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, NATIONAL BORDER PATROL COUNCIL, LOCAL 1929 Charging Party	Case No. DA-CA-01-0919

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 30, 2004
Washington, DC

UNITED STATES OF AMERICA

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

MEMORANDUM DATE: September 30, 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-01-0919

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL BORDER PATROL
COUNCIL, 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 04-45

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, NATIONAL BORDER PATROL COUNCIL, LOCAL 1929 Charging Party	Case No. DA-CA-01-0919

John M. Bates, Esquire
Mia L. Beck, Esquire
For the General Counsel

James Stack, Representative
For the Charging Party

Robert H. Humphries, Esquire
DeWayne Wicks, LRS
For the Respondent

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 Department of Justice, Immigration and Naturalization Service, U.S. Border Patrol,[1] El Paso, Texas (Respondent), as well as a Complaint and Notice of Hearing issued by 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.

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 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 the DEA Task Force at the Alamogordo, 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.[2] On March 31, 2004, the General Counsel filed a Motion For Permission To Submit Supplemental Brief, which was denied by Order dated April 9, 2004. On April 16, 2004, I issued an Order rescinding the previous Order and allowed 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. Both the General Counsel and the Respondent timely submitted supplemental briefs on this matter.

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.

---

[2] In its Post-Hearing Brief, the Respondent referenced a Justice Department document entitled "Officers' Handbook: A Guide to Proper Conduct and Relationship with Aliens and the General Public". Counsel for the General Counsel filed a Motion To Strike, asserting that the handbook was neither introduced nor admitted into evidence at the hearing. Further the Respondent referenced the handbook in its Brief even though the document was not entered into evidence. In its Exception To Motion To Strike, Respondent admits that the handbook was not previously part of the evidence concerning this matter, but argues that it speaks directly to the issue and requests that it be considered a valid document in rendering a decision in this matter. The General Counsel's Motion To Strike is granted. The handbook, although available to the Respondent at the time of the hearing, was not produced or offered into the record at that time. It is well settled that material which is not within the official record cannot be considered in rendering a decision in a case. *Federal Deposit Insurance Corporation, Washington, D.C.*, 41 FLRA 272 (1991).

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, 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. The Alamogordo Station has approximately 60 bargaining unit employees, with 8 to 12 supervisors. (Tr. 24) Timothy C. Rhodes was Chief Patrol Agent in Charge (PAIC) for the Alamogordo Station from June 1998 until his retirement in January 2002. (Tr. 92) Luis Barker has been the Chief for the El Paso Sector since November 1998. (Tr. 79)

The parties stipulated that "the collective bargaining agreement between the American Federation of Government Employees, National Border Patrol Council and the Immigration and Naturalization Service, United States Border Patrol expired in 1998, although the parties have continued to honor the terms and the conditions of the agreement since that time." (Tr. 7) Article 29 of the CBA (Jt. Ex. 1)

deals with Grooming and Appearance.[3] Grooming standards for uniformed agents are contained in the parties' CBA and strictly prohibit agents from wearing beards except for religious and health-related reasons. [Jt. Ex. 1] The standards, however, do not specifically address agents who are working in plainclothes details. The Respondent's interpretation of the negotiated standards is that the strict grooming standards that do not permit agents to wear hair that is beyond the collar, beards, goatees, or earrings, applies to agents whether or not they are working in uniform (with the exception of agents working in undercover assignments). The General Counsel asserts that in actual practice at the Alamogordo Station, agents assigned to the DEA Task Force have conformed to relaxed grooming standards as far back as the early to mid 1990's. (Tr. 28, 29, 30, 31, 32, 33)

In addition to their regular assignments, Border Patrol agents have the opportunity to volunteer for plainclothes details, such as the DEA Task Force. The DEA Task Force is a multi-agency task force that is headquartered in Las Cruces, New Mexico. The Task Force typically consists of 20 to 30 law enforcement agents and officers from U.S. Border Patrol, U.S. Customs Service, and various local law enforcement agencies such as the New Mexico State Police, and the Dona Anna County Sheriff's Office. (Tr. 17) Agents assigned to the DEA Task Force or Task Force Officers (TFO) from the Alamogordo Station respond to narcotics cases where suspects are apprehended at the two Alamogordo Station checkpoints. (Tr. 22, 58) TFO's duties include taking

---

[3] 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. . . .

