

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

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UNITED STATES DEPARTMENT OF .
JUSTICE, IMMIGRATION AND .
NATURALIZATION SERVICE, UNITED. .
STATES BORDER PATROL .
SAN DIEGO SECTOR .
SAN DIEGO, CALIFORNIA .

Respondent .

Case No. 8-CA-80157

and .

NATIONAL BORDER PATROL .
COUNCIL, AMERICAN FEDERATION .
OF GOVERNMENT EMPLOYEES, UNION .
LOCAL 1613, AFL-CIO .

Charging Party .

.

Peggy De Beliso, Esq.
For the Respondent

Gerald M. Cole, Esq.
For the General Counsel

BEFORE: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Statute, 92 Stat. 1191, 5 U.S.C. section 7101 et seq., (herein called the Statute). It was instituted by the Regional Director of Region VIII based upon an unfair labor practice charge filed on January 4, 1988, by the National Border Patrol Council, American Federation of Government Employees, Local 1613, AFL-CIO (herein called the Union) against the United States

Department of Justice, Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California (herein called the Respondent). The Complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally assigning collateral intelligence duties to bargaining unit employees in its San Diego Sector without first providing the Union notice and affording it the opportunity to bargain over the impact and implementation of the change.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned in San Diego, California, at which time the parties were represented by counsel and afforded full opportunity to adduce evidence and to call, examine, and cross-examine witnesses and to argue orally. Timely briefs were filed by the parties and have been duly considered.*

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendations.

Findings of Fact

Respondent's San Diego Sector has offices located in Chula Vista, Brownfield, Temecula, San Clemente and Campo, California. It also has sub-offices located in Boulevard and San Marcos, California. When border patrol agents employed at these locations discovered intelligence information prior to July 1987, they would forward the information through their supervisors to the Sector Intelligence Unit located at the Sector Headquarters in San Ysidro, California, where three or four GS-11 bargaining unit employees worked, who handled such intelligence. Border patrol agents used various methods to transmit the information, the most common of which was to use a blue 3x5

*/ The general Counsel's uncontested motion to correct transcript is granted.

card called the Sector Intelligence Coordinating System (SICS).

Intelligence information involves the collection, evaluation and dissemination of data that might prove useful to border patrol agents in apprehending immigration law violators. The intelligence information is obtained both through observation by agents and through interrogation of aliens apprehended in the United States.

Sometime in June 1987, Regional Commissioner, Western Region of the Immigration and Naturalization Service, Harold Ezell issued a memorandum in which he expressed disappointment at previous intelligence gathering efforts and directed that each district and sector implement guidelines set forth in an attached memorandum from the Regional Intelligence Office, David Couchman. As a result of the above memorandum on or about June 30, 1987, Chief Patrol Agent, Dale Cozart, notified the Regional Commissioner that certain named individuals had been designated collateral duty intelligence officers. Sometime in late July 1987, Union President T. J. Bonner noticed a memorandum on the bulletin board announcing that intelligence training would be conducted at Respondent's training facility in Spring Valley, California, on August 12 and 19, 1987. The memorandum was signed by Cozart. Dean Thatcher, a supervisory intelligence agent acknowledged that bargaining unit employees in addition to those listed as being named collateral intelligence officers attended the above training sessions. There had been no training of border patrol agents in intelligence duties prior to the training scheduled for August 1987. Furthermore, according to Associate Chief Patrol Agent, James Grim, a typical border patrol agent, at the station level spent only minutes per month on intelligence duties.

Bonner also testified that, after August 1987, at Campo, three border patrol agents were designated collateral intelligence officers. Although these agents, in the past, merely collected intelligence data and submitted it to Intelligence Headquarters they became responsible for collecting and evaluating data as well as coming up with predictions or trends of illegal entry patterns and disseminating such information at muster sessions. Muster sessions are meetings held at the beginning of each shift where all agents gather to receive information from supervisors. Furthermore, Bonner stated that after August 1987 when he obtained intelligence data through interrogation

of an alien, he would contact the designated collateral intelligence officer, who would take over the interrogation.

Respondent does not deny that collateral intelligence officers were named at the various stations. Nor did Respondent's witnesses contradict testimony that collateral intelligence officers were required to prepare presentations during musters at Campo.

A regularly scheduled labor-management meeting was held on August 28, 1987 at which the Union sought to bargain about this matter. Bonner presented Chief Patrol Agent Cozart with a letter requesting bargaining over the naming of various collateral intelligence officers in Sector stations. Cozart contended there were no new intelligence positions. Bonner then asserted that even though these were not positions "they are duties and we would like to bargain over them". Cozart replied that there were no additional duties and nobody had been tasked to such duties. Jack Willingham, Assistant Patrol Agent-in-charge of the Brownfield station stated that nine agents at Brownfield had been assigned the collateral intelligence duties. Cozart seemed somewhat upset by Willingham's comment, but the discussion ended at that point.

