U.S. IMMIGRATION AND NATURALIZATION SERVICE Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. BN-CA-30073

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 2, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

ELI NASH, JR.
Administrative Law Judge

Dated: August 31, 1995
Washington, DC

MEMORANDUM DATE: August 31, 1995

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: U.S. IMMIGRATION AND NATURALIZATION SERVICE

Respondent

and Case No. BN-CA-30073

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

U.S. IMMIGRATION AND NATURALIZATION SERVICE Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. BN-CA-30073

Mr. Steven R. Freedman
For the Respondent

Richard S. Jones, Esq.
For the General Counsel

Mr. T.J. Bonner,
Deborah S. Wagner, Esq.
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

The American Federation of Government Employees, National Border Patrol Council, AFL-CIO (herein the Union), filed an unfair labor practice charge, against the United States Immigration and Naturalization Service (herein the Respondent). On May 28, 1993, the Boston Regional Director for the Federal Labor Relations Authority notified the parties that he was deferring action in this case because he had been informed by the Federal Service Impasses Panel (herein FSIP) that it was considering a Request for

Assistance, in FMCS File No. 92-23200, that appeared to involve the same issues as in this case.

Thereafter, on September 11, 1993, Arbitrator Cornelius Peck, issued his Decision, finding with respect to the issue overlapping the two proceedings, that "[t]he evidence presented at the hearing establishes a **prima facie** case that the Agency departed from the requirement that new hires should be made on a competitive not geographical, basis." Arbitrator Peck declined however, to make this specific finding, stating instead that the Authority would be better equipped to rule on this issue and provide a meaningful remedy. Accordingly, on December 6, 1993, the Boston Regional Director issued a Complaint and Notice of Hearing alleging that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, as amended, (herein the Statute) by implementing its decision to hire residents of Puerto Rico to fill four Border Patrol Agent trainee positions at the Ramey Station, Mayaguez Sector, Puerto Rico, and assign them to permanent positions in Puerto Rico, rather than to staff the positions through the use of rotational tours which would entitle the employees to rotate to positions in the continental United States, without notifying the Union and giving it an opportunity to negotiate the impact and implementation of the change.

The hearing was originally scheduled for January 25, 1994 but, was indefinitely postponed to allow the parties to discuss settlement and/or factual stipulations. Thereafter, on June 23, 1994, in order to effectuate the purposes of the Statute the matter was transferred from the Boston Region to the Atlanta Region of the Authority. On September 28, 1994, the matter was reset for hearing because the parties were unable to stipulate the facts or to settle the matter.

A hearing of the Complaint was conducted in Hato Rey, Puerto Rico at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally.[1] Timely briefs were filed by the parties which have been duly considered.

On April 13, 1995, the General Counsel filed a Motion to Strike portions of Respondent's brief which it claimed contained "several references to a document not in evidence and at least one reference to a fact not in evidence." With respect to those references, I agree with the General Counsel and strike all reference with respect to GC Exhibit

[1] Respondent's uncontested motion to correct transcript is granted.

12, which due to my inadvertence was not received into evidence at the hearing. I now find that GC Exhibit 12 was irrelevant and therefore, it is rejected. Moreover, I am in agreement with the General Counsel that the undersigned should disregard and strike from the record references to any facts not in evidence. In this regard, the General Counsel notes specifically a reference by Respondent in its brief, "that Mr. Alphonzo Hilliard, Management's representative at the meeting referred to in Mr. Bonner's notes, did not recall any agreement to fill Puerto Rico positions only with journeyman level agents. . . ." Respondent had ample opportunity both during and after the hearing to address this testimony in an acceptable fashion. Based on the foregoing, the General Counsel's Motion to Strike is granted.

On April 14, 1995 and May 1, 1995, respectively, Respondent filed a Response Brief and a Motion for the Administrative Law Judge to treat the General Counsel's erroneously titled motion to strike as a response brief. Since GC Exhibit 12 was not received in evidence it is unnecessary for the undersigned to make any further findings in that respect. However, the Response Brief was not a rejoinder to the General Counsel's Motion to Strike, but was additional briefing of the trial issues of the case and as such can only be considered as a reply brief. Furthermore, Respondent attached an affidavit setting out the views of Alphonzo Hilliard on the matter. Clearly, the affidavit was given without an opportunity to cross-examine the witness and is in my view inappropriate. Section 2423.25 of the rules and regulations clearly restricts the filing of reply briefs except where permission of the Administrative Law Judge is given. No permission was sought by Respondent in this case, therefore, the reply brief and affidavit of Alphonzo Hilliard have not been considered, but are forwarded to the Authority, so that if it deems the Response Brief or affidavit appropriate, they may be considered in its handling of the matter.

Upon the entire record, from my observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following findings and conclusions.