custody of suspects, securing narcotics, presenting suspects to the U.S. Magistrate for initial proceedings, and processing the case for federal criminal prosecution. (Tr. 58) Often TFOs perform surveillance and other investigatory duties, as well as assist in debriefing suspects for the U.S. Attorney's Office. (Tr. 37, 59, 60) Only two agents at any one time are on the plainclothes details, which last for one year. (Tr. 37)

Senior Patrol Agent and Local 1929 Union President, James Stack testified that since being assigned to the Alamogordo Station in 1989 he witnessed many of the agents assigned to the DEA Task Force practice relaxed grooming standards. According to Stack's testimony, most TFOs at Alamogordo Station practiced relaxed grooming standards in some form, whether they wore beards, goatees, longer hair, earrings or generally had an unshaven look. For instance, Mike Wells wore a goatee or beard and longer hair on his detail in 1990 or 1991; Brad Williams wore a goatee and longer hair from 1991 to 1992; and Sid Hopper did not wear a beard or goatee but was often unshaven. Other agents on the DEA Task Force wore earrings, longer hair, goatees or beards. (Tr. 28, 29, 30, 31, 32, 33)

Furthermore, Stack and Senior Patrol Agent Jesus "Joe" Torres practiced relaxed grooming standards while serving on the DEA Task Force. (Tr. 20, 21) Stack who was assigned to the DEA Task Force in 1997-1998 testified that he did not cut his hair during the year that he served on the Task Force, that he wore a goatee, that he frequently did not shave and that he wore an earring. In fact, a drivers' license photo issued on June 23, 1998 shows he had a goatee, longer hair and an earring. (G.C. Ex. 2; Tr. 20, 21, 22) Torres transferred to the Alamogordo Station in 1993 and served on the DEA Task Force from December 2000 until September 2001. (Tr. 58) While on the DEA Task Force, Torres testified that he also practiced a relaxed grooming standard during his entire tenure on the Task Force by wearing a full beard, longer hair and an earring. (Tr. 63) A photograph taken by Torres' wife on July 14 or 15 of 2001 shows him wearing a full beard and longer hair. (G.C. Ex. 3)

While serving on the Task Force, Torres had two partners. Torres' first partner Anthony Williams wore a goatee and a gold earring in each ear during his tenure. When Williams' detail ended, Torres' next partner was Steve Jerde and he wore a full beard. (Tr. 30, 31, 32) Neither Torres, Williams, nor Jerde were ordered by the Respondent to conform to the strict grooming standards prior to July 13, 2001. (Tr. 25, 26)

Agents report to DEA supervisors with respect to work assignments while they are assigned to the DEA Task Force; however, they also report to Border Patrol supervisors concerning administrative tasks such as requesting annual leave, receiving performance appraisals, filing weekly production reports (I-50s), time and attendance reports and pay sheets. (Tr. 61) As a TFO, Torres testified that he had many occasions during the detail to interact with and to be seen by supervisors from the Alamogordo Station while he practiced relaxed grooming standards. (Tr. 65, 66, 67) As a TFO, Torres seized contraband that was confiscated at the Alamogordo checkpoints, and in order to maintain a chain of custody he was required to sign for the narcotics showing that it was being transferred from the Border Patrol to the Drug Enforcement Administration. Narcotics seized at the checkpoints are kept in the armory at the Station. Only supervisors have access to the narcotics in the armory and therefore Torres received the narcotics from supervisors. (Tr. 67) Torres also received a performance appraisal from his Border Patrol rating supervisor, Miguel McDowell, while on the Task Force and practicing relaxed grooming standards. (Tr. 65)

On or about July 13, 2001, while Torres was at the Alamogordo Station responding to a call, he was approached in the employee parking lot by PAIC Rhodes. Torres testified that Rhodes told him that the Chief Patrol Agent had instituted new grooming standards and he would have to shave and cut his hair by the following Monday morning. (Tr. 69) Torres complied with the Rhodes' order and shaved and cut his hair. Two or three weeks later, Torres again was in the Alamogordo Station responding to a narcotics case, when Rhodes ordered him to remove his earring, despite the fact that Torres has worn the earring continuously since he was ordered to shave and cut his hair. Torres again immediately complied with Rhodes' order to remove the earring. (Tr. 70)

