UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: January 20, 1999

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
SERVICE NEWARK, NEW JERSEY

Respondent

and Case No. BN-CA-80106

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2149, AFL-CIO

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

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

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WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, NEWARK, NEW JERSEY Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2149, AFL-CIO Charging Party	Case No. BN-CA-80106

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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **FEBRUARY 22, 1999**, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: January 20, 1999
Washington, DC

OALJ 99-13

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

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, NEWARK, NEW JERSEY Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2149, AFL-CIO Charging Party	Case No. BN-CA-80106

Mr. Lawrence A. Powers
For the Respondent

Mr. Lazaro Cosme
For the Charging Party

Richard Zaiger, Esquire
Julie McCarthy, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. [1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent on, or about,

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

October 26, 1997, unilaterally implemented at Cherry Hill, New Jersey, a change in overtime on Sundays and holidays in violation of §§ 16(a)(5) and (1) of the Statute.

This case was initiated by a charge filed on November 28, 1997 (G.C. Exh. 1(A)) and the Complaint and Notice of Hearing issued on March 27, 1998 (G.C. Exh. 1(C)), and set the hearing for June 16, 1998, pursuant to which a hearing was duly held on June 16, 1998, in Philadelphia, Pennsylvania, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument, which each party waived. At the conclusion of the hearing, July 24, 1998, was fixed as the date for mailing post-hearing briefs which time subsequently was extended, on motion of Respondent, with which all other parties concurred, for good cause shown, to July 31, 1998. Respondent and General Counsel each timely mailed a brief, received on, or before, August 4, 1998, which have been carefully considered. Upon the basis of the entire record[2], I make the following findings and conclusions:

FINDINGS

1. The American Federation of Government Employees, AFL-CIO (hereinafter, "AFGE") is the certified exclusive representative of a nation-wide consolidated unit of employees of the Immigration and Naturalization Service and the Immigration and Naturalization Council (hereinafter, "INS Council") is a structure within AFGE made up of a group of local unions representing main line bargaining unit employees of the Immigration and Naturalization Service, i.e., other than professional bargaining unit employees and other than Border Patrol bargaining unit employees (Tr. 64-65). American Federation of Government Employees, Local 2141, AFL-CIO (hereinafter, "Union") is an agent of AFGE and a member of INS Council for the representation of main line bargaining unit employees in the Newark District which includes Cherry Hill and the entire State of New Jersey (Tr. 111-112) and encompasses airports as well as ports for vessels (Tr. 111).

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[2] On my own motion, I make the following correction of the transcript: page 85, line 22, the word, "none", which is an obvious typographical error (see, Res. Exh. 4, Example 4, which is the reference in the transcript) is hereby deleted and the word, "noon" is substituted therefor.

2. Inspectors receive a minimum of eight hours pay at two times their normal rate of pay for any inspectional assignment performed on a Sunday or a holiday, regardless of the length of the assignment (Res. Exh. 3, p. 1; Joint Exh. 3(c); Tr. 41, 42). Pursuant to the Act of March 2, 1931, 8 U.S.C. § 1353a-1353b, as amended, the extra compensation so occasioned is paid by the master, owner, agent, or consignee of such vessel or other conveyance arriving from a foreign port. (Res. Exh. 3, INS Adm. Manual, part 2978.01; Tr. 32-33)

3. There is no dispute that before April 14, 1997, the established practice at Cherry Hill, and elsewhere, had been that Inspectors called in for inspectional duties on Sunday or a holiday performed all inspections required within a 24 hour period, but were not required to remain on duty between inspections and, if there were a single vessel to inspect, the Inspector went home when that inspection was completed. Thus, Mr. Michael De Marco, an Immigration Inspector at Cherry Hill, and, since about April, 1998, a Steward (Tr. 20-22), testified there, ". . . could be one [vessel]. It could be two. Could be three. Could be more." (Tr. 32); "If there was an 0100 ship and . . . a 2200 ship, the inspector would do both vessels . . . You would do the 1 o'clock. You'd go home, and then go back out and do the 10 o'clock." (Tr. 47). The eight hours on duty, or less, on a Sunday or a holiday need not be eight consecutive clock hours. ". . . They are to be specified in such a manner as to provide the maximum coverage at the minimum cost. . . ." (Res. Exh. 3, INS Adm. Manual. Paragraph 8(a)). If the total inspectional time within a 24 hour period was not more than 8 hours, the Inspector was paid for 16 hours (i.e. 8 hours @ double time) (Tr. 47) (see, Jt. Exhs. 3(a), Mr. De Marco, 2/2/97, clock hours worked - two vessels, first at 1030, second at 2300 - 2.75 hours, paid for 16 hours; 3(b), Mr. De Marco, 2/16/97, clock hours worked - three vessels, first at 0700; second at 0845; third at 2300 - 3.5 hours, paid for 16 hours; 4(a), Mr. Dennis M. Murphy, 5/19/96, one vessel at 1600, clock hours 1 hour 10 minutes, paid for 16 hours; 4(b), Mr. Murphy, 7/14/96, one vessel at 1400, clock hours 1 hour, 5 minutes, paid for 16 hours; 4 (c), Mr. Murphy, 1/26/97, one vessel at 0001, clock time one hour, paid for 16 hours; 4(d), Mr. Murphy, 2/23/97, one vessel at 1400, clock time 1 hour, 10 minutes, paid for 16 hours; 4(e), Mr. Murphy, 4/6/97, one vessel at 1600, clock hours 1 hour, 10 minutes, paid for 16 hours).

