

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. WA-CA-30789

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 **MAY 1, 1995**, 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: March 30, 1995

Washington, DC

MEMORANDUM

DATE: March 30, 1995

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
SERVICE, WASHINGTON, D.C.

Respondent

and
CA-30789

Case No. WA-

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. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO Charging Party	Case No. WA-CA-30789

Amy V. Dunning, Esquire
Mr. Steven R. Freedman
For the Respondent

Mr. Terrence J. Bonner
Deborah S. Wagner, Esquire
By Brief
For the Charging Party

Christopher M. Feldenzer, Esquire
Susan Kane, 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's instruction to supervisors, to, ". . . closely review their holiday and Sunday staffing patterns to ensure that an absolute minimum on-duty force is used during premium pay work hours. . . ." (G.C. Exh. 2), created a bargaining obligation. For reasons set forth hereinafter, I find that it did not and will dismiss the complaint.

This case was initiated by a charge filed on July 7, 1993 (G.C. Exh. 1(a)) and the Complaint issued on December 9, 1993 (G.C. Exh. 1(d)), for a hearing to be held on a date to be determined. On May 20, 1984, a Notice issued setting the hearing in this and other cases for June 29, 1994 (G.C. Exh. 1(d)); by Order dated June 14, 1994 (G.C. Exh. 1(e)) the hearing was rescheduled for July 21, 1994, and by Order dated July 7, 1994 (G.C. Exh. 1(f)) the hearings in this and other cases were scheduled to begin on August 10, 1994, pursuant to which a hearing was duly held on August 11, 1994, in Washington, D.C., before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence hearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, September 12, 1994, was set as the date for mailing post-hearing briefs, which time was subsequently extended, on timely motion of the Charging Party, to which the other parties did not object, for good cause shown to November 14, 1994. Charging Party, Respondent and General Counsel each timely mailed, or filed, an excellent brief, received on, or before, November 18, 1994, which have been carefully considered. Upon the basis of the entire record, I make following findings and conclusions:

Findings

1. The National Border Patrol Council (hereinafter, "Union") is the certified exclusive representative of a nationwide unit of approximately 4,500 employees in the continental United States and Puerto Rico who are assigned to the U.S. Department of Justice, Immigration and Naturalization Service's (hereinafter, "INS") Border Patrol Sectors.
(Tr. 14).

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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)(5) will be referred to, simply, as, "§ 16(a)(5)".

2. On September 30, 1976, the Union and INS entered into an Agreement (Res. Exh. 4), which is still in effect (Tr. 20, 21, 32). Article 27 is entitled "Overtime - (other than uncontrollable overtime)" and Section A provides,

"A. Overtime assignments will be distributed and rotated equitably among eligible employees. Supervisors shall not assign overtime work to employees as a reward or as a penalty, but solely in accordance with the Agency's needs. Complaints or disagreements on distribution of overtime shall be processed in accordance with the negotiated grievances procedure." (Res. Exh. 4, Article 27, Section A).

Article 28 is entitled, "Tours of Duty (Border Patrol Council)" and provides, in part, as follows:

"A. The parties . . . recognize that the Agency must, to carry out its mission, vary tours of duty. In the interest of good employee morale, it is agreed that changes in an employee's scheduled hours of duty shall be kept to the minimum necessary to accomplish the mission of the Agency.

"B. Assignment to tours of duty shall be posted five days in advance . . . covering at least a two week period.

. . .

"F. The administrative workweek shall be seven consecutive days, Sunday through Saturday.

. . . ." (Res. Exh. 4, Article 28, Sections A, B, F).

3. On January 19, 1993, Mr. Michael S. Williams, the Chief, U.S. Border Patrol, issued a memorandum to all Chief Patrol Agents which, in pertinent part, provided as follows:

"Recently . . . you were briefed on the Patrol's projected budget shortfall for 1993 Therefore, the following . . . will be implemented immediately program-wide:

. . .

"All Sectors will closely review their holiday and Sunday staffing patterns to

ensure that an absolute minimum on-duty force is used during premium pay work hours. Shifts which carry from one day to another are to be reviewed for critical needed and elimination where possible. All Sectors are to report the estimated amount of savings projected to the end of the fiscal year to their respective Regional Border Patrol offices by March 31.

. . .

". . . HQBOR will keep you updated and informed on budget changes as we work through this time of fiscal austerity." (G.C. Exh. 2).

4. On January 28, 1993, Mr. Marshall M. Metzgar, Chief Patrol Agent, Southern Region, in a memorandum to All Patrol Agents in charge, followed up Mr. Williams' memorandum and instructed supervisors as follows:

"Due to the potential for a budget crisis in the Border Patrol Program this fiscal year, Headquarters has instructed that a number of cost saving measures be taken.