PAIC Rhodes testified that he was aware that some employees on the DEA detail had beards and long hair. He did not have a problem with these grooming standards and allowed them to continue until July 2001. (Tr. 92, 93, 94, 95) At that time, he attended a PAIC meeting where it was brought to their attention that all Border Patrol agents were to comply with the grooming standards. (Tr. 94) He did not recall specifically speaking to Torres about the grooming standard. (Tr. 94) Rhodes indicated that he was aware that the relaxed grooming standards was not the standard usually enforced, but he did not have a problem with it. (Tr. 92, 93, 95) He further indicated that the

El Paso Sector staff would have no way of knowing that the agents had beards and long hair while working for DEA and that he never discussed it with anyone. (Tr. 94)

Shem Peachy currently works at the Alamagordo Station as a special operations supervisor and has been at the Station since 1990. He did not consider the DEA Task Force to be an undercover position. (Tr. 98-99) He did not personally follow the relaxed standard and did not believe that others did as well. After Rhodes became the PAIC, agents on the DEA Task Force wore longer hair, beards, goatees, or were unshaven. (Tr. 101-102) Since Peachy did not supervise that unit, he did not discuss the grooming standard with the employees. (Tr. 103) Peachy believed that what Rhodes allowed the employees to do was not in keeping with the Border Patrol policy. (Tr. 104)

Chief Barker testified that he found out the El Paso Sector grooming policy was not being followed at the Alamogordo Station and he sent a reminder to the Station. (Tr. 82) According to Barker, there is nothing in the nature of the duties of the DEA Task Force that would require or would be advantageous to have a relaxed grooming standard.

There is no longer a relaxed grooming standard for Border Patrol agents who are working on the DEA Task Force. Agents continue to volunteer for the DEA Task Force detail. (Tr. 56)

Issue

Whether or not the Respondent violated section 7116(a)(1) and (5) of the Statute by changing the grooming standards required of Border Patrol agents serving on a DEA Task Force in the Alamogordo, New Mexico Station without providing the Union with advance notice and an opportunity to negotiate over the change.

Positions of the Parties

General Counsel

The General Counsel asserts that the record evidence clearly establishes that the Border Patrol agents assigned to the DEA Task Force from the Alamogordo Station were allowed to conform to a relaxed grooming standard which included the wearing of longer hair, beards or goatees, and earrings, for the length of the detail. After July 13, 2001, however, agents were no longer allowed to follow the relaxed standards and were ordered to shave, cut their hair

and remove any earrings. This change was implemented by PAIC Rhodes, on direction from Chief Barker. It is undisputed that the Union was not first provided with any notice by the Respondent of its intent to change the grooming standard and was not given the opportunity to negotiate over the change.

The General Counsel further asserts that Respondent's defense that there was no duty to bargain over the change in grooming standards because the subject is "covered by" the parties' CBA should be rejected. The General Counsel argues that this is not a valid defense since the agreement expired in 1998, although the parties continue to honor the terms and conditions of the agreement. If the "covered by" defense is found to be applicable in situations where the contract between the parties has expired, it is the position of the General Counsel that it is still inapplicable in this case, since Article 29 of the CBA permits the Union to bargain over grooming standards with the exception of grooming standards detailed in Section D of the Article. Section D specifically outlines the grooming standards for uniformed agents and the instant case deals only with agents on a plainclothes detail, not in uniform.

If the grooming standard detailed in the CBA is found to apply to agents on plainclothes details, the General Counsel asserts that the evidence establishes that there is a long established past practice of permitting agents assigned to the DEA Task Force detail from the Alamogordo Station to conform to a relaxed grooming standard that includes allowing them to wear longer hair, beards, goatees, and earrings. The Authority has determined that an established past practice that is contrary to the terms of a collective bargaining agreement is an exception to the "covered by" defense.

In its Supplemental Brief in response to the April 16 Order, the General Counsel argues that the evidence in this matter clearly establishes that the impact resulting from the Respondent's change in the grooming standards of Border Patrol agents assigned to the DEA Task Force in the Alamogordo, New Mexico Station is above the level of *de minimis* as required by the Authority's decision in *SSA*, 59 FLRA 646. The General Counsel asserts that the Respondent's elimination of the relaxed grooming standard has resulted in an increased security risk for the agents both during and after serving on the DEA Task Force. *U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C.*, 56 FLRA 351 (2000) (*INS, Washington, D.C.*) (Violation of section 7116(a)(1) and (5) when the agency implemented a change in policy concerning

body searches without completing bargaining with the Union.) The General Counsel further argues that if it is determined that the criteria outlined in *Federal Correctional Institution*, 8 FLRA 604 (1982) are applicable in this matter, the evidence would establish that a *status quo ante* remedy is appropriate.

