

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

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UNITED STATES IMMIGRATION .
AND NATURALIZATION SERVICE .
UNITED STATES BORDER PATROL .
SAN DIEGO SECTOR .
SAN DIEGO, CALIFORNIA .
Respondent .
and . Case No. 8-CA-70694
NATIONAL BORDER PATROL .
COUNCIL, AMERICAN FEDERATION .
OF GOVERNMENT EMPLOYEES, .
LOCAL 1613, AFL-CIO .
Charging Party .
.

Jonathan S. Levine, Esquire
For the General Counsel

Peggy DeBeliso, Esquire
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq. and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on September 23, 1987, by National Border Patrol Council, American Federation of Government Employees, Local 1613, AFL-CIO (hereinafter called the Union or Local 1613), a Complaint and Notice of Hearing was issued on December 22, 1987, by the Regional Director for Region VIII, Federal Labor Relations Authority, Los Angeles, California. The Complaint alleges that the United States Immigration and Naturalization Service, United States Border

Patrol, San Diego Sector, San Diego, California, (hereinafter called the Respondent or INS), violated Section 7116 (a)(1) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of its actions in forbidding a unit employee from displaying a lapel pin bearing the logo and initials of the AFGE on his uniform.

A hearing was held in the captioned matter on March 14, 1988, in San Diego, California. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs dated April 12 and 14, 1988, respectively, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact

On February 2, 1987, the Federal Labor Relations Authority issued its decision in United States Immigration and Naturalization Service, Port of Entry, San Ysidro, California, 25 FLRA No. 30 (1987), (hereinafter called INS). In INS, the Authority found that the Respondent therein had violated the Statute by virtue of its action in prohibiting unit employees from wearing a union pin, in the shape of a shield, bearing the initials A.F.C.E., AFL-CIO, which was red, white and blue in color, and which measured 1/2 an inch by 3/8 of an inch.

Thereafter, the president of the Local involved in the INS case informed Mr. Albert Cummings, Chief Steward for Local 1613 of the INS decision and sent him a copy.*/ After discussing the decision with the president of Local 1613, Mr. Cummings, so as to be recognizable as a Local officer, began to wear the aforementioned AFGE pin at the end of March, 1987. According to Mr. Cummings, Respondent's supervisors must have seen him wearing the union pin as it was plainly exhibited on his uniform during morning muster.

*/ The Charging Party is the exclusive representative of a unit of Respondent's employees located in the San Diego Sector, San Diego, California.

In or about April of 1987, Mr. Cummings represented an employee in front of the Chief Patrol Agent, Mr. Dale Cozart, in the latter's office. At that time Mr. Cummings was wearing the union pin on his breast pocket area next to his name tag. Mr. Cozart stared at the pin while shaking Mr. Cummings' hand at the start of the meeting.

On or about April 24, 1987, Mr. Cummings was told by the Assistant Patrol Agent In Charge for the Brown Field Station, Mr. Jack Willingham, to remove the union pin. Mr. Willingham told Mr. Cummings that he had received a lot of pressure from the Sector, regarding the pin. Mr. Cummings assumed that Mr. Cozart had ordered that he not be allowed to wear the pin.

After his conversation with Mr. Willingham, Mr. Cummings informed Mr. Tom Merchant, Union Treasurer, that he had been told he could no longer wear the union pin. As a result, Mr. Merchant approached Mr. Willingham and asked him why Mr. Cummings had been ordered to take the pin off. Mr. Willingham told Mr. Merchant that it was his understanding that Mr. Cummings had been representing someone at Sector in front of Mr. Cozart and that shortly thereafter, the order had come from Sector Headquarters, through Assistant Patrol Agent Miguel Vallina, telling them to have someone order Mr. Cummings to take the AFGE lapel pin off.

Accordingly, by letter dated April 30, 1987, the Union informed Mr. Cozart that in its view, Mr. Willingham's order to Mr. Cummings concerning the AFGE pin was a violation of the Statute. Mr. Cozart was directed to the INS decision and asked to provide a response to the Union within 10 days on whether unit employees could continue wearing the pin while in an on-duty status.

Mr. Cozart responded by letter dated May 18, 1987, stating that the pin could not be worn as it was not in accordance with Respondent's Administrative Manual. Mr. Cozart continued that the INS decision was inapplicable as a different uniform was involved. Mr. Cozart then stated as follows:

As you note, 25 FLRA 30, INS v AFGE 2805, does concern the same agency and the wearing of the same pin. The crucial factor, which you fail to note, is that it does not involve the same uniform. The design, intent, and function of the official Border Patrol uniform are distinct

and easily differentiated from the design, intent, and function of the Immigration Inspector uniform. The mission of the Border Patrol Agent is so dissimilar from the mission of the Immigration Inspector that the rationale of 25 FLRA 30 cannot logically be applied to the Border Patrol official uniform, which is unique.