4. In 1996, the parties negotiated a new national Agreement. Mr. Charles J. Murray, currently stationed in the New York District Office as a Special Agent, is President of the INS Council and was a member of the INS

Council bargaining team for the last five rounds of contract negotiations, including the 1996 negotiations (Tr. 65-66). Mr. Murray stated, without contradiction, that negotiations began on, or about, September 8, 1996, and were completed by about December 8, 1996 (Tr. 66); however, the new Agreement was not signed and did not become effective until April 14, 1997 (Jt. Exh. 1, Tr. 66).

Two new provisions were added to Article 27 of the new Agreement which drastically changed inspectional overtime. These were sections:

> "H. No employee shall be required to work more than 9 hours of inspectional overtime (including rollback) on a regular work day or more than 12 hours of overtime (excluding rollback) on a Sunday, Holiday, or other day on which the employee is not regularly scheduled to work when there are other qualified and eligible employees who are available and willing to work.
>
> "I. Breaks in working hours of more than one (1) hour shall not be scheduled or assigned in any overtime day absent the agreement of the affected employee." (Jt. Exh. 1, Art. 27, Sections H and I)

Mr. Murray stated that Mr. James A. Broz, a member of the INS Council negotiating team and Northern Region V.P. of the Council, was the driving force for a limit on overtime hours on duty, which was agreed to and became Article 27, Section H (Tr. 72-73). As to Sunday or holiday overtime, an employee may not be required to work more than 12 hours when there are other qualified and eligible employees available; but, as Mr. Murray pointed out, while an employee can be kept on duty for 12 hours, he would be paid for not less than 24 hours. (Tr. 85, 86; Res. Exh. 3, INS Adm. Manual, Paragraph 9d. (3)(b))

The proposal to limit breaks in the inspectional work day on Sundays and holidays was Mr. Murray's, which he had also advanced in prior negotiations (Tr. 71, 76). As Mr. Murray explained, the proposal was made because,

> ". . . in many parts of the country, Immigration Inspectors were required to come in on overtime and perhaps work for the statutory computation, eight hours at the double time rate, work their time in littles, if you will, in little blocks of time.

"So that an employee might work from 1 a.m. to 3 a.m. And as I said, an employee might be required to work, you know, a small block of time, two hours of so, and then be dismissed and then come back for another two or three hours.

"And then be required to return later that day, or later that night perhaps for two or three hours, sometimes working, you know, a full eight-hour day, sometimes not.

"But, sometimes working it over a twelve or sixteen or twenty-four hour period. And from our point of view, that was just . . . not acceptable.

. . .

". . . We proposed that there be . . . a break no more than one hour. . . ." (Tr. 76-77).

The proposal, that breaks be no more than one hour, was accepted and incorporated as Section I of Article 27, without any management counter-proposal (Tr. 77).

Neither Respondent's abbreviated bargaining notes (Res. Exh. 1), nor the "annotated" version of Article 27 (Res. Exh. 2) contains any discussion of Section I, although each refers to Section H (Res. Exh. 1, p. 24; Res. Exh. 2, p. 57) and Ms. Claire Seglem, Deputy Assistant Regional Director for Inspections, Eastern Region and a management member of the negotiating team (Tr. 122, 123), testified that she did not remember any discussion about Section I,

" . . . I don't recall any conversation about leaving and going home because the AMs [Adm. Manuals] clearly state that they will remain . . .

"QYou're not disputing the fact that there has been a practice in Cherry Hill where employees have been allowed to leave once they completed their overtime inspection work on a Sunday?

"ANo, I'm not because I have done that same thing.

"QIn other words, you have worked on occasion overtime on Sunday, completed your work and gone home?

"AThat's correct.

"QAnd there's nothing illegal about that?

"ANo, because I was available for subsequent duties should they arise.

"QOkay. And that's part of the procedures for working overtime on Sundays?

"AWell, it was . . ." (Tr. 131).

