

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-000

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| SOCIAL SECURITY ADMINISTRATION REGIONAL OFFICE OF QUALITY ASSURANCE AND PERFORMANCE ASSESSMENT DALLAS, TEXAS Respondent and | Case No. DA-CA-90671 |
| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1336 Charging Party | |

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 **OCTOBER 23, 2000**, 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: September 22, 2000
Washington, DC

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

MEMORANDUM

DATE: September 22, 2000

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
REGIONAL OFFICE OF QUALITY ASSURANCE
AND PERFORMANCE ASSESSMENT
DALLAS, TEXAS

Respondent

and
CA-90671

Case No. DA-

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1336

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

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

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WASHINGTON, D.C.

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| SOCIAL SECURITY ADMINISTRATION REGIONAL OFFICE OF QUALITY ASSURANCE AND PERFORMANCE ASSESSMENT DALLAS, TEXAS Respondent | |
| and | Case No. DA-CA-90671 |
| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1336 Charging Party | |

Ms. Michelle Maxwell
For the Respondent

Ms. Vickie Gregory
For the Charging Party

William D. Kirsner, Esquire
Melissa J. McIntosh, 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 refused to bargain over an

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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)(2) will be referred to, simply, as, "\$ 16(a)(2)."

asserted change of conditions of employment, whereby Respondent prohibited the wearing of personal headsets when working Saturday overtime, in violation of §§16(a)(5) and (1) of the Statute. Respondent concedes that it refused to bargain but asserts that it changed no condition of employment because employees never were permitted to wear personal headsets when working Saturday overtime. There is no dispute that employees are not permitted to wear personal headsets during the week.

This case was initiated by a charge filed on July 21, 1999, which alleged violations of §§16(a)(1), (5) and (8) of the Statute (G.C. Exh. 1(a); the Complaint and Notice of Hearing issued December 29, 1999 (G.C. Exh. 1(c)), alleged violations only of §§16(a)(5) and (1) of the Statute; and the hearing was set for March 15, 1999, which was corrected by Motion for Prehearing Conference, dated: December 29, 1999, to March 15, 2000 (G.C. Exh. 1(d)), pursuant to which a hearing was duly held on March 15, 2000, in Dallas, Texas, 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 on Respondent's Motion To Dismiss. At the conclusion of the hearing, April 17, 2000, was fixed as the date for mailing post-hearing briefs, which time subsequently was extended, on motion of Respondent, to which the other parties did not object, for good cause shown, to May 5, 2000. Respondent and General Counsel each timely mailed a helpful brief, received on, or before, May 11, 2000, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. On Saturday, May 1, 1999, Mr. Carl L. Cerrato, Director, Disability Quality Branch (DQB), worked and, as he entered from the garage, he saw Mr. Robert Morris, a DQB employee, wearing a headset. Employees in DQB do not wear headsets for business purposes so Mr. Cerrato knew that Mr. Morris was wearing a personal headset; however, he waited a few minutes to be sure Mr. Morris was not on a break and, when he checked about 15 minutes later, Mr. Morris was not wearing a headset so he said nothing to Mr. Morris. But, on Monday, May 3, 1999, at 10:10a.m., Mr. Cerrato sent the following e-mail message to Mr. Morris,

"Robert, I just wanted to remind you that radio, tape or other type of audio is not permitted at the office.

This would also include OT periods as well.

"I appreciate your understanding and cooperation.
. . . ." (Agency Exh. 4.; Tr. 165).

Mr. Cerrato sent a copy of the e-mail to Mr. Adolfo Cantu, Deputy Director, DQB.

2. On May 13, 1999, Mr. Steven L. Miller, an employee in the Assistance and Insurance Program Quality Branch (AIPQB), and Chief Steward, sent a letter [memorandum] to the Director, DQB, Dallas [Mr. Cerrato], in which he stated, in part, as follows:

"It has been brought to my attention by numerous employees that on May 1, 1999 (Saturday) you told employees on duty in the DQB that they could no longer listen to music or audio on headsets (C.D. player, radios, etc.). We request to bargain on this as it is a substantial change in past practice." (G.C. Exh. 4) (Emphasis supplied).

