States Immigration and Naturalization Service, Washington, D.C.*, 56 FLRA 721 (2000), the Authority approved the application of the "manifest injustice" test used by the National Labor Relations Board in *Pattern & Model Makers Association*, 310 NLRB 929 (1993) (*Pattern Makers*) to determine whether an Authority decision should be applied retroactively. The NLRB considered the following factors in determining whether to depart from its general rule of retroactive application in order to avoid working a manifest injustice: "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines, and any particular injustice to the losing party under retroactive application of the change of law." *See Pattern Makers*, 310 NLRB at 931. The Authority's extension of the *de minimis* rule to substantive bargaining issues found in

SSA should be applied retroactively. In that regard, I find that under the first prong, the parties did rely on preexisting law, which would argue against retroactive application. However, both the second and third prongs argue for retroactive application. Specifically, retroactive application would further the purposes of the new *de minimis* rule and would not produce any particular injustice to the Charging Party. In agreement with the Respondent, the allegations of the complaint effect only a few bargaining unit employees, for a relatively short period of time, and do not effect pay, benefits, work location or the ability to perform work. Therefore the effects of the alleged change in policy are *de minimis*.

Accordingly, it is concluded that the Respondent did not change the policy with regard to grooming standards for bargaining unit employees on plainclothes details. Consequently, it is found that the Respondent had no obligation to provide notice to the Union of the November 2000 requirement that employees be clean-shaven or to bargain with the Union upon request. Therefore, the Respondent did not violate section 7116(a)(1) and (5) of the Statute.

Based on all of the above, it is recommended that the Authority adopt the following:

ORDER

It is hereby ordered that the Complaint in Case No. DE-CA-01-0612 be, and it hereby is, dismissed in its entirety.

Issued, Washington, DC, September 28, 2004.

_____

SUSAN E. JELEN
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-01-0612, were sent to the following parties:

_____

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