[General Counsel's premise, that the practice of leaving between inspections was unique to Cherry Hill, is false. As noted in Paragraph 3, above, the Administrative Manual, Paragraph 8(a) (Res. Exh. 3), specifically states that the eight hours on duty, ". . . need not . . . be eight (8) consecutive clock hours. . . ." and, inter alia, gives as an example, ". . . the eight (8) hours of duty might be from 2:00 a.m. to 5:00 a.m., then from 7:00 a.m. to 9:00 a.m., and finally from 10:00 a.m. to 1:00 p.m." (id.). Indeed, Ms. Seglem's personal experience was not at Cherry Hill (Tr. 131-132).]

Mr. William Michael Petty, a Senior, Labor Relations Specialist for Headquarters, INS (Tr. 145), and, also, a management member of the negotiating team (Tr. 145), testified that Section I was discussed (Tr. 170). He stated, in part, as follows:

"AI really can't tell you precisely when this arose. I recall that this topic of the split shift was something we discussed over several arguing (sic) sessions.

"We talked about the ability amongst other things of management being able to hold people over. . . ." (Tr. 170-171).

Mr. Murray stated that there was, ". . . lengthy colloquy on that specific issue [overtime hours on duty] during the negotiations." (Tr. 75) and ". . . we explained it [his proposal that there not be more than one hour break on overtime] . . . ." (Tr. 77).

Mr. Murray stated that section 2978 of the Administrative Manual had been negotiated at the national level (Tr. 92). Mr. Murray testified that,

> "AThe AM is clear in saying that an employee can be assigned eight hours or less on a Sunday, or a holiday.
>
> . . .
>
> "But the AM is clear that the employee can work less as well as eight hours.
>
> . . .
>
> "Q. . . The expectation is they'd work as much as possible as eight hours?
>
> "AI think so. I think the AM says that, generally, one of the functions of the management official is to try and obtain productivity.
>
> "QFor as much as they're getting paid for?
>
> "AI think so.
>
> . . .
>
> "AThe AM is clear though that it is to be inspectional work.
>
> . . .
>
> "AIt can't be make, you know, busy work.
>
> "QDuties associated directly with the inspectional program?
>
> "ADirectly with the inspectional program." (Tr. 93-94).

5. Mr. Petty testified, without contradiction, that Respondent's Exhibit 4, "Explanation of Changes to Article 27 Overtime:", had been developed jointly by himself and Mr. Broz, Northern Region [Western] Vice President of the INS Council and member of the negotiating team, with input from Ms. Seglem and Ms. Mary Ann Gantner, Deputy District

Director, New York (Tr. 149, 150, 151), and, further that Respondent's Exhibit 4 had been used by him, and by Mr. James P. McIntire, then President of the INS Council[3], at every training session (Tr. 150, 151). Respondent Exhibit 4 provides, in relevant part, as follows:

> "**Explanation of Changes to Article 27 Overtime:**
>
> "**The Limitations in Section H:** This Section limits the amount of inspectional overtime an employee can be assigned. The limitation varies depending upon whether the day in question is a regular workday of the employee. If it is a regular workday, the employee may not be required to work more than 9 hours of overtime, including any rollback time. If it is not a regular workday, the employee may not be required to work more than 12 hours of overtime, excluding any rollback time. Neither of these limitations apply if a qualified (and eligible) replacement is not available to take over for the employee.
>
> "**The Limitations in Section I: (Although not expressly stated, the bargaining history on this Section reflects the following intent.)** With one exception, this section limits the length of a break between period of overtime work neither of which overtime period is a continuation of a regular work period. That limit is one hour unless the employee is agreeable to a longer break period. The exception pertains to an unexpected preshift assignment, i.e., where an employee who is scheduled to work a shift on a Sunday or holiday is unexpectedly called out (because of an early arriving flight, for example) to work an overtime assignment in advance of the scheduled overtime shift. In such situations, the one hour limitation on breaks between overtime periods does not apply.
>
> "Examples:

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3 Mr. McIntire had been Executive Vice President from October, 1983 until May, 1996, at which time he was elected President and Mr. Murray was elected Executive Vice President. Mr. Murray was elected President, again, in May, 1998 (Tr. 65).

. . .

"3. On a day on which the employee is not regularly scheduled to work, he/she works a 9 a.m. to 5 p.m. overtime shift. The employee is then directed to return to work for one hour starting at 9 p.m. Under Article 27, Section I, the employee could not be required to return at 9 p.m. **unless he/she voluntarily accepted the assignment.** The involuntary assignment at 9 p.m. would not be permitted because the break between the employee's 9 a.m. to 5 p.m. overtime shift and the beginning of the next assignment in that overtime day, at 9 p.m., would be greater than the one hour permitted by the agreement. However, instead of releasing the employee after the first assignment and directing him/her to return at 9 p.m., management could keep the employee on duty until 10 p.m. (performing productive work of some kind), except for a 1-hour break. This would be permitted under the agreement because there would be no break of more than one hour (Article 27, Section I) and the total hours worked on an overtime day would not exceed 12 (Article 27, Section H).