Finding of Facts

The Union is the exclusive representative for a unit of employees appropriate for collective bargaining. Puerto Rico is the only overseas work location in the nationwide bar-gaining unit represented by the Union. Its location was established in 1987. Originally, nine bargaining unit

Border Patrol Agents were selected from a Service-wide announcement to work there.

The work location in Puerto Rico provides a unique work and living environment, very different from the continental United States. Indeed, the parties stipulated at the interest arbitration hearing that conditions at the Puerto Rico stations "are 'deplorable,' 'substandard,' and 'less than acceptable by U.S. Standards'." Arbitrator Peck favored the Union's proposal for a 2-year rotation period rather than the three years proposed by Respondent based on his findings that, among other things, burglary was extremely common; water and other utilities are not reliable; schooling and medical facilities are unsatisfactory; and local taxes produce a financial burden. Arbitrator Peck further observed that the nature of the work was much more difficult than in the states. He also observed that the stress created by these conditions extends to wives and families, and found that several divorces resulted.[2] Since the establishment of the Puerto Rico work station in 1987, only one employee of the many granted rotation rights has chosen to remain in Puerto Rico beyond the tour of duty. That employee, Joe Swider, testified that he personally had adapted to Puerto Rico and had no objections to living there. The remaining approximately 15 to 20 agents assigned there all exercised the option to rotate out of Puerto Rico and back to the continental United States at the conclusion of their respective tours.

As already noted, the original agents appointed to Puerto Rico, and all other agents subsequently assigned there have all had the option of rotating out of Puerto Rico after completing a two or three-year tour of duty in Puerto Rico. Until the change in hiring practice that is the subject of this case, Respondent continued to bring in replacements through a reassignment program. Thus, this program clearly allowed employees to rotate back to the states when their agreed-upon tours were completed. On April 20, 1992, this changed with the hire of four new employees--Edgar Perez, Edwin Rodriguez, German Catala and Martin Santiago--who were hired as "local hires" or "direct hires." Respondent acknowledged that this hiring was a deliberate change in policy for the specific purpose of avoiding the expense of providing the rotation rights enjoyed by the other agents in Puerto Rico. As early as August 15, 1991, at least one management official, Joe Bennett, had already suggested in a memorandum, of that

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This concern for his wife's well-being, is a major reason why Edgar Perez, one of the four employees hired in this case, testified he was anxious to obtain rotation rights.

date, hiring trainees to save money. This time, it had been the Union's understanding that Respondent would not fill positions in Puerto Rico with trainees. Indeed, this had been specifically discussed at a bargaining session on October 8, 1991, when the Union sought to clarify its previous understanding. It was also the Union's understanding that applicants for any position, including Puerto Rico, would be judged on merit and not on where they happened to live. In this regard, Respondent, by its Assistant Commissioner, James H. Walker, had, on March 25, 1987, notified the Union upon the establishment of the Puerto Rico duty station of the following:

> [b]argaining unit positions in the Puerto Rico Sector will be filled under the procedures of the Merit Promotion and Reassignment Plan, AM 2265. Existing federal rules regarding benefits, such as home leave, will apply. The Service plans that instead of the current two-year rotation period, employees will be rotated every three years, with possible one year extensions after the initial tour.

Therefore, it appears that the only change Respondent proposed, at the time it established the Puerto Rico sector, was to <u>lengthen</u> (not abolish) the rotation period. Union President T.J. Bonner acknowledged that the Union failed to timely request to bargain that change, thereby clearing the way for the three-year rotation period to be initially imposed in Puerto Rico. Furthermore, there is no evidence to suggest that Respondent ever notified the Union of a departure from this policy prior to April 1992, nor did Respondent offer any testimony to contradict Bonner's recollection that the practice was reiterated at the October 8, 1991 meeting. In fact, Respondent, in a letter dated August 30, 1991, had already assured the Union that it "has no explicit intention to fill positions through noncompetitive means. The option to use non-competitive procedures is included to cover emergency situations only."

Shortly after the October 8, 1991 meeting, however, Respondent apparently determined that it could save considerable sums of money by simply hiring residents of Puerto Rico directly into positions there, rather than using the long-established merit and rotation plans. Marylou Whelan, Director of its Personnel Division, notified Bonner of the change in a letter dated April 17, 1992. Bonner, as Union President, is the person designated to receive notices of changes in conditions of employment. Respondent constantly hires new employees; thus, the fact that new employees were being hired would not, in and of itself, have been a change in conditions of employment. Indeed, Bonner,

who has been President since February 1989, had never before received notice of new hiring.

The notice in this case, however, conveyed significant changes, and was not simply a routine hiring action. According to Bonner, it was significant in his mind because here employees were being hired straight from Puerto Rico because of their geographic location rather than because of merit. Whelan's April 17 letter also informed Bonner that the new employees were going to be excluded from a number of working conditions enjoyed by other bargaining unit employees, such as accelerated promotion, home leave, overseas rotation and cost of living allowance. Bonner did not receive Whelan's letter until April 23, 1992, several days after the April 20, 1992 implementation date.