With regard to a remedy in this matter, the General Counsel requests that the Respondent be directed to restore the *status quo ante* as well as post an appropriate Notice To All Employees.

Respondent

Respondent argues that the General Counsel failed to prove that there was a practice of relaxed grooming standards for Border Patrol agents on detail to the DEA Task Force. The facts demonstrate that any relaxed standard occurred only under the supervision of former PAIC Rhodes who admitted that he did not consider the grooming standards for uniformed officers on detail to be important. He further admitted that he took this position with no notice to or permission from management of the El Paso Sector. Once Chief Barker became aware of the deviation from the Sector's grooming standards, he took immediate steps to reaffirm the existing policy.

The parties' CBA, although expired, remain controlling throughout every Border Patrol Sector. Local variations of a nationally negotiated agreement which continues as a practice cannot be changed unless known and accepted by national level officials and there has been no evidence presented that this relaxed standard is known or sanctioned by anyone outside the officers of Local 1929 or PAIC Rhodes.

Respondent also argues that the grooming standards found in the CBA do not apply only when employees are actually wearing a uniform. Article 29 of the CBA makes a reference to the term "uniformed officers", and Respondent takes the position that a Border Patrol agent is a law enforcement officer whether wearing the uniform or in plainclothes and therefore is a "uniformed officer" at all times.

Finally, 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 affecting 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.

Analysis

Counsel for the General Counsel asserts that there has been a change in bargaining unit employees' conditions of employment without notice to and/or bargaining with the Union. Specifically the General Counsel asserts that the policy of relaxed grooming standards for Border Patrol agents detailed to the DEA Task Force in the Alamogordo Station was changed when those employees were ordered to shave facial hair, cut their hair and not wear earrings. The Respondent asserts that there has been no change; that such employees were never allowed to maintain a relaxed grooming standard; and that the July announcement was merely requiring isolated employees to conform to 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).

The record evidence clearly establishes that Border Patrol agents from the Alamogordo, New Mexico Station, who volunteered for DEA Task Force details were allowed to practice a relaxed grooming standard during their time on the detail. While not all agents took advantage of this relaxed standard, many of the agents grew their hair longer, grew beards or goatees or generally went unshaven, and also wore earrings. The testimony of both Stack and Torres was detailed and consistent and is therefore credited. Respondent's own witnesses, PAIC Rhodes and Supervisor Peachy, also testified that, at least since Rhodes became the PAIC, the relaxed standard was in practice at the Alamogordo Station. While the Respondent argues that the El Paso Sector did not approve such a relaxed standard, it is clear that the relaxed standard was openly practiced for several years, 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).4

As stated above, I have found there has been a change with regard to the grooming standards for bargaining unit employees. It has been determined by the Authority that grooming standards are substantively negotiable. *United States Department of Justice, Immigration and Naturalization Service*, 31 FLRA 1123, 1135-36 (1988) (The Authority upheld an interest arbitration award that neatly trimmed beards could be worn by Border Patrol agents while in uniform, contrary to management's argument that grooming standards were non-negotiable since the wearing of beards interfered with the employees' work or affected the public's ability to recognize officers as law enforcement officers of the U.S. Government and therefore was within management's right to determine the method and means of performing its work under section 7106(b)(1) of the Statute.)

In *SSA* the Authority determined that the *de minimis* standard which it established in *Department of Health and Human Service, Social Security Administration*, 24 FLRA 403, 407-408 (1986) (*DHHS, SSA*) should be applied to changes which do not involve the exercise of a reserved management right as well as to changes which do involve the exercise of such a right. In order to determine whether a change in conditions of employment requires bargaining, the pertinent facts and circumstances presented in each case would be carefully examined. Principal emphasis is placed on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable consideration would also be taken into account in balancing the various interests involved. It is therefore necessary to determine whether the Authority's decision in *SSA, supra*, should be retroactively applied in this matter.