3. Mr. Cerrato, Director, DQB, responded by letter dated May 24, 1999, in which he stated,

"Sub: Your memo dated May 13, 1999 re. Work Practices in DQB

"Your memo [letter] indicates that a substantial change in working conditions has recently occurred in the DQB. However, the practice of not permitting DQB employees to listen to music or audio devices during duty hours has been in place for many years. Therefore, we respectfully decline your request to bargain regarding this issue." (G.C. Exh.5) (Emphasis supplied).

Mr. Cerrato testified, in part that,

"A: Well, as I said, we have never allowed headsets in our office, and the incident was such that, you know, we had established a past practice in not allowing headsets. We had certainly not changed any kind of conditions of employment, and so as a result, we were not going to grant their demand for bargaining." (Tr. 166-67).

4. On July 1, 1999, Mr. Miller, Chief Steward, wrote a letter to Mr. David Crawford, Director, Regional Office of Quality Assurance and Performance Assessment, Dallas, in

which he, inter alia, requested information and stated, in part, that,

"On June 26, 1999 two employees in AIPQB were advised that the wearing of headsets for the purposes of listening to music during overtime was prohibited. As this is a change in a long standing past practice that exists within DQB and AIPQB . . . If the agency wishes to bargain over this change in the long standing past practice, the union stands open to accept Notice of the proposed change." (G.C. Exh. 6) (Emphasis supplied).

5. Mr. Crawford responded by memorandum dated July 7, 1999, in which he stated,

"This memorandum is in response to your letter of July 1, 1999 concerning the use of headsets for the purpose of listening to music during overtime."

"First, your statement that no response was made to the union request of May 13, 1999 is incorrect. The Director, DQB, provided the attached response . . ." [G.C. Exh. 5]

"Second, there has been no change in any past practice concerning listening to music during duty hours in either DQB or AIPQB. As explained in the attached, this policy has been in place for many years. We have never knowingly allowed employees to listen to music during duty hours. Since management has made no change in working conditions, there is no obligation to bargain."

(G.C. Exh. 7) (Emphasis supplied).

6. Mr. Cerrato seldom works overtime on Saturday, indeed he has done so only about twice in the last five years (Tr. 163). He said that a memorandum had been issued in 1984 or 1985 by then Deputy Director Paula Summer which was given to all employees. The memorandum said that radios were not permitted during duty hours; Mr. Cerrato said that, "I don't think it said headsets, but then I see them as synonymous . . ." (Tr. 172). However, the record does not indicate that, before the incident of May 1, 1999, team leaders had been reminded of the Paula Summer memorandum (Tr. 172), although team leader Arlen Gene Nemec said the policy had been communicated to him by the late Director of DQB, Mr. Leon Anderson, between 1992 and 1995 (Tr. 104).

7. General Counsel has presented evidence that employees wore personal headsets to listen to radios or cassette players when working Saturday overtime; but I find

considerable hyperbole in their testimony. For example, the record shows that before 1998, overtime occurred infrequently (Tr. 95-96); in 1999, AIPQB worked overtime about one Saturday a month (Tr. 136) which was, ". . . probably the most we've worked in many years" (id.); Team Leader Brenda Liess, AIPQB, said that she had worked Saturday overtime about 20 times during the last two years and that only on 8-10 times were employees present (Tr. 152).

8. I do not doubt that Ms. Vickie Gregory, AIPQB, as she stated, wore a personal headset the only two times she worked Saturday overtime, namely in June 1998 (Tr. 21); but did Respondent know? She said that before working Saturday overtime she asked her team leader, Ms. Liess, if there were special rules that she needed to know for Saturday overtime and that Ms. Liess, ". . . didn't specifically mention that there was any prohibition about wearing headsets. . . ." (Tr. 22); but Ms. Liess testified that neither Ms. Julia Lashley nor Ms. Gregory ever came to her to ask if there were any special rules for Saturday overtime (Tr. 161). Ms. Gregory said that while wearing headsets she was addressed by Ms. Liess and she, Gregory, took off her headset to hear her (Tr. 23); but Ms. Liess said she did not remember ever seeing Ms. Gregory, nor Mr. Steve Miller or Mr. Jerry Barnett wearing headsets (Tr. 153) although Ms. Liess said she saw employees wearing headsets on Saturday for business purposes (Tr. 152), including Mr. Gene Weiler (Tr. 153). Ms. Liess said that without specifically looking for it, you would not be able to tell an official headset, which AIPQB routinely uses for business purposes, from a personal headset (Tr. 153).