"4. On a day on which an employee is not regularly scheduled to work, the employee is assigned a vessel inspection at 3 a.m., another at 7 a.m., and a third at noon (assume each inspection will last about an hour). The latter two assignments would not be permitted under Article 27, Section I, **unless the employee voluntarily accepted them**, because they would involve breaks in an overtime day of more than one hour. However, instead of releasing the employee between assignments, management could require the employee to remain on duty during the entire period or any part of it (with or without a single 1-hour break between the first and second or second and third assignments). This would be permitted under the agreement because the total hours worked during a non-regularly scheduled work day would not exceed twelve (Article 27, Section H) and there would be no more than one break or no more than one hour during the overtime day(Section I)." (Res. Exh. 4) (Emphasis in original).

When asked if the negotiated Agreement permitted an employee to be held on duty to perform the three inspections in Example Number 4, above, Mr. Murray testified in the affirmative, as follows:

> "AThat management can require an employee to remain on duty?
>
> "QFor that shift, correct.
>
> "AYeah, I think so.
>
> "QOkay, that's within the intent of the language.
>
> "AI think the statute gives them that right.
>
> "QOkay. Is there anything in article 27 when it was negotiated that prohibited the agency from assigning an eight-hour shift to an employee on Sundays?
>
> "AI don't believe so." (Tr. 86-87).

Neither party showed the training schedule for the new Agreement, but Mr. Lazaro J. Cosme, President of the Union, testified that training for the Union occurred in June, 1997 (Tr. 118).

6. Although the new Agreement (Jt. Exh. 1) became effective April 14, 1997, no change occurred at Cherry Hill, and, further, while training of the Union on the new Agreement took place in June, 1997, no change occurred at Cherry Hill. Thus, Mr. De Marco on May 4, 1997, inspected two vessels, the first at 0030 [12:30 a.m.] and the second at 2230 [10:30 p.m.], total clock time 1.75 hours, paid for 16 hours (Jt. Exh. 3(d); Tr. 51-52); on June 22, 1997, Mr. De Marco inspected one vessel at 0300 [3:00 a.m.], total clock time 1.25 hours, paid for 16 hours (Jt. Exh. 3(e); Tr. 43-44) [after the inspection was completed, he went home (Tr. 44-45); on October 14, 1997, Mr. De Marco inspected one vessel at 1000, total clock hours 3.5 hours, paid for 16 hours (Jt. Exh. 3(f); Tr. 45 [after the inspection was completed, he went home (Tr. 45-46)]); Mr. Murphy on May 11, 1997, inspected one vessel at 1500 [3:00 p.m.] total clock time 1 hour and 10 minutes, paid for 16 hours (Jt. Exh. 4 (f)); Mr. Murphy on May 25, 1997, inspected one vessel at 1600 [4:00 p.m.], total clock time 1 hour, paid for 16 hours (Jt. Exh. 4(g)); Mr. Murphy on August 17, 1997, inspected

one vessel at 1600 [4:00 p.m.], total clock time 1 hour and 20 minutes, paid for 16 hours (Jt. Exh. 4(h)); Mr. Murphy on August 30, 1997, inspected one vessel at 2200 [10:00 p.m.], total clock hours shown 25 minutes [this appears to be wrong and should be 2 hours and 25 minutes], paid for 16 hours (Jt. Exh. 4(i)); Mr. Murphy on October 13, 1997, inspected one vessel at 0530 [5:30 a.m.], total clock time 2 hours and 30 minutes, paid for 16 hours (Jt. Exh. 4(j)); Mr. Frederick Nye on May 18, 1997, inspected one vessel at 0000 [12:00 p.m.], total clock time 40 minutes, paid for 16 hours (Jt. Exh. 5(a)); Mr. Nye on July 27, 1997, inspected one vessel at 2130 [9:30 p.m.], total clock time 2 hours and 50 minutes, paid for 16 hours (Jt. Exh. 5(b)).

7. On Saturday, October 25, 1997, while working at the Newark International Airport, Mr. De Marco was offered overtime inspection at Cherry Hill the following day and when he accepted the offer to work Sunday overtime, his supervisor, Ms. Sharon Dooley [nee Gertchkopf] told him, ". . . to inspect the 0100 vessel and then return to the office and complete an eight-hour shift, until 0900." (Tr. 53). This was the first time he had ever been told he had to remain on duty after completing a Sunday overtime inspection to complete an eight hour shift (Tr. 53). Mr. DeMarco on October 26, 1997, inspected one vessel at 0100 [1:00 a.m.], completed the inspection at 0230 and returned to the office to complete the eight hour shift. Total clock time 8 hours, paid for 16 hours (Jt. Exh. 3(g); Tr. 55-56). Mr. De Marco reported the issue of having to work the eight hour shift to Steward Murphy (Tr. 54).[4]

Mr. Cosme testified that he received no notice of the change in Sunday overtime until after Mr. De Marco had been required to remain on duty for the full eight hour shift on October 26, 1997 (Tr. 114).