On September 2, 1987, Cozart responded by letter denying that any "positions" had been created and stating that "there is nothing of substance to bargain over concerning training . . ." Bonner replied to the September 2 letter stating that the Union was renewing its demand to bargain. No response to this letter was ever received by the Union. Contemporaneous with the assignment of additional collateral intelligence duties, Respondent, sometime around August 26, 1987 posted a vacancy announcement for a new GS-11 senior border patrol position, which specifically listed intelligence gathering as a primary duty of the job. The job description of the GS-9 border patrol agent contains no specific reference to intelligence duties.

Bonner asserted that by unilaterally designating agents to perform these duties, Respondent gave the designated agents a competitive edge in the selection of the senior border patrol position and that if an agent failed to perform their duties in a satisfactory manner it could adversely affect their performance appraisal. As already noted, nine employees were designated collateral intelligence officers and assigned such duties at Brownfield, three at Campo and from three to six at the other substations. According to Bonner, at the Campo

Station, after August 1987 the collateral intelligence officers performed intelligence duties about 15 percent of their work week.

The above assignment of collateral intelligence duties lasted until the new GS-11 senior border patrol positions were selected.

Conclusions

In this case it is undisputed that management has a substantive right to assign work and to determine the personnel by which agency operations shall be conducted. It is also undisputed that if management changes a condition of employment as a result of an exercise of a right under 5 U.S.C. 7106, it has a duty to bargain regarding the impact and implementation to the extent that any change is more than de minimis. 5 U.S.C. 7106(b)(2) and (3); Department of Health and Human Service, Social Security Administration and the American Federation of Government Employees, Local 1760, 24 FLRA 403 (1986); U.S. Department of Labor Occupational Safety and Health Administration, 24 FLRA 743 (1986). Veterans Administration, West Los Angeles Medical Center, 24 FLRA 714 (1986).

In Department of Health and Human Services, supra, the Authority reassessed and modified the previously existing de minimis standard stating that each case involving such an issue would be carefully examined and that it would place principal interest on the following:

on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involved.

In the instant matter border patrol agents devoted only "minutes" per month to intelligence duties prior to the instant change. After August 1987, however, border patrol agents were required for an unspecified time not only to gather intelligence information, but agents participated in interrogations which they had not done before and gave intelligence presentations at musters, a new duty. Their participation in intelligence duties started to consume about 15 per cent of their work time. Furthermore, same agents were trained for approximately 3 1/2 hours for the new intelligence duties.

The concept of collateral intelligence officers appears to have been a new one in the San Diego Sector. Directions for new intelligence gathering technics came from a higher level. Although some intelligence work was performed prior to August 1987, it was not at the same level required after that date and the intelligence duty expectations for the border patrol agents were not the same. The new duties clearly constituted a change in conditions of employment. Further, it is clear that the assignment of the collateral intelligence duties herein was more than de minimis. As the General Counsel points out, the unilateral designation of certain bargaining unit employees to collateral intelligence duties gave them a competitive edge over other agents in applying for the newly posted GS-11 series border patrol position requiring intelligence gathering. Furthermore, the undisputed 15 percent of time spent on new intelligence duties took time away from other work and, of course, could affect promotions and rating potential of the border patrol agent. Thus, the border patrol agents were required to perform new duties or old duties to an extent they had not performed those duties in the past. The new duties had a foreseeable effect on employment and promotion potential of those agents. The assignment of collateral intelligence duties thus created an obligation to bargain. Accordingly, it is found that Respondent had a duty to notify the Union and provide it with an opportunity to bargain over the impact and implementation of the assignment of the collateral intelligence duties. Having failed in this duty, it is found that Respondent violated section 7116(a)(1) and (5) of the Statute. It is therefore recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the United States Department of Justice, Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California, shall:

1. Cease and desist from:

(a) Unilaterally changing working conditions for unit employees by assigning collateral intelligence duties to employees in the San Diego Sector, without first notifying the National Border Patrol Council, American Federation of Government Employees, Local 1613, AFL-CIO, the

exclusive representative of certain of our employees, and affording it the opportunity to bargain over the impact and implementation of such change.

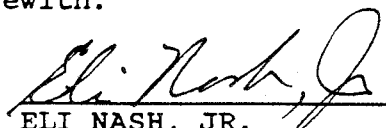
(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

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

(a) Upon request, bargain with the American Federation of Government Employees, Local 1613, AFL-CIO over the impact and implementation of collateral intelligence duties assigned to border patrol agents.

(b) Post at its San Diego, California, Border Patrol Sector, where bargaining unit members represented by the National Border Patrol Council, American Federation of Government Employees, Local 1613, 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 Patrol Agent in Charge or a designee and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

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



ELI NASH, JR.
Administrative Law Judge

Dated: July 25, 1989
Washington, D.C.

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 working conditions for unit employees through the assignment of collateral intelligence duties in the San Diego Sector, without first notifying the National Border Patrol Council, American Federation of Government Employees, Local 1613, AFL-CIO, the exclusive representative of certain of our employees, and affording it the opportunity to bargain over the impact and implementation of such change.

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

WE WILL, upon request, bargain with the Union over the impact and implementation of the assignment of collateral intelligence duties in the San Diego Sector.

(Activity)

Dated: _____ 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, Region VIII, whose address is: 350 South Figueroa Street, 3rd Floor Room 370, Los Angeles, CA 90071, and whose telephone number is: (213) 798-3805.