9. As noted above, employees in AIPQB routinely wear official headsets which have a single earpiece with a thin, tubular microphone which goes from the earpiece to a position in front of the mouth or it can be rotated up or down (G.C. Exh. 2). Although the official headset has a single earpiece, the device has an adjustable band which fits over the head and the end opposite the earpiece terminates with a flat, elongated end which rests against the head. While not an earpiece, it has somewhat the appearance of one. Personal headsets, to my personal knowledge, come in a variety of sizes. Typically, as Mr. Eastman stated (Tr. 85) headsets which come with radio cassette players, or radio - compact disc players, tend to be small and the head bands narrow. Most, as an option, have a single earpiece which fits in the ear, much like a hearing aid; and, while the foam-like covering over the earpieces on the head band, to cushion the earpiece against the ear, come in colors, most are grey or black. Of course,

as Mr. Eastman also said, there also are; ". . . big, round", headsets that, "the airline people use" (Tr. 85), which he said he wore a few times when his walkman headset was broken, but this was ". . . more than three years ago. . . ." (Tr. 86).

As Mr. Robert Morris stated, until about two years ago, "We worked for a period of time without any team leaders. We just--examiners just came to work on Saturdays . . . they changed it about two years ago" (Tr. 80-81).

10. Mr. Steven L. Miller, Chief Steward, said he once wore a personal headset in AIPQB but stopped after 1993 or 1994 (Tr. 37). Mr. Jerry Barnett said he has worn a personal headset in AIPQB on Saturday in the early '90s; didn't wear them in for a few years and then wore them again in the late '90s (Tr. 59). Mr. Barnett said he saw Team Leader Wethington speak to Mr. Gene Weiler when Mr. Weiler had his personal headset on, but then he said, ". . . he [Weiler] takes off his headsets when he sees her; they discuss whatever they do; and he puts the headsets back on." (Tr. 62-63). Mr. Weiler has been in AIPQB since March 1990 (Tr. 69) and has worked Saturday overtime, ". . . some years we have more, some years, very little. It's not a regular type of thing." (Tr. 69). He said he had worn a headset on Saturday to listen to music and said he ". . . assumed they'd [Team Leaders] notice, but no one said anything about it." (Tr. 71). Mr. Terry "Skip" Eastman has been in AIPQB, or its equivalent, since 1973 (Tr. 83) and has worn headsets on Saturday (Tr. 84). He said Mr. Robert [Bob] Costa, Deputy Director of AIPQB, on a Monday morning, ". . . following the Saturday of overtime" (Tr. 87), which he placed as in either July or August, 1999, ". . . told me that we no longer wear headphones or -- that I could no longer wear headphones on Saturdays." Mr. Eastman said he asked, "Why" and Mr. Costa said, ". . . we don't pay you \$50.00 an hour to listen to music." (Tr. 87).

11. Ms. Guadalupe Wethington has been a Team Leader in AIPQB for one year (Tr. 113) and has worked Saturday overtime during 1999, quite frequently the first part of the year, later about one or two Saturdays a month (Tr. 114). She said she did not recall seeing Mr. Barnett wearing a headset on Saturday (Tr. 114); that she had never noticed any employee wearing a personal headset on Saturday (Tr. 114); that she had seen employees in AIPQB wearing headsets to make telephone calls (Tr. 115). She also said that without specifically looking for it, you could not distinguish an official headset from a personal headset (Tr. 115). She said she saw Gene Weiler wearing something, ". . . and I assumed that it was a headset to interview,

talk on the telephone." (Tr. 116). She said she had not gone up to Mr. Weiler when he had a headset on (Tr. 117); that Team Leaders have their own case files to work on Saturday (Tr. 117); that she could not recall ever going to an employee on Saturday since she has been a Team Leader (Tr. 123), rather, employees come up to her to ask a question or to discuss a case (Tr. 123).

Ms. Judith Pieper has been the Director of AIPQB since 1990 (Tr. 126) and does not work Saturday overtime (Tr. 127). She said employees are not allowed to wear headsets in AIPQB for personal reasons (Tr. 129); that on two occasions during the regular workweek she had seen employees with headsets listening to a radio and on each occasion told them to cease; that the first person had been a Ms. Sue Webb (Tr. 128) and the other had been a Mr. Carl Power (Tr. 127-28). Ms Pieper said she has a radio in her office for weather emergencies and had used it for that purpose once or twice in the last ten years (Tr. 128).

