

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 .

Respondent .

and .

Case No. 2-CA-90260

AMERICAN FEDERATION OF .  
GOVERNMENT EMPLOYEES, .  
AFL-CIO, LOCAL 1917 .

Charging Party .  
.....

Louise Fillmann  
For Respondent

Ignatius A. Gentile  
For Charging Party

Allan W. Stadtmauer, Esq.  
For General Counsel of the FLRA

Before: SAMUEL A. CHAITOVITZ  
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-  
Management Relations Statute, 5 U.S.C. § 7101 et seq.,  
hereinafter referred to as the Statute, and the Rules and  
Regulations of the Federal Labor Relations Authority (FLRA),  
5 C.F.R. Chapter XIV, § 2423.1 et seq.

Pursuant to a charge filed, and amended, by the American  
Federation of Government Employees, AFL-CIO, Local 1917,  
hereinafter called AFGE Local 1917, against the United

States Immigration and Naturalization Service, hereinafter called INS, the General Counsel of the FLRA, by the Regional Director of Region II of the FLRA, issued a Complaint and Notice of Hearing. The Complaint alleges that INS violated section 7116(a)(1) and (5) of the Statute by unilaterally changing a past practice of permitting employee parking on West Houston Street in New York City without providing AFGE Local 1917 advance notice of the change and an opportunity to negotiate concerning the substance and/or impact and implementation of the change. INS filed an answer denying it had violated the Statute.

A hearing in this matter was conducted before the undersigned in New York City, New York. INS, AFGE Local 1917, and General Counsel of the FLRA were represented and afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were filed and have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and my evaluation of the evidence, I make the following:

#### Findings of Fact

INS is part of the Justice Department and is responsible for the control of aliens travelling in and residing in the United States. At all times material the American Federation of Government employees National Council of Immigration and Naturalization Service Locals, hereinafter called AFGE Council, has been the exclusive collective bargaining representative for a nationwide unit of INS employees, including those in the INS New York District. INS has recognized AFGE Local 1917 as the agent for AFGE Council for the purposes of bargaining for the unit employees in the INS New York District. INS maintains the Service Processing Center (SPC) at 201 Varick Street, New York City, which is part of the INS New York District.

Immigration Deportation Officers and Detention Officers are employees assigned, among other places, to the SPC and are within the subject unit. Detention Officers generally watch over detained aliens and Deportation Officers transport aliens and handle the paperwork associated with deportation actions.

For at least a year prior to March 31, 1989, Detention Officers and their supervisors assigned to the SPC parked their personally owned cars used in commuting to work on the south side of West Houston Street, between Greenwich and Hudson Streets. The SPC, located at 201 Varick Street, is located between West Houston and King Streets, with Hudson Street being the western border of the building. There is room for about 16 to 17 cars to park in the area on West Houston Street where the Detention Officers and their supervisors parked. The employees and supervisors parked their cars on West Houston Street on a "first come, first served" basis and placed agency Official Business placards in the windshields of their cars.

In making these findings I rely on the testimony of Ignatius Gentile, President of AFGE Local 1917 and a Deportation Officer assigned to 26 Federal Plaza, and Brian Wilkes, at the time in question a Detention Officer assigned to the SPC. Gentile's duties took him to the SPC often and regularly and he observed unit employees and their supervisors parking in the area in question on West Houston Street. Similarly, Wilkes observed a number of unit employees and a number of supervisors parking their privately owned cars in the parking spaces on West Houston Street. The testimony of Gentile and Wilkes is uncontradicted.

Since at least on or about August 14, 1988, parking signs were present at the location in question on West Houston Street which stated on the top, "NO STANDING, 8am-6pm, Mon thru Fri, Except, Authorized Vehicles" and then immediately below was attached another sign which stated, "Dept. Of, Justice".

Wilkes was a Detention Officer assigned to the SPC until September 25, 1989, when he became a supervisor. While working as a Detention Officer Wilkes worked a normal day shift. From August 1988 to early March 1989, Wilkes used public transportation to commute to work. In early March of 1989 he learned from other Detention Officers and supervisor Sal Turkis that parking on West Houston Street was available for parking privately owned cars used for commuting. After observing employees and supervisors parking their cars on West Houston Street with "Official Business" placards in their windshields, Wilkes began to commute in his car and to park it on West Houston Street, placing an "Official Business" placard, which he obtained from another employee, in his windshield.

One day in mid-March 1989, Wilkes heard his car, as well as others, was being ticketed. Not all cars parked on West Houston Street were ticketed. Apparently those cars with the "Official Business" placard encased in plastic, laminated, did not receive tickets, while those cars whose placards were not laminated did. Wilkes called the New York City Traffic Bureau and was advised that if he supplied a copy of the "Official Business" placard and a letter stating he worked for INS, the ticket would be quashed. Other employees and supervisors advised Wilkes that they had had tickets withdrawn previously by providing such documents. The record does not establish who wrote the letters stating these employees and supervisors were employed by INS; it does not establish whether the letters were written by a representative of INS management or by the employees on their own behalf.