On May 22, 1993, Bonner answered in writing, addressing his concerns in a specific fashion. At the outset, he noted that the agency had not provided the contractually required 30-day notice of the changes. Bonner then observed that the procedures used in hiring the four employees appeared to be "inconsistent with applicable laws, rules and regulations, as well as [Respondent's] own policies." He was particularly concerned that, Respondent appeared to circumvent the general provisions of FPM Chapter 332, Subchapter 2-2a which states, in relevant part: "Generally, qualified and available applicants will be considered for employment regardless of residence." Further, Bonner requested copies of any authority Respondent had that allowed it to make exceptions to merit promotion principles. Bonner was aware that an agency can elude the general requirements if it has a "special agreement" with Office of Personnel Management (herein OPM). Conse-quently, he asked for a copy of such a special agreement, and copies of any requests to OPM for direct hire authority and any OPM responses to such requests. At this point, there was no question that the four employees had, in fact, been hired as “direct” i.e., local hires. Employees were not, as now contended by Respondent, hired as a result of nationwide competition based on merit. Under merit promotion, an agency, pursuant to the "Rule of Three" embodied in 5 C.F.R. § 332.404, must fill the first vacancy from the highest three eligibles on the certificate who are available for appointment "with sole regard to merit and fitness." Under the plain language of the regulations, there is simply no

room for discretion to deviate from this.[3] Absent any documentary evidence or corroborative testimony from OPM, Respondent's assertion that it is not bound to hire eligible applicants in the order in which they are rated and ranked simply cannot given a lot of weight.[4]

In his May 22, 1992 letter to Whelan, Bonner expressed disappointment that Respondent was reneging on its bargaining commitments made the previous year, culminating in the assurances given at the October 8, 1991 meeting that vacancies filled outside the continental United States would continue to be filled using competitive procedures. He expressly alluded to the parties' earlier correspondence, including Whelan's letter of August 30, 1991, reinforcing Respondent's commitment to use competitive procedures.

On July 13, 1992, Whelan responded in writing. When answering Bonner's question concerning "the rationale for hiring trainees to perform complex duties in the Puerto Rico Sector rather than continuing to rotate journeymen under the provisions of the Merit Promotion and Reassignment Plan," Whelan admitted that a change in procedure had occurred: "The use of rotational tours, while initially determined desirable, appears to be an unnecessary expense for the continuing operation." Although admitting a change in policy, Whelan denied that Respondent had a duty to bargain with the Union, apparently because Article 4 of the parties' collective bargaining agreement that simply repeats management's statutory right under 5 U.S.C. § 7106. In referencing that contract provision, Whelan noted the following:

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[3] Respondent maintains that it can avoid the most eligible applicant in the nation, and delay hiring him even for "a little longer than a year," as long as it eventually offers him a job somewhere. When asked where the authority for this proposition can be found, Respondent's Personnel Staffing Supervisor Velmenia Stanley, conceded that "[i]t is not found anywhere." Rather, it turns out to be <u>oral</u> permission from unnamed persons at OPM to, in effect, allow Respondent to pick and choose from applicants, without regard to rank or merit from a nationwide certification list based on where the applicant lives. This uncorroborated assertion is difficult to believe.

[4] Assuming that Respondent has this "oral" permission from OPM to deviate from merit principles, its exercise of this new "right" might in itself be a change in the selection procedure which could create a bargaining obligation.

> INS management continues to retain its exclusive right ". . . to hire, promote, transfer . . ." and ". . . maintain the efficiency of Government operations . . ." In these austere times, the INS management is continually attempting to identify methods that would be less costly to the agency without hindering operational efficiency and engendering adverse impact.

Thus, Whelan claims that Respondent has a management right to assign trainees wherever it wanted to do so, notwithstanding its statutory obligation to negotiate with the Union. It is also noted, that while Whelan was management's focal point for dealing with the Union in this situation, she was not called by Respondent as a witness. Instead, Respondent presented the testimony of John Mata, its Assistant Chief Patrol Agent assigned to the Headquarters Border Patrol Office, whose duties include oversight of personnel actions. Mata testified that he believed Article 4 of the parties' contract gave Respondent the "right to hire trainees and place them where we have the greatest need." Mata later testified that he was unaware of any obligations under the Statute in this respect, stating essentially that the Labor-Management Relations Office handles such matters. Mata also testified that the idea of placing trainees in Ramey was new, and was not originally a part of the Ramey Sector's plans. He did however, deny any knowledge of Respondent's 1991 agreement not to place trainees there. Mata, it is observed, did not deal with the Union and therefore, as he stated he was not in a position to know whether such an agreement existed.