Mr. Robert Costa has been Deputy Director of AIPQB for three years (Tr. 133). He rarely works Saturday overtime, the last time having been two and a half years ago (Tr. 134). He has seen employees wearing headsets which he assumed ". . . were on business" (Tr. 134). On Monday, May 3, 1999, Mr. Cerrato called and told him that, ". . . his group the Disability group, had worked overtime on Saturday, and he noticed that someone was listening -- well, had headsets on, so he told them to stop. Then he called me to find out if we used headsets in our component, which is AIPQB. And I said, yes, we use them for several business-related reasons. After I hung up, I said, Well, I better check and make sure of that. So I went out and asked some of the team leaders if they knew of anybody who may have been using headsets for listening to the radio, and I was given two names [Gene Weiler and Skip Eastman]. But neither of those people had headsets on when I went to talk to them." (Tr. 135). Mr. Costa said he had just gone to Messrs Weiler and Eastman and, ". . . I said, If you have been using headsets to listen to the radio, cease and desist." (Tr. 135, 138). Mr. Costa said that in 1999, AIPQB worked about one Saturday per month (Tr. 136). He said he had gone to Team Leader Troye Donlow because her office is right next to his and that he may also have asked Lupe Wethington; that they said they thought Mr. Weiler and Mr. Eastman ". . . might have been" listening to music (Tr. 137). Mr. Costa said, ". . . I think if you're getting paid time and a half to do a job and the job requires concentration, you shouldn't be listening to a headset, to music. If you wanted to listen to music, it's voluntary

overtime. You could volunteer to stay home and listen to the radio." (Tr. 138).

Troye Donlow has been a Team Leader in AIPQB since April 1996 (Tr. 141) and has worked Saturday overtime but not very often -- in the past year about 11 times (Tr. 141). Ms. Donlow when questioned by Mr. Costa, told him she had seen Gene Weiler wearing headsets (Tr. 144) and admitted that she saw that it had, ". . . the line going out of it with the little music box." (Tr. 146). While Ms. Donlow said she had seen, ". . . probably about three [employees] with headsets." (Tr. 145), she said employees wore headsets to talk on the telephone and the record does not show that any employee that she saw, except Mr. Weiler, was wearing a personal headset. Ms. Donlow said that she had not been told of a policy prohibiting employees from listening to music on overtime Saturdays, ". . . I didn't realize it until I was asked if I'd seen anybody with headsets on." (Tr. 146).

Ms. Brenda Liess has been a Team Leader in AIPQB for three or four years and prior to that had been a section chief since 1990 (Tr. 151-52). During the last two years, she worked Saturday overtime about 20 times and only on eight or ten occasions were employees present (Tr. 152). She saw employees when present on Saturday wearing headsets for work-related reasons (Tr. 153-55). She said she had never noticed any employee wearing a headset when approaching her (Tr. 153-53). She said she had not seen Vickie Gregory, Steve Miller, Jerry Barnett or Skip Eastman wearing headsets (Tr. 153-5) but had seen Mr. Gene Weiler wearing work-related headset, "as far as I know." (Tr. 153, 156).

12. Ms. Julia Lashley has been in DQB 26 years (Tr. 46) and in the last couple of years has worked Saturday overtime once or twice a month (Tr. 47), working about five hours at the most (id.). She said she wore a headset to listen to music for most of her Saturday working time (Tr. 48) and that supervisors Gene Nemec and Richard Sanders, and a past team leader, Fannie Eubanks, had seen her wearing headsets (Tr. 48). She said that Mr. Nemec on several occasions had asked her questions when she had her headset on and maybe Mr. Sanders on one occasion (Tr. 49). She said she was, ". . . almost sure" that team leader Eubanks wore headsets (Tr. 51). Ms. Lashley said there was always a team leader present, "They always had to be present. It's a requirement." (Tr. 55).