On November 16, 1997, Mr. De Marco inspected one vessel, and two aircraft, the vessel having been inspected at 0200, the first aircraft at 1030, and second aircraft at 1100. He completed the third inspection at 1150. Mr. De Marco was not asked about Joint Exhibit 3(h), and the record fails to show specifically where the aircraft were inspected but it presumably was at McGuire Air Force Base which is within Cherry Hill's area (Tr. 23). From the Exhibit itself, it would appear that he was not required to remain

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Mr. De Marco had worked the 11:00 a.m. to 7:00 p.m. on Saturday, October 25, 1997, at Newark (Tr. 52), did not arrive at home until about 10:00 p.m. and after dinner and a brief time to relax, left at about 12:30 a.m. for the 1:00 a.m., assignment (Tr. 56).

at the duty site after the first inspection had been completed, and, in accordance with Article 27 I, had agreed to more than a one hour break, inasmuch as he noted that the 2d and 3d assignments were more than one hour from the first. Because the overtime was performed over a period greater than eight hours (9 hours and 50 minutes), even though the clock hours were only 2 hours and 40 minutes for the three inspections, he was paid for 20 hours, i.e. 8 hours double time for Sunday overtime, ½ day's pay (4 hours) for the time over 8 hours (Jt. Exh. 3(h)); i.e., Mr. De Marco under the new Agreement treated the eight hour overtime assignment as "duty" time, whereas, before the new Agreement only inspectional time was "duty" time (see, for example, Jt. Exhs. 3(a) and (b)).

On January 11, 1998, Mr. Nye inspected one vessel at 0200 [2:00 a.m.], completed the inspection at 0335 [3:35 a.m.] [one hour and 35 minutes] and returned to the office for completion of eight hour shift. Total clock time 8 hours, paid for 16 hours (Jt. Exh. 5(c)). On March 22, 1998, Mr. Nye inspected one vessel at 0730, completed the inspection at 0900 [one hour and 30 minutes] and returned to the office for completion of eight hour shift. Total clock hours 8 hours, paid for 16 hours (Jt. Exh. 5(d)).

8. Mr. De Marco testified that shipping agents call in the Estimated Time of Arrivals (ETAs) of vessels on Friday for Saturday, Sunday and Monday morning arrivals because, ". . . Friday is the last day that the office is technically open to the public." (Tr. 31). On the basis of the scheduled arrivals, overtime is assigned and the Inspector knows the schedule on Friday or Saturday when the Sunday overtime is offered. (Tr. 31, 53). Mr. De Marco stated, without equivocation, that the Inspector was responsible for all scheduled Sunday ship arrivals whether it was one, two, three or more, within a 24 hour period (Tr. 32, 46-47, 59-60); but the Inspector was not responsible for unscheduled arrivals (Tr. 60-61). He was asked, for example, if, on March 2, 1997 (Jt. Exh. 3(c)) when a single vessel had been scheduled at 0420, had another vessel shown up after he had gone home at 0500, would he have been responsible for its inspection and he said "no" (Tr. 60, 62); that they could have tried to call him but if they couldn't reach him, they would have had to go down the wheel to find someone (Tr. 60). There was no evidence or testimony that any unscheduled vessel had ever arrived for inspection on Sunday or a holiday.

CONCLUSIONS

There is no disagreement that there long had been a practice, when working Sunday or holiday overtime, of permitting employees to leave work upon completion of one inspection and returning to perform other inspections, as required, within 24 hours. This was specifically authorized by the Administrative Manual and Cherry Hill followed the practice with the added practice, shown at least at Cherry Hill, of working only the inspection time required, i.e., if there were a single Sunday or holiday inspection scheduled, the employee would perform that inspection and then go home (Jt. Exh. 3(c); 4(a), (b), (c), (d), (e)), or if there were two or more Sunday or holiday inspections scheduled, the employee would perform the final inspection, return home, if there were a break between inspections, return for the next inspection, etc., continuing to handle all scheduled inspections within 24 hours (Jt. Exhs. 3(a) [one inspection at 10:30 a.m.; second inspection at 11:00 p.m.], (b) [one inspection at 7:00 a.m., second inspection at 8:45 a.m.; and third inspection at 11:00 p.m.])

The 1997 Agreement changed Sunday and holiday overtime as follows: First, the duration of the assignment was reduced from 24 hours to 12 hours. Second, breaks in working hours shall not exceed one hour, absent agreement of the affected employee. (Jt. Exh. 1, Art. 27, Secs. H & I).