It is worthy of note that Whelan’s avoidance of Bonner's major point of contention--that Respondent was circumventing merit principles and the FPM by simply hiring local people rather than the most qualified under a nationwide, competitive announcement--is a shallow assertion, without explanation, that Bonner had misinterpreted the regulations. Whelan did not deny, however that Respondent had in fact used direct hire authority; indeed, Whelan defended Respondent's direct hire of Puerto Rico residents by providing a copy of Delegation Agreement Number WA-DJ-30. This may be one of the reasons Respondent did not call Whelan. Her admission that Respondent had used a purported direct hire authority from OPM (and her efforts to convince Bonner that Respondent had such authority from OPM) directly contradicts the theory of Respondent's case in this. Now Respondent is contending that it "didn't really" circumvent OPM regulations; rather, under Respondent's "new and improved" version of events, its Eastern Region simply "made a mistake" with respect to the

paperwork to make it "appear" that Respondent had violated merit system principles.

Bonner replied to Whelan by letter, on October 6, 1992, where he focused on Whelan's failure to demonstrate that Respondent had direct hire authority,[5] and renewed his information requests in that regard. He also mentioned that the MOU Whelan provided, by its terms, requires adherence to Appendix D of FPM Chapter 332. He also touched on the Appendix D requirement that shortage conditions be such that the use of streamlined recruitment and selection procedures would not jeopardize merit principles or provisions of civil service rules and regulations. In this regard, Bonner requested information concerning the total number of applicants for the Mayaguez Border Patrol Sector since its inception to support his theory that there was not "a shortage of applicants that would justify the granting of direct-hire authority for that area." He explained his view that the direct hiring of candidates in Puerto Rico were in violation of OPM regulations, absent the requested documentation that would show otherwise.[6] Bonner persisted that even if Respondent's actions could somehow be found to be proper under the regulations, the Union still wished "to bargain to the fullest extent permissible by law over the changes in conditions of employment relating to the filling of vacancies in the Mayaguez, Puerto Rico Border Patrol Sector." Finally, he suggested that "the ***status quo ante*** with regard to the selection of candidates for bargaining unit officer corps positions in Puerto Rico be restored and maintained until such times as all aspects of bargaining have been completed."

Respondent did not answer Bonner's October 6, 1992 letter or his bargaining request. The Union then filed this unfair labor practice charge on October 16, 1992.

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The document Whelan provided, Delegation Agreement Number WA-DJ-30, requires GS-5 and GS-7 Border Patrol Agent positions to be examined on a nationwide basis. Thus, Whelan failed to provide Bonner with any authority or other justification for hiring residents of Puerto Rico without regard to their relative merit compared to applicants from other places.

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Respondent was never able to produce such documentation. To the contrary, Respondent admitted that there was no shortage of applicants for job vacancies in Puerto Rico. Accordingly, there was absolutely no regulatory justification for Respondent to depart from merit principles even if Velmenia Stanley's claim that someone from OPM gave someone from Respondent oral permission is to be believed.

In the interim, the parties reached an impasse over Respondent's proposed changes to its Administrative Manual (AM) Chapter 2274, "Employment at Locations Outside the Continental United States," culminating in the October 8, 1991 meeting discussed above.[7] On October 18, 1991, the Union requested the assistance of the FSIP in resolving the disputed issues. Shortly after the April 20, 1992, change that is at issue in this case, the FSIP, on June 2, 1992, ordered the parties to submit the disputed issues to neutral mediation/ arbitration. Mediation sessions were held on March 11 and 12, 1993, where a few issues were resolved; however, on June 23 and 24, 1993, the parties had to present the bulk of the issues to Arbitrator Peck, who issued his decision on September 11, 1993.

The issue in this unfair labor practice charge, although arising after the Union's original request for assistance from FSIP, became a point of contention at the arbitration hearing. The Union added a proposal to address the problem as follows:

> The Service shall refrain from locally hiring employees for Officer Corps positions in Puerto Rico in violation of the express intent of its original proposal as well as applicable law, rules and regulations. Those employees who have been hired illegally shall be rotated out of Puerto Rico in accordance with the overseas rotation policy.

As already noted, the arbitrator received evidence on the issue of Puerto Rico hires because the Authority had specifi-cally deferred processing of this unfair labor practice charge until he ruled. Although the arbitrator ultimately decided that the Authority could better provide a remedy in this case, he did find that "[t]he evidence presented at the hearing establishes a **prima facie** case for the Union that the Agency departed from the requirement that new hires should be made on a competitive, not geographical, basis." Arbitrator Peck based this observation in large part on the documents submitted by the Agency at that hearing--four pages extracted from a list of certified eligible employees nationwide. As the arbitrator observed,

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7 See GC Exhibit 9, a letter dated June 19, 1991, giving the Union notice of the proposed changes. Thereafter, the parties exchanged correspondence and met on October 8, 1991, where Respondent reiterated the fact that no changes were contemplated with respect to filling vacancies in Puerto Rico.