Wilkes attempted to get a letter from the SPC's Deputy Assistant Director for Deportation and Detention Leroy Frederick stating that Wilkes was an employee of INS and was authorized to park on West Houston Street. Frederick refused to write such a letter.

Frederick looked into the matter and learned of the parking signs and that employees were parking their privately owned cars at the West Houston Street location.

On March 31, 1989, Frederick issued a memorandum to all employees at the SPC stating that the parking spaces on West Houston Street are designated for Justice Department vehicles and not for privately owned vehicles. The memorandum stated "The only vehicles authorized to park in this area are Government Vehicles". The memorandum went on to say that privately owned cars parked on West Houston Street will be ticketed by the New York City Police Department and could be towed to the City pound. This memorandum was circulated among Deportation Officers and Detention Officers. Gentile received the memorandum in early April 1989.

Gentile inquired of the New York City Department of Transportation regarding the procedures for authorizing parking spaces. By letter dated November 17, 1989, the New York City Department of Transportation informed Gentile inter alia, that upon an agency's request spaces are assigned in proportion to the number of vehicles, both government owned and privately owned, that are used in the field more than 50% of the time. The letter stated, "No spaces are provided for vehicles used primarily for commutation."

The letter went on to state that once spaces are installed they are primarily regulated by the agency, which decides to whom they are assigned and issues identification that the parked car is being used for agency business. The letter went on to state, "Authorized spaces, once installed, will remain unless it is found that they are not being used for government business. If they are being used to house commuter vehicles, they will be removed."

In addition to the subject parking spaces on West Houston Street, the SPC has a lease for 11 spaces in a garage, five allotted spaces on the street in front of SPC's entrance at 201 Varick Street and room for two vehicles in a loading bay on 201 Varick Street. The SPC has about 17 government vehicles assigned to it. Apparently the government owned vehicles were routinely parked in the garage, on the street in front of 201 Varick, and in the loading bay.

#### Discussion and Conclusions of Law

The FLRA has held that an agency violates section 7116(a)(1) and (5) of the Statute when it unilaterally changes an established condition of employment without first notifying the collective bargaining representative of its employees and giving it an opportunity to bargain about the prospective change. See Department of the Air Force, Scott Air Force Base, Illinois, 31 FLRA 1013 (1988); and Immigration and Naturalization Service, 16 FLRA 1007 (1984), hereinafter referred to as the INS Case. Further, providing parking places and the distribution of such parking places among employees are conditions of employment. See United States Customs Service, Washington, D.C., 29 FLRA 307 (1987); and the INS Case, supra.

A condition of employment becomes an established past practice when the practice is consistently followed for a substantial period of time with the employer's knowledge. INS Case, supra; and Department of the Navy, Naval Weapons Station Concord, Concord, California, 33 FLRA 770 (1988). The record herein establishes that employees and supervisors of the SPC had been parking in the West Houston Street parking spaces, on a "first come, first served" basis, for about a year before Frederick issued his memorandum on March 31, 1989. Thus, although Frederick contends that he did not learn about such parking by employees till March 1989, a number of supervisors at the SPC knew about such a practice and, in fact, also parked their cars there.

Because employee parking in the West Houston Street parking spaces had gone on for about a year before the March 31, 1989, memorandum and because this practice was known to a number of supervisors, I conclude it was an existing condition of employment at the time Frederick issued the March 31, memorandum.

Despite concluding the foregoing, I also conclude that the record does not establish that any SPC officials wrote any letters or made any statements on behalf of employees for the purpose of quashing any parking tickets that the employees had received from New York City for parking on West Houston Street. Thus, the record does not establish that there was any past practice with respect to the SPC helping employees quash parking tickets received for parking on West Houston Street. Accordingly, under the existing condition of employment, employees at the SPC had the agency's permission to park their personally owned cars in the West Houston Street parking spaces, but were subject to being ticketed or towed by the New York City authorities.

Although it is less than crystal clear, I conclude that the March 31 memorandum notified employees of the SPC that they may no longer park their personally owned cars used for commuting to work on West Houston Street. The memorandum could be interpreted as merely explaining the New York City limitations on parking in the West Houston Street spaces, an interpretation not urged by INS either orally or in its brief. I conclude, however, that reasonable employees would interpret the memorandum as informing them that the SPC was not authorizing them to park their privately owned cars on West Houston Street and that the only cars the SPC was authorizing to park there were government cars. The memorandum went on to advise employees that if they violated these instructions their cars could be ticketed and towed by the appropriate New York City agencies.

Accordingly, I conclude that by means of the March 31, 1989, memorandum Frederick changed the then existing condition of employment of permitting the SPC employees to park in the West Houston Street spaces. The record establishes that Frederick did not provide advance notification of this change to AFGE Local 1917 and did not provide it with an opportunity to bargain about the substance of the change in the parking policy. In this regard the SPC did not provide AFGE Local 1917 with an opportunity to bargain about the implementation of the change in the parking policy and appropriate

arrangements for employees adversely affected by the change. This failure to bargain about the impact and implementation of the change is necessarily included in the failure to bargain about the substance of the change in the parking policy.