"One measure requires that scheduling of premium pay (ie, Sunday, holiday) work hours be reduced and held to the absolute minimum. Therefore, I am directing that all Patrol Agents in Charge and Supervisors make immediate adjustments to schedules to comply with Headquarter's directives.

"Supervisors will assign personnel to provide coverage during a six (6) day administrative work week starting Monday and ending Saturday. No scheduling of work hours on Sunday or a holiday may be undertaken without approval of the respective Assistant Chief for each location. . . ."

(G.C. Exh. 3).

Mr. John Claydon, Senior Border Patrol Agent, Jacksonville, Florida, and for about seven years National Vice President of the Union for the Southeastern United States (Tr. 22, 23), testified that he knew of no similar document in any of the other twenty sectors, which had taken action to eliminate scheduled Sunday or holiday work without approval (Tr. 26), although he ". . . heard complaints of the same situation happening. . . ." (Tr. 26).

5. Mr. Claydon further testified that before January, 1993, the typical staffing at Orlando on Sunday and holidays had been six to seven agents and that after January 1993, the typical level became two agents (Tr. 25-26). Mr. Terrence J. Bonner, President of the Union (Tr. 13), testified that by statute, employees who work on Sundays are entitled to a 25 percent premium and that employees who work on a holiday receive double time (Tr. 14). In addition, there is a ten percent night shift differential for hours between 6:00 p.m. and 6:00 a.m. (Tr. 15).

6. Mr. J. William Carter, Acting Deputy Assistant Commissioner, Border Patrol, who has been with the Border Patrol over 22 years (Tr. 38), testified that to his certain knowledge, the Service had since 1978, when he first became a supervisor, periodically reminded supervisors to closely monitor and review Sunday and holiday staffing; that this was done at least annually; and that he knew of no bargaining concerning this matter (Tr. 39-41).

7. Mr. Thomas P. Burroughs, Information Systems Specialist (Tr. 29), produced Respondent Exhibit 1, which shows the amount of Sunday pay paid, by Region and by Sector, in fiscal years 1992 and 1993; Respondent Exhibit 2, which shows the amount of holiday pay paid in fiscal years 1992 and 1993; and Respondent Exhibit 3, which shows a comparison of Border Patrol 1992 and 1993 fiscal year Sunday and holiday overtime payments (Tr. 30-32). Mr. Burroughs testified that, as shown by Respondent Exhibit 3, "In '93, in real dollars

. . . there were more holiday and Sunday pay paid out. . . ." (Tr. 32), i.e., that Respondent spent more money for Sunday and holiday in 1993 than it did in 1992 (Tr. 32). Thus, Respondent Exhibit 3 shows total Sunday pay in 1992 of \$3,383,285 [adjusted to reflect 3.7% cost of living increase received in January 1993 - 3,508,467] and 3,810,957 in 1993; holiday pay: 3,170,906 in 1992 [adj. 3,288,230] and 3,439,001 in 1993. However, both the Sunday and holiday pay by year varied greatly from region to region and from sector to sector. For example, in the Southern Region both the Sunday and holiday pay increased in 1993 over 1992; but in the Miami sector, Sunday pay decreased slightly, 25,132 [adj. 26,062] in 1992 to 24,280 in 1993; and holiday pay also decreased in the Miami sector, 46,859 [adj. 48,593] in 1992 to 38,259 in 1993. (Res. Exh. 3).

8. It is conceded that Respondent gave the Union no notice of either its January 19 or January 28, 1993 memoranda to supervisors.

Conclusions

Respondent changed no established shift, established no new shift, did not fail to post schedules in advance, as required by the Agreement, and did not fail to distribute overtime assignments equitably as required by the agreement. Respondent did instruct its supervisors to keep holiday and Sunday staffing to the absolute minimum possible consistent with accomplishment of its mission; but this is a management right reserved exclusively by § 6(a) of the Statute to Respondent and recognized by Article 28, Section A of the Agreement as an obligation of management to meet its needs. Respondent's decision on the number of employees to schedule to work on Sundays and holidays gave rise to no bargaining obligation. Because Respondent had no obligation to bargain on its decision concerning the number of employees it required to meet its needs on Sundays and holidays, neither its failure to give the Union notice nor its failure to bargain on its decision concerning the number of employees required was in violation of the Statute. Accordingly, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. WA-CA-30789 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 30, 1995
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. WA-CA-30789, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: March 30, 1995
Washington, DC