Respondent could not explain at that hearing how the four employees had been hired based on merit:

> On cross examination the personnel staff specialist testified that the whole list would have contained about 1,000 names and would have been approximately 115 pages in length. Based on its calculation of the number of certified eligibles listed on a page, the Union contends that 480 certified eligibles would have had to have been skipped over to reach the person hired whose name appeared on page 115 of the list of certified eligibles, which was one of the four sheets presented by the Agency as an exhibit. One third of the persons on the four pages presented were hired as border patrol agents, on the basis of which the Union argues that it is inconceivable that there were no more than three qualified individuals listed on the 60 pages between the first numbered and last numbered page of the exhibit. This, the Union contends, makes it incredible that the Agency did not select applicants solely on the basis of geography.

Having failed to convince the arbitrator that it had not departed from past practice by hiring the four employees based solely on the basis of geography, Respondent, evidently developed a new theory just for this hearing since it now, contrary to the position it took at the arbitration hearing, conceded that it consciously decided, as a cost-saving measure, to change its practice of using the overseas rotation policy to fill positions in Puerto Rico. Admittedly, the policy change was made after it issued the vacancy announce-ments in this case. In this respect, it is clear that the vacancy announcement, which issued several years before the selections involved here, in 1988, does not even remotely suggest that applicants were applying for jobs in Puerto Rico. Hence, there was no reason for any applicant to have antici-pated assignment to Puerto Rico when they submitted their applications; yet, when one applicant, Edgar Perez, was contacted about the job several years after applying (and even after moving to Arizona), he was offered only a job in Puerto Rico and that job was offered on a "take it or leave it" basis.

DISCUSSION AND CONCLUSIONS

A. The Union did not waive its statutory right to negotiate when it agreed to Article 4 in the collective bargaining agreement, nor does the collective bargaining agreement cover the issues in this case

Whelan, in her letter to Bonner, and Mata, in his testimony created an impression, at least, that Respondent felt it had no duty to negotiate with the Union because of the language in Article 4 of the parties' collective bargaining agreement. The specific provision cited by Respondent is Article 4, Section C., which reads as follows:

> Management officials of the agency retain the right, in accordance with applicable laws and regulations--(1) to direct employees of the agency; (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees; (3) to relieve employees from duties because of lack of work or for other legitimate reasons; (4) to maintain the efficiency of the Government operations entrusted to them; (5) to determine the methods, means, and personnel by which such operations are to be conducted; and (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.

Although the parties' collective bargaining agreement took effect in 1976, prior to enactment of the Statute, the above cited language is essentially a recitation the rights Respondent has under section 7106(a)(1) of the Statute. It is not insignificant that, the agreement, by its own terms, limits Respondent's exercise of those rights to be "in accordance with applicable laws and regulations." One such law is section 7106(b)(2) and (3) which provides that nothing will preclude management from negotiating procedures and appropriate arrangements for employees adversely affected by the exercise of management rights. This was, of course, recognized by the Authority in the context of areas of consideration for job vacancies in Department of Health and Human Services, Social Security Administration, 44 FLRA 870 (1992) (Social Security Administration). Respondent's witnesses seemed unaware that any such obligation might even exist or that it might have a duty to bargain the impact and implementation of changes in conditions of employment.

A waiver of a statutory right must be clear and unmistakable. U.S. Department of the Treasury, Customs Service, Washington, D.C. and Customs Service, Northeast Region, Boston, Massachusetts, 38 FLRA 770, 784 (1990). Here, not only is there no mention anywhere in the collective bargaining agreement pertaining to overseas hiring and promotion policy, but Article 4, by its own

terms, requires Respondent to obey applicable laws, including the Statute.

The parties negotiated their collective bargaining agreement in 1976, some eleven years before the Puerto Rico duty station (the only overseas post in the bargaining unit) was established; a suggestion that anything in that agreement "contemplated" hiring in Puerto Rico when the duty station did not come into existence, requires telepathy that has not been demonstrated here. While Respondent urges that there was no agreement written or oral saying that it "would put only journeymen . . ." in Puerto Rico, it does say however, that it has reassigned internal candidates by means of the Overseas Rotation Program. What is clear in this case is that Respondent has not hired applicants for the Puerto Rico post in the manner these four trainees were hired.

In its brief, Respondent argues that it followed the collective bargaining agreement and that the subject of this case was covered by that agreement. Thus, it followed the agreement "by utilizing its ability to hire a Puerto Rico resident from an OPM national certificate as a means of minimizing cost of operations." Furthermore, it would not differentiate from the national practice, for a segment of the bargaining unit. Unfortunately, in my opinion there is no record evidence to suggest that Article 4 or any other contract provision covers the issue of overseas hiring or reassignments.

U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993), sets out the framework for analyzing whether a contract provision covers a matter in dispute. The three parts of the test concern whether the matter is expressly contained in the agreement; if not expressly contained, whether the subject is "inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract"; and lastly, whether the parties reasonably should have contemplated that the agreement would foreclose further bargaining. None of those factors are present here. In short, the subject matter is not expressly covered there were no overseas stations opened until more than 10 years after the collective bargaining agreement went into effect; nor could it have been bound up in any aspect of overseas assignments (since this was an overseas hire and not a reassignment) since none came into existence until more than 10 years after the collective bargaining agreement was signed; and, the matter could not have been contemplated by the parties since the agreement was in existence over 10 years before any overseas post opened.

