

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

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

Respondent .

and .

Case No. 8-CA-90083

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

Charging Party .

.
Peggy DeBeliso, Esq.
For Respondent

T.J. Bonner
For Charging Party

Deborah S. Wagner, 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 by National Border Patrol Council, American Federation of Government Employees,

Local 1613, AFL-CIO, hereinafter referred to as AFGE Local 1613, against United States Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California, hereinafter referred to as Border Patrol San Diego Sector and the San Diego Sector, the General Counsel of the FLRA, through the Regional Director of FLRA Region VIII, issued a Complaint and Notice of Hearing. The subject complaint alleges that Border Patrol San Diego Sector violated section 7116(a)(1) and (5) of the Statute by making a change in working conditions by changing the manner in which soft body armor is worn by employees without first completing bargaining with the AFGE Local 1613 over the substance and impact and implementation of the change. Border Patrol San Diego Sector filed an answer denying it had violated the Statute.

A hearing in this matter was conducted before the undersigned in San Diego, California. Border Patrol San Diego Sector, AFGE Local 1613 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, 1/ my observation of the witnesses and their demeanor, and my evaluation of the evidence, I make the following:

Findings of Fact

The United States Border Patrol is the uniformed enforcement branch of the United States Immigration and Naturalization Service, hereinafter called the INS. The Border Patrol is a national force including about 3500 Border Patrol Agents stationed in twenty-two sectors throughout the nation. Each sector contains several Border Patrol Stations within its area of responsibility. The San Diego Sector is such a sector and is headed, as are all the others, by a Chief Patrol Agent and the second in command is

1/ AFGE Local 1613 filed a "Motion To Correct Transcript", which has been unopposed. Accordingly, this Motion is GRANTED and a copy of the proposed corrections are attached hereto as "Appendix A." Border Patrol San Diego Sector filed a "Motion to Amend the Trial Transcript", which has been unopposed. Accordingly, this Motion is GRANTED and a copy of the Motion is attached hereto as "Appendix B."

the Deputy Chief Patrol Agent. In the sectors, in supervisory capacities, are also several staff Assistant Chief Patrol Agents. Within the sectors are stations, each headed by the Patrol Agent in Charge, who in turn is assisted by an Assistant Patrol Agent in Charge, followed by the Field Operations Supervisor and finally by the first-line supervisors. The Border Patrol is a uniformed, mobile, paramilitary, force wherein the uniform reflects the wearer's rank.

Border Patrol Agents' duties include detecting and preventing illegal entry of aliens, enforcing drug and customs laws, and, often, arresting violators of state laws. There are about 750 Border Patrol Agents assigned to the San Diego Sector. The San Diego Sector operates 24 hours a day and seven days a week, paying special attention to peak periods in alien traffic, such as late evening and early morning hours. The agents engage in a variety of activities to accomplish their primary goals. These activities include, among others, patrolling borders, conducting city patrol operations to detect illegal aliens who have already entered the country, and manning highway checkpoints in San Clemente and Temecula, California. About 150 agents are assigned to San Clemente and Temecula. Border Patrol Agents assigned to the San Diego Sector make about 1,666 arrests a day. Border Patrol Agents' duties are very dangerous and they are exposed, on a daily basis, to physical assaults, knife attacks, shooting incidents and rock throwing attacks.

Since 1968, and at all times material, the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, hereinafter called the Council, has been recognized by INS, as the exclusive collective bargaining representative for a nationwide unit of Border Patrol Service employees, including the agents in the Border Patrol San Diego Sector. AFGE Local 1613 is the Council's agent for representing and bargaining on behalf of the agents located in the various facilities of the Border Patrol San Diego Sector.

Prior to September of 1987 Border Patrol Agents assigned to the Border Patrol San Diego Sector had been assigned a forest green bullet proof vest, also referred to as body armor. Some agents had also been assigned a different item of body armor and some had purchased different types of body armor. The forest green body armor has tails which can be tucked in the agents' trousers. Some of the other vests do not have tails.

At all times material agents have been free to wear body armor or to refrain from wearing bullet proof vests. The choice was up to the individual agent, although it is clear management and AFGE Local 1613 feel it is desirable for agents to wear their body armor whenever in the field and in dangerous situations. Similarly agents have been free to wear the agency issued forest green bullet proof vests, other agency issued vests, or ones that they had purchased privately. Prior to September of 1987 some Border Patrol Agents wore their body armor over their uniforms. Some agents apparently find wearing body armor for extended periods of time to be uncomfortable, especially in the heat of the San Diego Sector.

Border Patrol has detailed regulations with respect to the official uniforms to be worn by its agents. The uniforms include a dress uniform which includes, among other required items, an Eisenhower jacket, a dress storm coat and a commando sweater and a rough duty uniform which includes, among other items, a rough duty jacket, thermal vest, commando sweater, and raincoat. About ten to fifteen percent of the approximately 737 unit employees in the San Diego Sector do not wear uniforms, the approximately 150 who man the highway checkpoints in San Clemente and Temecula wear dress uniforms, and the remainder normally wear the rough duty uniform. All the uniforms include a badge and nameplate.