Mr. Robert Morris has been in DQB since 1998 (Tr. 75). He works Saturday overtime, ". . . First few years, we

didn't have much overtime, so might just work four or five Saturdays a year. In the last couple of years, we've had overtime almost every other Saturday" (Tr. 75). Mr. Morris said he has worn headsets on Saturday to listen to music every Saturday he has worked since 1988 (Tr. 76). Mr. Morris said that, "On overtime Saturdays for the last two years, we had a team leader every Saturday" (Tr. 77) but that before that, "We worked for a period of time without any team leaders. We just -- examiners just came to work Saturdays." (Tr. 80). Mr. Morris said, ". . . Gene Nemec was on duty almost every Saturday, and prior to Gene being the only one that worked Saturdays, they rotated team leaders. I wore my headsets anytime I moved around the office. I never took them off, so I'm bound to have passed team leaders almost constantly." (Tr. 79). When asked if any other management official had seen him with his headset on, Mr. Morris responded,

"A: Carl Cerrato.

. . .

"A: He's the director of DQB.

"Q: Did he see you with your headsets on?

"A: Well, he specifically saw my headsets on, I know, in May of '99, because he sent me an e-mail. But we have worked other Saturdays on the same day when I was wearing headsets, and I didn't take my headset off because Carl was there, because I didn't -- I had no clue there was something wrong with wearing headsets." (Tr. 79-80).

Mr. George Wright has been in DQB since October, 1996 (Tr. 92). He works Saturday overtime about one Saturday a month (Tr. 92) and has never worn a headset to listen to music (Tr. 93).

13. Mr. Nemec has been a Team Leader about six years and a supervisor for about 12 years (Tr. 95). He has worked Saturday overtime pretty regularly for the last two years (Tr. 95, 96), generally working every other Saturday (Tr. 96). Before 1997, overtime was very infrequent (Tr. 96). Mr. Nemec said headsets are, ". . . not allowed . . . during working hours." If they're at their desk working, they're not supposed to be wearing headphones." (Tr. 97). Mr. Nemec said there had been only one occasion, at Y2K, when no bargaining unit employees were present when he worked Saturday overtime (Tr. 97). He further said that during the Oklahoma City bombing, headsets were allowed, on an exceptional basis because so many people had friends in the

Oklahoma City Federal building, and we also had a television going and radios, ". . . But other than that, no." (Tr. 98). He said that in about the middle of May, 1999, on a Saturday, he found Ms. Lashley at her desk wearing headsets and asked her to remove them (Tr. 98). He said ". . . I don't recall ever seeing her wearing headsets before" (Tr. 99) and that he had never seen Mr. Morris wear headsets (Tr. 99).

Mr. Adolfo Cantu has been Deputy Director of DQB since 1988 (Tr. 177); he does not work Saturday overtime; and has never seen an employee in DQB wear a headset (Tr. 177).

Mr. Richard Sanders has been a Team Leader and/or a supervisor in DQB since 1983 (Tr. 182); he seldom works Saturday overtime, only two or three times in the last two years (Tr. 182). He said he never had noticed employees wearing headsets (Tr. 182) and specifically had not seen either Ms. Lashley or Mr. Morris wear a headset at Saturday overtime (Tr. 183). Mr. Sanders said, ". . . it was never an issue. I mean, we just didn't do it, as far as I knew. So I don't know of any policy. No. Q: . . . you didn't know of any policy because it had never come up before. Right? A: That's correct." (Tr. 184).

Conclusions

It is well established that parties may establish terms and conditions of employment by practice, or other form of tacit or implied agreement. Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA 413 (1980). As I stated in Department of Health, Education and Welfare, Region I, Chicago, Illinois, 4 FLRA 736 (1980), for a practice to constitute a condition of employment, the 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." (id. at 746).

See, also, Department of Health and Human Services, Social Security Administration, 17 FLRA 126, 138 (1985); Norfolk Naval Shipyard, 25 FLRA 277, 286-87 (1987). General Counsel has shown that some employees when working Saturday overtime wore personal headsets to listen to music or to the radio; but the record does not show that management knowingly acquiesced, or, except for one first-line supervisor on one occasion, Ms. Donlow, who had seen Mr. Weiler wearing a headset listening to music and said nothing to him, that any

supervisor knew employees were wearing personal headsets to listen to the radio or to music.