Accordingly, the Union has not waived its right to negotiate the impact and implementation of changes in the area of consideration for overseas hiring. Therefore, it is found that the instant matter was not covered by the collective bargaining agreement.

B. The filling of the Puerto Rico vacancies constituted a change in conditions of employment

There is little question that the areas of consideration for job vacancies concern employees' conditions of employment. Social Security Administration, supra, 879. Additionally, the Authority has held that most policies and practices concerning areas of consideration for job vacancies were fully negotiable. See e.g., Department of Defense, Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, 4 FLRA 760 (1980). However, in National Association of Government Employees, Local R5-165 and Tennessee Air National Guard, 35 FLRA 886, 888-90 (1990), the Authority adopted the Court of Appeals decision in Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. FLRA, 857 F.2d 819 (D.C. Cir. 1988), and found that certain matters concerning rating and ranking employees could be nonnegotiable on the theory that it interferes with management's right under section 7106(a)(2)(C) to select employees from any appropriate source. The proce-dures and appropriate arrangements employed when exercising such rights are still negotiable. Id. at 879-80. Thus, the Authority found that the unilateral reduction of the area of consideration violated Section 7116(a)(1) and (5) of the Statute. Social Security Administration, supra, 883.

Despite its protestation, as already noted Respondent admits that it has filled the Puerto Rican positions at the Ramey Station, prior to the hires herein, "by placing only journeyman level Border Patrol Agents at this location." Furthermore, Respondent does not deny that it unilaterally reduced the area of consideration for the Puerto Rico job vacancies from the entire nation to the Commonwealth of Puerto Rico only. Stanley, Respondent's Personnel Staffing Specialist, confirmed that it was not coincidence that the four people who were hired had lived in Puerto Rico; she admitted that Respondent's scheme was by design, and that it was specifically looking for applicants in Puerto Rico. Respondent, merely sifted through thousands of applicants nationwide from a Certification list (prepared for a vacancy announcement, which by the way was not even designed for Puerto Rico vacancies) until it found four applicants who happened to have Puerto Rican addresses. There is no

pretense here that the selections were based on merit or anything other than the applicants have addresses in Puerto Rico.

C. Was there an established past practice in the case

Respondent also contends that there is an established past practice of it making the decision as to "which would be the appropriate staffing pattern for the location in question," but that is not the issue here. Conditions of employment may be established by past practice of the parties. U.S. Department of Labor, Washington, D.C., 38 FLRA 899 (1990); Department of the Navy, Naval Weapons Station Concord, Concord, California, 33 FLRA 770 (1988); Department of the Treasury, Internal Revenue Service (Washington, D.C.) and Internal Revenue Service Hartford District (Hartford, Connecticut), 27 FLRA 322 (1987). Respondent defines past practice to fit its case by contending that the past practice must be viewed in terms "of the environment and stability of the duty location." Such a requirement is not pertinent to the instant case which is found not to involve a past practice issue. Furthermore, even where a past practice is established there could still be notice requirements before making a change in conditions of employment.

It is my opinion that the issue here does not concern whether a practice existed of Respondent setting a staffing pattern for its locations. Rather, it is whether in staffing the overseas assignment, Respondent used a different and new method for filling those vacancies than it had in the past, without notifying or bargaining with the exclusive representa-tive. In this regard, it does appear as Arbitrator Peck states, the Respondent "departed from the requirement that new hires should be made on a competitive, not geographical, basis." If there was a practice, it was that hiring would be done on a competitive basis. Respondent's departure there-fore, would clearly change its previous hiring practice for the Puerto Rico location without notifying the exclusive representative. Such a change without giving notice and the opportunity to negotiate is violative of the Statute.

D. The impact on the bargaining unit was more than de minimis

It is noted again, that Respondent's managers, Whelan and Mata, defend its hiring of trainees with only Puerto Rico addresses based on Respondent's belief that it has an absolute right to hire employees. Unfortunately, Respondent offered no explanation as to how it is privileged to ignore

its statutory obligation to bargain the impact and implementation of its decision to bring, for the first time, trainees to Puerto Rico (thereby precluding the bargaining unit Border Patrol Agents from exercising their longstanding right to rotate) or to limit the area of consideration to Puerto Rico residents only. The justifications offered for not bargaining with the Union over the admitted change in policy, as we have seen already, is that the Union waived its right to bargain by agreeing to Article 4 of the parties' collective bargaining agreement and, that the change in employees' conditions of employment was no more than **de minimis** have little merit.