Although Section I was discussed (Tr. 75, 77, 170-171), the abbreviated bargaining notes (Res. Exh. 1) do not reflect the discussion, however, the "Explanation of Changes To Article 27 Overtime" (Res. Exh. 4), jointly developed by Mr. Broz, Northern Region Vice President of the INS Council and member of the negotiating team, and by Mr. Petty, Labor Relations Specialist and management member of the negotiating team, discusses Section I and gives example of its application. Thus, example 4 is of an inspection of a vessel at 3:00 a.m.; a second inspection at 7:00 a.m.; and a third at noon and states, "The latter two assignments would not be permitted under Article 27, Section I, unless the employee voluntarily accepted them, because they would involve breaks in an overtime day of more than one hour." (Res. Exh. 4) (Emphasis in original). The example continues, ". . . However, instead of releasing the employee between assignments, management could require the employee to remain on duty during the entire period or any part of it (with or without a single 1-hour break between the first and second or second and third assignments). This would be permitted under the agreement because the total hours worked . . . would not exceed twelve (Article 27, Section H) and there would be no more than one break or no more than one hour during the overtime day (Section I)." (Res. Exh. 4) (Emphasis supplied).

Mr. Murray, the proponent of what became Section I, stated that section 2978 of he Administrative manual, which he had participated in negotiating (Tr. 93), ". . . is clear in saying that an employee can be assigned eight hours or less on a Sunday, or a holiday" (Tr. 93), but the expectation is that they work eight hours as much as possible (Tr. 93). However, Mr. Murray emphasized that the work to be assigned must be inspectional work, ". . . It can't be . . . busy work" (Tr. 94); but must be associated. ". . . Directly with the inspectional program." (Tr. 94). Ms. Seglem emphasized that while she did not recall any conversation about leaving and going home, ". . . the AMs clearly state that they will remain . . . ." (Tr. 131) and Mr. Petty said, "we talked about the ability amongst other things of management being able to hold people over. . . ." (Tr. 171).

The Administrative manual, at least from about 1989 (Tr. 93), had provided that employees could be assigned eight hours or less on a Sunday or a holiday with the expectation that they would work eight hours as much as possible, but the new Agreement limited the period subject to assignment to 12 hours and prohibited more than one hour breaks in working time. The Union was fully aware that the one hour limitation on breaks in working time would result in employees being held on duty and this was specifically set forth in the jointly developed training material. Because the new Agreement contemplated employees being held on duty on Sunday and holiday overtime, indeed, the one hour limitation on breaks on duty time, without the agreement of the employee, required that the employee be kept on duty to perform inspectional duties. Not only did the parties recognize that the negotiated one hour limit on breaks in working time would require that employees be held on duty but the negotiated one hour limit on breaks in working time changed the long established practice of releasing an Inspector from duty after an inspection to return for other inspections within a 24 hour period (reduced by the new Agreement to a 12 hour period) and re-affirmation of the long established policy, as set forth in the negotiated Administrative Manual, of Respondent specifying the time on duty of eight hours or less (Res. Exh. 3, Adm. Man. 2978.01, Par. 8(a)) would not have constituted a change in conditions of employment. Department of the Treasury, Internal Revenue Service, Cleveland, Ohio, 6 FLRA 240, 241 (1981); Department of the Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii, 29 FLRA 1236, 1259 (1987).

But Respondent made no change whatever at Cherry Hill when the new Agreement became effective April 14, 1997. For

example, as noted above, on May 4, 1997, Mr. De Marco inspected two vessels, the first at 12:30 a.m. and the second at 10:30 p.m. (Jt. Exh. 3(d)). Had the provisions of the new Agreement been applied, the second inspection would have been barred by both Section H (more than 12 hours) and I (breaks of more than one hour) and, although the total clock time was only 1.75 hours, he would have been entitled to considerably more than 16 hours pay (8 hours @ double time, see, Jt. Exhs. 3(h); Res. Exh. 3, Paragraph 9d(3)(b); Tr. 85, 86). Further, after completing a single scheduled inspection, the Inspector went home (Jt. Exhs. 3(e), (f); 4 (f), (g), (h), (i), (j); 5(a), (b); Tr. 43, 44, 45, 46). Nor did Respondent make any change at Cherry Hill after the training for the Union in June, 1997 (Jt. Exhs. 3(e), (f); 4 (f), (g), (h), (i), (j); 5(b)).

Because Respondent, with the willing acquiescence of the Union, had continued the long established prior practice, which was contrary to the new Agreement, that practice became a condition of employment for Cherry Hill. In Department of Health, Education and Welfare, Region V, Chicago, Illinois, 4 FLRA 736, 746 (1980) (hereinafter, "HEW, Region V, Chicago"), I held that,

> ". . . To constitute a condition of employment contrary to a negotiated agreement, such practice must: (a) be known to management; (b) responsible management must knowingly acquiesce; and (c) such practice must continue for some significant period of time. . . ." (4 FLRA at 746).