The General Counsel argues that the impact resulting from the Respondent's change in the grooming standards is above the level of *de minimis*. The General Counsel asserts that agents assigned to the DEA Task Force have contact with illegal aliens who are in possession of controlled substances, thus lending an additional element of danger to the work of the agents. Torres testified that uniformed

4
I do not find the "covered by" defense applicable in this matter since the CBA has expired, even though the parties have agreed to follow its terms and conditions. It is further noted that the standards outlined in Article 29 refer to the "wearing of the required uniform", which are not the facts in this particular matter.

Border Patrol agents ordinarily have contact with an illegal alien only when that person is apprehended. However, agents on the DEA Task Force have much more extensive contact with illegal aliens who are in possession of narcotics when they are apprehended. Both Stack and Torres testified that they did not want to be recognized as Border Patrol agents by the suspects that they apprehend while they are serving on the Task Force or after they have completed their service on the Task Force due to security concerns. Torres testified that, prior to his detail to the DEA Task Force, two agents who had been serving on the Task Force were detailed to other locations as a result of death threats. The General Counsel therefore argues that the Respondent's elimination of the relaxed grooming standards in this matter has resulted in an increased security risk for the agents both during and after service on the DEA Task Force. The General Counsel asserts that this is similar to a violation found in *INS, Washington, D.C.*, 56 FLRA at 351, (ALJ determined that the change in body search policy adversely affected thousands of bargaining unit employees by increasing the danger.)

The Respondent asserts that by applying the *DHHS, SSA* standard, the matter at issue must be found *de minimis*. The Respondent notes that, although not controlling, the number of employees affected is a factor to be considered. The matter at issue in this case affects no more than two Border Patrol agents at any given time, and it may affect fewer than that. More important, however, is the nature of the impact of the change. The change only impacts employees that volunteer for the DEA Task Force and is only for a limited period of time, no more than one year. Further the change does not impact pay, benefits or performance of duties. It merely affects simple grooming and only precludes the wearing of long hair, beards and goatees and earrings. With regard to the General Counsel's safety concern, the Respondent noted that James Stack admitted that the primary reason for adhering to a relaxed standard was simply personal preference. (Tr. 40) Respondent's witnesses all testified that there was nothing in the duties of the DEA Task Force details that would support that a relaxed grooming standard was either required or even advantageous.

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.[5] In that regard, I find that under the first prong, the parties did rely on preexisting law, which would argue against retroactive application. However, the General Counsel did present evidence at the hearing related to the impact of the decision. Further, 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 affect only a few bargaining unit employees who volunteer for the DEA Task Force, for a limited period of time, and do not affect pay, benefits, work location or the ability to perform work. Further, I do not find the General Counsel's argument regarding the possible security issues as a result of the elimination of the relaxed grooming standard to be persuasive. The security issues appear tenuous, at best, since the apprehended individuals are aware that the employees on detail are Border Patrol agents. Further, the lack of the relaxed standard has not affected volunteers for the position. The record evidence overall indicates a personal preference by some individual Border Patrol agents for a relaxed grooming standard rather than any genuine security issue. Therefore the change in policy is *de minimis*.

Accordingly, it is concluded that the Respondent had no obligation to provide notice to the Union of the change that eliminated the relaxed grooming standards for bargaining unit employees at the Alamogordo, New Mexico Station detailed to the DEA Task Force. 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.

---

[5] The General Counsel took no position regarding the retroactive application of the *SSA* standard.

DA-CA-01-0919 be, and it hereby is, dismissed in its entirety.

Issued, Washington, DC, September 30, 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-01-0919, were sent to the following parties:

_____

_

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

John M. Bates, Esquire **7000 1670 0000 1175 4434**
Mia L. Beck, Esquire
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204-3581

Robert H. Humphries, Esquire **7000 1670 0000 1175 4441**
Assistant Chief Counsel
U.S. Customs and Border Protection
9400 Viscount Blvd., Suite 108
El Paso, TX 79925

DeWayne Wicks, LRS **7000 1670 0000 1175 4458**
Immigration and Naturalization Service
7701 N. Stemmons Freeway
Dallas, TX 75247

James Stack, Representative **7000 1670 0000 1175 4465**
President
AFGE, Local 1929
2316 Camino del Rey
Alamogordo, NM 88310

REGULAR MAIL:

President
AFGE
80 F Street, NW
Washington, DC 20001

DATED: September 30, 2004

Washington, DC