It established that even if a subject matter of the change is outside the duty to bargain, an agency must provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are negotiable. Accordingly, even where the subject matter of the change is outside the duty to bargain, there remains a responsibility to bargain over the impact and implementation of the change in conditions of employment that have more than a **de minimis** impact on unit employees. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Hartford District Office, Hartford, Connecticut, 41 FLRA 1309, 1317 (1991). More specifically, the obligation exists, even where management, as here, is exercising what it considers a section 7106 right. See, for example, U.S. Department of Justice, Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California, 35 FLRA 1039, 1047 (1990).

In resolving whether a change is more than **de minimis**, the Authority will carefully examine the following:

> facts and circumstances presented in each case . . . . In examining the record, we will place principal emphasis on such general areas of consid-eration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involved.
>
> As to the number of employees involved, this factor will not be a controlling consideration. . . . As to the size of the bargaining unit, this factor will no longer be applied.

Department of Health and Human Services, Social Security Administration, 24 FLRA 403, 407-08 (1986). Chief Patrol Agent Gary Labbe testified, in an effort to counter evidence showing the working and living conditions in Puerto Rico to be very different from the continental United States. Labbe submitted that there are advantages in coming to Puerto Rico--the different nature of the work which could lead to some career-enhancing experiences being one of those advantages. Unwittingly, Labbe supplied an illustration for the General Counsel to demonstrate more than a **de minimis** impact resulted to bargaining unit employees from this change. Thus, if one is to believe Labbe, changing the area of consideration for filling vacancies in Puerto Rico prevented stateside employees from competing for a tour of duty that offered career enhancing experiences, that according to Labbe, were available. By the same token, the ban on rotating out of Puerto Rico adversely affects the employees already in Puerto Rico (particularly an employee like Edgar Perez) who is anxious to rotate back to a more familiar lifestyle and working environment.

Respondent seeks to limit impact by saying that the working conditions such as the same work, breaks, overtime, etc., are the same in Puerto Rico as in the other border patrol stations. This analysis ignores the most obvious and maybe the most critical issue of the case, i.e., the Overseas Rotation Program. The apparent impact or foreseeable impact of this change is that four existing bargaining unit employees may have been deprived of a career enhancing opportunity to serve in Puerto Rico. Less obvious, but seemingly more important is that the applicants who were hired do not have the same rotation rights as previously hired Puerto Rico agents who could rotate out of Puerto Rico after a prescribed period.

In short, Respondent's cost-saving measure, prevented all of its bargaining unit employees, no matter where their original residence, from taking advantage of potentially career-enhancing experiences--unless that employee is willing to spend the remainder of his working life in an overseas location. In the circumstances, the impact or reasonably foreseeable impact on Border Patrol Agent's lives and working conditions flowing from the change in the instant case, clearly is more than **de minimis.**

Based on all of the foregoing, it is found that Respondent violated section 7116(a)(1) and (5) of the Statute by implementing a decision to hire residents of Puerto Rico to fill four Border Patrol Agent trainee positions at the Ramey Station, Mayaguez Sector, Puerto

Rico, and assign them to permanent positions in Puerto Rico, rather than staff the positions through the use of rotational tours which would entitle the employee to rotate to positions in the continental United States, without notifying the Union and giving it an opportunity to negotiate the impact and implementation of the change.

The Remedy

While a **status quo ante** remedy, is on the surface, appropriate in a case like this, where an agency unilaterally reduces the area of consideration for job vacancies. Social Security Administration, supra, at 883, the Charging Party and the General Counsel both suggest that such a remedy would generate unnecessary hardship on the four employees hired as a result of Respondent's change in policy. Such a remedy requiring a re-posting and hiring the best qualified applicants without regard to residence, would have the effect of removing these four employees from the government. While the hyperbole about the egregious nature of the violations is rejected, the undersigned does see as a meaningful remedy here a remedial order that allows the four affected employees to experience the same conditions of employment enjoyed by their co-workers.

I agree that the **status quo ante** remedy would create a potentially extremely unfair situation to the four employees who had already waited several years to be hired from the list before Respondent formulated its plan to abandon its overseas rotation policy. Consequently, I am in agreement with the General Counsel that a cease and desist order, Notice posting and an order directing Respondent to offer the four employees --Edgar Perez, Edwin Rodriguez, German Catala and Martin Santiago--the rotation rights to the continental United States enjoyed by the other Border Patrol Agents in Puerto Rico. Exercise of such rights should be optional; in other words, employees should have the right to remain in Puerto Rico, if they so choose, as agent Joe Swider has done.