The uniform of a Border Patrol Agent is nearly identical to that worn by the Inspectors involved in the INS decision. The Border Patrol Agent's uniform is dark green and includes a law enforcement officer type of shirt. It has a badge over the left pocket and a name plate over the right pocket. There is also a badge holder and two pockets on the front of the shirt which has a standard button down front. Also there are two epaulettes that would normally be found on a law enforcement officer's uniform shirt. Lastly, there is a Border Patrol shoulder patch on the left sleeve. The uniform worn by INS Inspectors is the same, except as described above, it is a blue uniform.

Both Border Patrol Agents and Immigration and Naturalization Service Inspectors are tasked with enforcing the immigration and nationality laws of the United States. Immigration Inspectors work at the Ports of Entry inspecting individuals at the gates when they drive into the country or as pedestrians presenting themselves for inspection. Border Patrol Agents work outside of the Port facilities in the fields and in various areas such as canyons, mountains and in general some very rough terrain searching for illegal aliens. INS Inspectors are in constant contact with the public whereas Border Patrol Agents have minimal contact with the public.

While the record contains extensive testimony with regard to the differences in the duties performed by the Border Patrol Agents vis a vis the Immigration Inspectors, other than speculation, there is no probative evidence to support the testimony of Mr. Willingham and Mr. Veal as to what would occur if the Border Patrol Agents were allowed to wear the A.F.G.E. AFL-CIO, 3/8 to 1/2 inch button. Thus, they gave no factual account of any incidents that had occurred while the button was worn and only speculated that the wearing of the button would cause a morale problem and be devisive.

The Administrative Manual which deals with the uniform of the Border Patrol Agents in detail makes no mention or

allowance for the wearing of insignia not specifically described in the Manual.

The record further indicates that the Border Patrol Agents, unlike the Immigration Inspectors, have generally been prohibited from wearing anything but officially authorized insignia on their uniforms.

Discussion and Conclusions

The General Counsel takes the position that the facts of the instant case are virtually indistinguishable from those appearing in INS v AFGE Local 2805, 25 FLRA No. 30, wherein the Authority found that the Respondent therein violated Section 7116(a)(1) of the Statute when it prohibited the Immigration Inspectors from wearing the identical 3/8 to 1/2 inch AFGE pin on the flap of their shirt pockets. In such circumstances and since the record is devoid of any probative evidence indicating that the wearing of the AFGE pin would interfere in any way with the performance of the Border Patrol Agents' assigned duties, the General Counsel urges a similar 7116(a)(1) finding herein.

The Respondent on the other hand takes the position that the facts in the instant case are different than those appearing in INS, supra, in that (1) the duties and the uniforms of the Border Patrol Agents are different from those of the Immigration Inspectors, (2) the record supports the conclusion that the wearing of the insignia would be devisive, (3) and would be contrary to the Administrative Manual which prohibits the wearing of any insignia other than those authorized in the Manual.

Contrary to the contention of the Respondent and in agreement with the position of the General Counsel I find that the INS case cited above is dispositive of the instant complaint. Thus, in INS the Authority found that employees, namely Immigration Inspectors, had a right under Section 7102 of the Statute to wear the identical pin involved herein. Specifically, the Authority found that the pin was small and unobtrusive and did not and could not reasonably be expected to interfere with the public's ability to recognize the Immigration Inspector as a representative of a Government Authority. In reaching the foregoing conclusion the Authority noted, among other things, that there had been no showing that the wearing of the union pin interfered in any way with the purpose for which the Agency required that the uniform be worn. The Authority also found that the "inspector's handbook", which prescribed the way the uniform

was to be worn, was not a proper basis for denying the employees' their Section 7102 rights "to form, join, or assist any labor organization."

Accordingly, based upon the above considerations and analysis, and in the absence of any probative evidence establishing that the wearing of the union insignia interfered in any way with the purpose for which the Respondent required the uniform to be worn, I find that the Respondent's action in prohibiting the Border Patrol Agents from wearing the above described union pin on their uniforms violated Section 7116(a)(1) of the Statute.

In view of the above finding it is hereby recommended that the Authority adopt the following order designed to effectuate the policies and purposes of the Statute.

ORDER

Pursuant to Section 2423.29 of the Authority's Rules and Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, the United States Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute by prohibiting Albert Cummings or any other Border Patrol Agent from wearing the American Federation of Government Employees, AFL-CIO, union lapel pin or similar union insignia while on duty.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the 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) Permit Albert Cummings or any other Border Patrol Agent to wear an American Federation of Government Employees, AFL-CIO, lapel pin or similar union insignia while they are on duty.

(b) Post at its San Diego Sector, San Diego, California facilities 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 Chief Patrol Agent and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, 350 S. Figueroa Street, Room 370, Los Angeles, CA 90071, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.



BURTON S. STERNBURG
Administrative Law Judge

Dated: June 16, 1988
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 NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute by prohibiting Albert Cummings or any other Border Patrol Agent from wearing the American Federation of Government Employees, AFL-CIO, union lapel pin or similar union insignia while on duty.

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

WE WILL permit Albert Cummings or any other border patrol agent to wear an American Federation of Government Employees, AFL-CIO, lapel pin or similar union insignia while they are on duty.

(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 S. Figueroa Street, Room 370, Los Angeles, CA 90071, and whose telephone number is: (213) 894-3805.