Although the Authority found it, ". . . unnecessary to reach or pass upon whether or under what circumstances the specific provisions of a negotiated agreement may be superseded by the parties' inconsistent established practice," (4 FLRA at 737), the late Judge Scalzo, in U.S. Nuclear Regulatory Commission, 6 FLRA 18, 33 (1981), cited and relied upon the three conditions necessary (he found that proof of (a) and (b) was missing in his case), and the Authority adopted, ". . . the Judge's findings, conclusions, and recommendation." (6 FLRA at 19). In Department of Health and Human Services, Social Security Administration, 17 FLRA 126 (1985), Judge Naimark also cited and relied upon the three conditions set forth in HEW, Region V, Chicago, supra, and concluded that the record did not support the conclusion that management knowingly approved the disputed practice, 17 FLRA at 138. The Authority adopted the judge's finding and conclusions and, further, stated, in relevant part, ". . . While the Authority agrees that knowing

acquiescence over a significant time may indicate past practice, the record does not support a finding of knowing acquiescence. . . .” (17 FLRA at 127, n.2). In Letterkenny Army Depot, 34 FLRA 606 (1990), the Authority stated,

> “. . . where the parties by mutual action have gone beyond provisions of an existing contract, conditions of employment may be established by such practice. . . .” (34 FLRA at 610-611).

In this case, Sunday and holiday overtime is a condition of employment and after the April 14, 1997, effective date of the new Agreement, which changed inspectional overtime, Respondent made no change whatever at Cherry Hill and the Union acquiesced in maintaining the long established prior practice. Because the parties by mutual action (see, Joint Exhibits 3(e), (f); 4(e), (f), (g), (h), (i), (j); 5(a), (b); Res. Exh. 3, Par. 9d(3)(b); Tr. 43, 44, 45, 46, 85-86), went beyond the provision of the existing Agreement and, for six months after the Agreement had become effective -- indeed ten months after the negotiation of the new Agreement had been completed -- the parties by mutual action maintained the prior existing practice and the mutual action for six months[5] established the practice as a condition of employment. Respondent, on October 25, 1997, without notice to the Union, unilaterally changed the conditions of employment respecting Sunday and holiday inspectional overtime, which had become conditions of employment by the mutual action of the parties for six months after the new Agreement had become effective, in violation of §§ 16(a)(5) and (1) of the Statute.

The practice plainly was known by Respondent's principal officials, including its Acting Port Director; its Assistant Regional Commissioner, Inspections; Finance; and Payroll (Joint Exhs. 3, 4, 5); six months was a significant period of time; and, as noted, the practice was the result of the mutual action of the parties.

Because Respondent unilaterally changed established conditions of employment without notice to the Union and without opportunity to negotiate procedures and appropriate

[5] Unawareness of the new Agreement was not argued by any party and, indeed, the record is entirely to the contrary; but, even after training for the Union in June, 1997, the parties by mutual action continued the practice, which differed from the new Agreement, until the conditions of employment were unilaterally changed by Respondent on October 25, 1997.

arrangement, pursuant to § 6(b)(2) and (3) of the Statute (I & I bargaining), a status quo ante remedy is both appropriate and necessary, however, General Counsel's request for, ". . . compensatory time to bargaining unit employees. . . ." (General Counsel's Proposed Order, Par. 2 (c)) is denied for the reasons that the record does not justify such remedy and the grant of such compensatory time would be unlawful. Under the established conditions of employment, which Respondent unilaterally changed, Inspectors, although permitted to return home upon completion of an inspection, or inspections, nevertheless were obligated to return for any scheduled inspections within 24 hours (see, for example, Joint Exhibits 3(a), (b), (d)). The Inspectors were paid double time for 8 hours (Joint Exhibit 3(g), 5(c) and (d)) and, as Respondent points out in his Brief (last page of text, unnumbered), the Controller General has long held that

> "The statute [the Act of March 2, 1931, 46 Stat. 1467, providing for overtime compensation of employees of the Immigration Service], does not contemplate nor permit both the payment of extra compensation and the granting of compensatory time for the same period of work." 10 Comp. Gen. 537, 538 (A-36167) (June 3, 1931).

Indeed the decision of the Comptroller General, id., further stated,

> ". . . reference is made to the amendment suggested in decision of April 22, 1931, 10 Comp. Gen. 487, to paragraph (c) of the proposed regulations, to make it read as follows:
>
> > "No time off shall be allowed for time for which extra compensation must be paid under this order.'" (id. at 538).

Paragraph 9a. of the I & N Service Administrative Manual, 2978.01, January 4, 1985 (Res. Exh. 3), provides:

> 9. Compensation Under the Act.
>
> a. Compensatory Leave Prohibition. In no case may compensatory leave be granted to immigration officers for any time on duty for

> which extra compensations are due under the Act. (See 10 Comp. Gen. 487)." (Res. Exh. 3, Par. 9a.)