Respondent maintains that Chapter 302 of the Federal Travel Regulations, § 302.1-12(b), precludes such a remedy. Respondent apparently interprets the regulation to mean that a new appointee in Puerto Rico whose residence is in Puerto Rico and is assigned to a station in Puerto Rico is not eligible to be transferred or to travel outside the continental United States are a couple of flaws in Respondent’s approach. In the first place, the regulation does not prohibit anything. Rather, the plain language of the regulation simply makes appointees from other areas eligible for the travel benefits. Therefore, a remedial

order from the Authority could not directly thwart the regulation. Even assuming that such an order would contradict the travel regulations, the Authority is vested by sections 7105(g) and 7118 of the Statute with broad powers to remedy violations of the Statute. See generally National Treasury Employees Union v. FLRA, 910 F.2d 964 (D.C. Cir. 1990) (en banc); Department of the Army, U.S. Army Soldier Support Center, Fort Benjamin Harrison, Office of the Director of Finance and Accounting, Indianapolis, Indiana, 48 FLRA 6 (1993).

This remedy would be particularly appropriate, in the circumstances of this case, because Respondent consciously chose to change employment conditions for the specific and admitted purpose of avoiding the financial cost of granting rotation rights. Furthermore, the possibility that this remedy will increase costs for Respondent is irrelevant. As the Authority has observed, quoting from American Federation of Government Employees v. FLRA, 785 F.2d 333 at 338 (D.C. Cir. 1986):

> [E]conomic hardship is a fact of life in employment, for the public sector as well as the private. Such monetary considera-tions often necessitate substantial changes. If an employer was released from its duty to bargain whenever it had suffered economic hardship, the employer's duty to bargain would practically be nonexistent in a large proportion of cases.

Lexington-Blue Grass Army Depot, Lexington, Kentucky and American Federation of Government Employees, AFL-CIO, Local 894, 24 FLRA 50, 54 (1986). In other words, mere monetary cost does not render an otherwise negotiable proposal nonnegotiable, and does not preclude the remedy requested here. The general policy favoring make-whole relief to employees adversely affected by an agency's failure to bargain over the impact and implementation of a change in conditions of employment must take precedence over monetary cost to an agency.

I am also in agreement with the General Counsel, for the reasons stated in its brief, that the Notice should be signed by a high ranking Immigration and Naturalization office, like the Commissioner and, that it should be posted throughout the entire bargaining unit.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, U.S. Immigration and Naturalization Service, Puerto Rico:

1. Shall not:

(a) Unilaterally change the conditions of employment of its employees by implementing a decision to hire residents of Puerto Rico to fill four Border Patrol Agent trainee positions at the Ramey Station, Mayaguez Sector, Puerto Rico, and assign them to permanent positions in Puerto Rico, rather than to staff the positions through the use of rotational tours which would entitle the employees to rotate to positions in the continental United States, without notifying the National Border Patrol Council, American Federation of Government Employees, AFL-CIO and giving it an opportunity to negotiate the impact and implementation of the change.

(b) In any like or related manner interfere with, restrain, or coerce its employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

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

(a) Offer four employees--Edgar Perez, Edwin Rodriguez, German Catala and Martin Santiago--the rotation rights to the continental United States enjoyed by the other Border Patrol Agents employed in Puerto Rico. Exercise of such rights should be optional; in other words, employees should have the right to remain in Puerto Rico, if they so choose, as agent Joe Swider has done.

(b) Notify the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, of any new positions for Border Patrol Agent trainees at the Ramey Station, Mayaguez Sector, Puerto Rico, and afford it the opportunity to bargain, to the extent consistent with law and regulation, on the impact and implementation of the policy.

(c) Post at all locations within the Immigration and Naturalization Service where bargaining unit employees represented by the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, 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, Immigration

and Naturalization Service, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, August 31, 1995

ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change the conditions of employment of our employees by implementing a decision to hire residents of Puerto Rico to fill four Border Patrol Agent trainee posi-tions at the Ramey Station, Mayaguez Sector, Puerto Rico, and assign them to permanent positions in Puerto Rico, rather than to staff the positions through the use of rotational tours which would entitle the employees to rotate to positions in the continental United States, without notifying the National Border Patrol Council, American Federation of Government Employees, AFL-CIO and giving it an opportunity to negotiate the impact and implementation of the change.

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

WE WILL offer four employees--Edgar Perez, Edwin Rodriguez, German Catala and Martin Santiago--the rotation rights to the continental United States enjoyed by the other Border Patrol Agents employed in Puerto Rico. Exercise of such rights should be optional; in other words, employees should have the right to remain in Puerto Rico, if they so choose, as agent Joe Swider has done.

WE WILL notify the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, of any new positions for Border Patrol Agent trainees at the Ramey Station, Mayaguez Sector, Puerto Rico, and afford it the opportunity to bargain, to the extent consistent with law and regulation, on the impact and implementation of the policy.

(Activity)

Date: By:
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Atlanta Regional office, whose address is: 1371 Peachtree Street, NE, Suite 122, Atlanta, Georgia 30309-3102, and whose telephone number is: (404) 347-2324.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. BN-CA-30073, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Steven R. Freedman, Esq.
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Employees, National Border Patrol
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REGULAR MAIL:

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American Federation of Government
Employees
80 F Street, NW
Washington, DC 20001

Dated: August 31, 1995
Washington, DC