It is not disputed that personal headsets are not permitted during the regular workweek, so Ms. Lashley's assertion that she thought they were permitted on Saturday because, "There was no reason not to." (Tr. 48), factually is not correct. The employees seem to believe that because dress is more casual on Saturday, the prohibition on the use of personal headsets was lifted and, obviously, some "tested the water" by using personal headsets on Saturday, but when Mr. Cerrato, Director of DQB, on May 1, 1999, saw Mr. Morris wearing a headset, which he had removed when Mr. Cerrato checked a few minutes later, Mr. Cerrato on Monday morning, May 3, 1999, reminded him by e-mail that, ". . . radio, tape or other type of audio is not permitted at the office. This would include OT periods as well. . . ." (Agency Exh. 4). Mr. Morris told Ms. Lashley; she did not like it and, "The next overtime Saturday, I wore my headsets . . . I was told that I could not wear them" by Mr. Nemeč. (Tr. 52-53). Mr. Nemeč credibly stated that he had not seen Mr. Morris wear headsets and that he had not seen Ms. Lashley wearing handsets before the incident in the middle of May, 1999, when he found her at her desk wearing headphones and asked her to remove them (Tr. 98, 102; see, also, Tr. 52-23). Mr. Sanders also credibly testified that he had never seen employees in DQB wearing headsets and specifically had never seen Ms. Lashley nor Mr. Morris wear a headset on Saturday overtime (Tr. 183).

I did not find Ms. Lashley's testimony entirely credible. For example, she insisted that she worked comp. time [overtime] in the '70's, one or twice a month (Tr. 47) whereas all other witnesses said overtime was very infrequent until the last two years. She also insisted that there never was an occasion when a supervisor was not present, "Never. It's not permitted . . . They always had to be present. It's a requirement." (Tr. 55); but this was directly contradicted by the testimony of Mr. Morris, ". . . We just--examiners just came to work on Saturdays." (Tr. 80) and by Mr. Nemeč who said it had been mandatory that a team leader be present on Saturday, ". . . only . . . for about the last six months." (Tr. 99-100). I do not doubt that on some occasions she wore her headset on Saturday, but I do not believe she wore it with either the frequency or the openness she asserted.

In AIPQB, employees routinely wear official headsets for business purposes and do so on Saturday overtime. With full appreciation that the official headset, with its microphone, is distinguishable from a personal headset which

has no microphone. I credit the testimony of Ms. Wethington and Ms. Liess that without specifically looking you would not be able to distinguish one from the other. Ms. Wethington saw employees in AIPQB wearing headsets to make telephone calls and when she saw Mr. Weiler wearing something, she, ". . . assumed that it was a headset to interview, talk on the telephone. (Tr. 116). Ms. Donlow said she had seen "probably about three" (Tr. 145) employees in AIPQB with headsets but the only one she saw that was a personal headset was Mr. Weiler's. Ms. Liess credibly testified that she saw employees wearing headsets on Saturday for work-related reasons (Tr. 152, 153) and that the headset she saw Mr. Weiler wearing was for work-related purposes, "As far as I know." (Tr. 153, 156)

Each employee is "enclosed" on three sides, by a wall and two panels, they sit facing one panel with only one side of their body towards the open side which faces an aisle (G.C. Exh. 3). The arrangement would permit employees to use personal headsets without the supervisor being aware and the record indicates that employees exercised wariness, ". . . he [Weiler] takes off his headsets when he sees her [Wethington]" (Tr. 62). In short, the record does not show that there ever was a practice of wearing personal headsets on Saturday that was known to management or to which responsible management knowingly acquiesced. Therefore, when management reminded employees in May, 1999, and on or about June 26, 1999, that the wearing of personal headsets was not permitted, it changed no existing condition of employment and did not violate §16(a)(5) or (1) of the Statute by declining to bargain on a change in conditions of employment because it changed no condition of employment.

Having found that Respondent did not violate §16(a)(5) or (1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. DA-CA-90671 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

September 22, 2000
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. DA-CA-90671, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

William Kirsner, Esquire
Melissa McIntosh, Esquire
Federal Labor Relations Authority
525 Griffin Street, Suite 926
Dallas, TX 75202

P168-060-226

Michelle Maxwell, Esquire
Social Security Administration
OLMER, GG-10, W. Highrise Bldg.
Baltimore, MD 21235

P168-060-227

Vickie Gregory, Representative
AFGE Local 1336
1301 Young Street, Room 300-D
Dallas, TX 75202

P168-060-228

REGULAR MAIL:

President
AFGE, AFL-CIO
80 F Street, NW.
Washington, DC 20001

CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: SEPTEMBER 22, 2000
WASHINGTON, DC