Accordingly, as the Administrative Manual shows, the amendment proposed by 10 Comp. Gen. 487 was, indeed, adopted; in addi-tion the Comptroller General in 10 Comp. Gen. 537 (A-36167), as set forth above, specifically stated that, ". . .The statute does not contemplate nor permit both the payment of extra compensation and the granting of compensatory time for the same period of work." Moreover, the Administrative Manual also prohibits compensatory leave for Immigration officers for any time on duty for which extra compensation is due under the Act. As the Inspectors received extra compensation, in the form of double time, the grant of compensatory time would be unlawful.

Having found that Respondent violated §§ 16(a)(5) and (1) of the Statute by its unilateral change of established conditions of employment concerning Sunday and holiday inspectional overtime, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41, and § 18 of the Statute, 5 U.S.C. § 7118, the U. S. Department of Justice, Immigration and Naturalization Service, Newark District, Cherry Hill Sub-office, Cherry Hill, New Jersey, shall:

1. Cease and desist from:

(a) Implementing or enforcing at Cherry Hill, New Jersey, Sections H and I of Article 27 of the collective bargaining Agreement, effective April 14, 1997 (Jt. Exh. 1, Art. 27, Sections H and I), unless and until it gives American Federation of Government Employees, Local 2149, AFL-CIO (hereinafter, "Union") notice, in writing, of its intention to implement Sections H and I of Article 27, and, upon request of the Union, bargain in good faith, pursuant to § 6(b)(2) and (3) of the Statute, concerning procedures and appropriate arrangements.

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

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

(a) Rescind the implementation of Sections H and I of Article 27 of the collective bargaining Agreement, which it unilaterally implemented on October 26, 1997.

(b) Reinstate the conditions of employment concerning Sunday and holiday inspectional overtime that had been in effect prior to October 26, 1997.

(c) Give notice to the Union, in writing of any proposed change in Sunday and holiday inspectional overtime, i.e. intent to implement at Cherry Hill Sections H and/or I of Article 27, and, upon request, bargain in good faith concerning the impact and implementation of any such proposed change.

(d) Post copies of the attached Notice, on forms to be furnished by the Federal Labor Relations Authority, at its Cherry Hill Sub-office. Upon receipt of such forms, they shall be signed by the District Director and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notice 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.

(e) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director of the Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston,

Massachusetts 02110-1200, in writing, within 30 days from

the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: January 20, 1999

Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of Justice, Immigration and Naturalization Service, Newark District, Cherry Hill Sub-office, Cherry Hill, New Jersey has violated the Federal Service Labor-Management Relations Statute (hereinafter, "Statute") and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement or enforce at Cherry Hill, New Jersey, Sections H and I of Article 27 of the collective bargaining Agreement, effective April 14, 1997, unless and until we give American Federation of Government Employees, Local 2149, AFL-CIO (hereinafter, "Union") notice, in writing, of our intent to implement Sections H and I of Article 27, and, upon request of the Union, bargain in good faith, pursuant to § 6(b)(2) and (3) of the Statute, concerning the impact and implementation of such change.

WE WILL RESCIND the implementation of Sections H and I of Article 27 which we unilaterally implemented on October 26, 1997.

WE WILL REINSTATE the conditions of employment concerning Sunday and holiday inspectional overtime that had been in effect prior to October 26, 1997.

WE WILL GIVE NOTICE to the Union, in writing, of any proposed change in Sunday and holiday inspectional overtime, i.e. intent to implement at Cherry Hill Sections H and/or I of Article 27, and, upon request of the Union, WE WILL BARGAIN IN GOOD FAITH concerning the impact and implementation of any such proposed change.

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

_____

Regional Director

Immigration and Naturalization Service, New Jersey

Dated: _____, 1999

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, Boston Region, whose address is: 99 Summer Street, Suite 1500, Boston, Massachusetts, and whose telephone number is: (617) 424-5730.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. BN-CA-80106, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Julie Mccarthy, Esq.
Richard Zaiger, Esq.
Federal Labor Relations Authority
99 Summer Street, Suite 1500
Boston, MA 02110
Certified Mail No. P 168 060 115

Lazaro Cosme, President
American Federation of Government
Employees, Local 2149
U.S. Department of Justice
Immigration and Naturalization Service
Newark International Airport
Terminal B
Newark, NJ 07114
Certified Mail No. P 168 060 116

Lawrence A. Powers, Esq.
U.S. Department of Justice
Immigration and Naturalization Service
Eastern Regional Office
70 Kimball Avenue
So. Burlington, Vermont 05403-6813
Certified Mail No. P 168 060 117

REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: January 20, 1999
Washington, DC