INS could urge, although it did not do so clearly either orally at the hearing or in writing in the brief, that it was merely complying with the law when it changed the parking policy and forbade employee parking on West Houston Street and therefore, it could not bargain about the substance of the decision. Such a contention, however, is rejected. INS would not be violating the New York City parking regulations by permitting employees to park in the designated spaces on West Houston Street; rather, INS would merely be allowing employees to park in the spaces, as far as INS is concerned, and the employees, at their discretion, could park in the spaces and risk being punished by the city authorities. INS, itself, would not be violating the local parking regulations, although it would risk having New York City withdraw the allocation of these spaces to INS, something to which it could presumably agree. On the other hand, during bargaining about the parking situation INS and AFGE Local 1917 could agree on a reallocation of all the parking spaces used by the SPC.

Further, to the extent INS has any discretion to bargain about the use of these spaces under New York City law, it must bargain to the extent of this discretion. See American Federation of Government Employees, AFL-CIO, Council of Prison Locals, Local 1661, and U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut, 29 FLRA 990 (1987), at 1004-1007. I note, also, that section 7117 of the Statute provides that an agency has an obligation to bargain in good faith to the extent not "inconsistent with any Federal law or any Government-wide rule or regulation." This section does not mention inconsistency with any local or city law or regulation. Thus as stated above, INS' obligation to bargain extended to its permission to park in the spaces on West Houston Street, and did not extend to New York City's enforcement of its parking regulations.

There seemed to be some attempt at the hearing herein to establish that AFGE Local 1917 waived its right to bargain about the parking arrangements, but, again it was not argued either orally at the hearing or in writing in INS' brief, and it is not clear exactly where such a waiver is expressed.

I conclude the union did not waive its right to bargain about the change in the parking arrangement because the record does not establish a clear and unmistakable waiver of such right. Internal Revenue Service, 16 FLRA 904 (1984).

In light of all of the foregoing, I conclude that INS violated section 7116(a)(1) and (5) of the Statute when its agent, the SPC, changed an existing condition of employment, forbidding employees from parking in the allocated spaces on West Houston Street, without first notifying AFGE Local 1917 and giving it an opportunity to bargain about the substance of the change. INS Case, supra.\*

The appropriate remedy in this matter is a return to the status quo ante. INS Case, supra.

Having found that INS violated section 7116(a)(1) and (5) of the Statute, I recommend the Authority issue the following Order:

#### ORDER

Pursuant to section 2423.9 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the United States Immigration and Naturalization Service shall:

1. Cease and desist from:

(a) Changing policies governing employee parking at the New York Service Processing Center without first affording the American Federation of Government Employees, Local 1917, AFL-CIO, the employees' exclusive collective bargaining representative, notice and an opportunity to bargain concerning any proposed change in such policies.

(b) Refusing to bargain with the American Federation of Government Employees, Local 1917, AFL-CIO, the employees' exclusive collective bargaining representative, concerning any change in policies governing employee parking at the New York Service Processing Center.

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\*/ In the event the FLRA were to conclude that INS was not obliged to bargain about the substance of the change, I would conclude INS still would have been obliged to notify AFGE Local 1917 of the proposed change and give it an opportunity to bargain about the impact and implementation of the change.



(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured 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) Rescind the changes in the policy governing employee parking at the New York Service Processing Center made on March 31, 1989, whereby employees were forbidden to park in reserved spaces on West Houston Street, and return to the policy in effect prior thereto.

(b) Notify and, upon request, bargain with the American Federation of Government Employees, Local 1917, AFL-CIO, the employees' exclusive collective bargaining representative, concerning any proposed change in policy regarding employee parking at the New York Service Processing Center.

(c) Post at the New York Service Processing Center 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 District Director for the New York District and shall be posted and maintained by him 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.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, 26 Federal Plaza, Room 3700, New York, NY 10278, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued: July 31, 1990, Washington, D.C.

  
SAMUEL A. CHAITOVITZ  
Administrative Law Judge

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 change policies governing employee parking at the New York Service Processing Center without first affording the American Federation of Government Employees, Local 1917, AFL-CIO, our employees' exclusive collective bargaining representative, notice and an opportunity to bargain concerning any proposed change in such policies.

WE WILL NOT refuse to bargain with the American Federation of Government employees, Local 1917, AFL-CIO, our employees' exclusive collective bargaining representative, concerning any change in policies governing employee parking at the New York Service Processing Center.

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 Federal Service Labor-Management Relations Statute.

WE WILL rescind the changes in the policy governing employee parking at the New York Service Processing Center made on March 31, 1989, whereby employees were forbidden to park in reserved spaces on West Houston Street, and return to the policy in effect prior thereto.

WE WILL notify and, upon request, bargain with the American Federation of Government Employees, Local 1917, AFL-CIO, our employees' exclusive collective bargaining representative, concerning any proposed change in policy regarding employee parking at the New York Service Processing Center.

\_\_\_\_\_  
(Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Title)

This Notice must remain posted 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 its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority whose address is: 26 Federal Plaza, Room 3700, New York, New York, 10278, and whose telephone number is: (212) 264-4934.