During early or mid-September of 1987 Deputy Chief Patrol Agent of the San Diego Sector William Veal observed an agent in the field arrest a group of aliens. The agent was observed wearing his bullet proof vest over his uniform and the body armor covered the agent's badge and nameplate and the tails of the vest hung down in the front and back, covering the agent's gun belt. Veal later discovered that wearing a bullet proof vest on the outside of the uniform was a regular practice in one station in the San Diego Sector.

By letter dated September 11, 1987 San Diego Sector Chief Patrol Agent Dale W. Cozart advised AFGE Local 1613 President T.J. Bonner,

It appears some officers may be wearing body armor in a manner which critically compromises the effectiveness of the body armor. It is my intent to standardize the wear of body armor concealed beneath the uniform shirt. This notice is extended to

you in accordance with Article 3G of the Negotiated Agreement. As this matter is of vital importance to officer safety, a prompt reply and/or waiver of the 30-day reply period would be appreciated.

AFGE Local 1613 responded requesting that the matter be discussed at the next monthly labor-management relations meeting on October 8, 1987. At this meeting the AFGE Local 1613 representatives asked what concerns led to management's desire to standardize the wearing of body armor. The representatives of the agency responded that a felon who saw the body armor would shoot so as to avoid the body armor and would aim at the unprotected parts of the body and also because wearing the body armor over the uniform shirt covered the badge and nameplate. AFGE Local 1613 representative Bonner suggested that agents be allowed to wear the body armor over the uniform shirt so long as the bullet proof vest is covered by an article of uniform outerwear which would display the badge and nameplate. Veal indicated this would look unprofessional. Bonner stated it would be impossible to tell if the body armor were covered by a jacket. The issue was discussed, but no agreement was reached.

On October 19, 1987 Bonner wrote the Chief Patrol Agent indicating that the parties had met, discussed the proposed change as to the wearing of body armor, no agreement was reached, and that, in accordance with the collective bargaining agreement, AFGE Local 1613 desired to enter into formal negotiations. On November 10, 1987 AFGE Local 1613 submitted these four written proposals:

- A. The parties agree that the wearing of body armor shall remain a matter of individual discretion to be exercised by each agent.
- B. The parties agree that concealable body armor, in order to be maximally effective, should be worn under the outermost article of uniform apparel. This does not preclude agents from wearing the body armor over a uniform shirt, as long as it is covered by a uniform jacket or other approved article of uniform apparel.
- C. Violations of this policy shall be treated consistent with the past practice

of handling uniform apparel violations in the San Diego Sector.

D. The terms of this agreement are binding upon both parties until such time as both parties agree to modify or terminate the agreement.

These proposals were discussed on November 11, 1987, at the next labor-management meeting. Cozart agreed to proposal "A" as it reflected the then current practice. Except in extraordinary situations, the practice was that employees decided whether to wear body armor. Cozart stated management did not intend to force employees to wear body armor, or to discourage them from wearing bullet proof vests. Both parties understood that proposal "A" applied to ordinary situations and not to extraordinary or dangerous circumstances.

Cozart expressed concern that if an employee wore the body armor under a jacket that was not buttoned or zipped, the professional appearance would be diminished. Cozart conceded that there was little difference between this proposal and wearing the body armor under a shirt as long as the body armor was totally concealed. AFGE Local 1613 representatives clarified that it was not the union's intent to permit any part of the body armor to be exposed. AFGE Local 1613 agreed with the agency's concern that if the body armor were visible the people being apprehended would try to injure the agents by shooting around the body armor.

With respect to proposal "C" the agency stated that the union should not tell the agency when to discipline employees. AFGE Local 1613 replied that it was not trying to prevent the agency from disciplining employees but rather requiring that improper wearing of body armor be treated in the same manner as a uniform code violation.

There was little discussion of proposal "D" at this meeting. At the conclusion of this meeting the parties had agreed upon proposal "A", but not upon proposals "B" or "C". Cozart told the AFGE Local 1613 representatives that he would look into the matter and get back to the union.

The next communication between the parties concerning the body armor issue was a letter dated February 24, 1988 from Veal to Bonner which contained what the San Diego Sector characterized as its "last best offer". This letter consisted of three items. The first item stated that the

agency would continue to provide the agents with body armor. The second item stated that the decision whether to wear body armor would remain within the discretion of the individual agent. This was substantively the same as union proposal "A". The third item required that agents who elect to wear the vest must wear it under the uniform shirt or flight suit. In setting forth this requirement the letter justified it on the grounds that if the body armor were worn over the shirt, and thus was in view, an assailant could direct his attack to an unprotected area; it would conceal the uniform thus precluding the recognition of the agent as a law enforcement officer; and it would prevent the agent from using the "tails" and thus anchoring the body armor in place.

AFGE Local 1613 responded by letter dated March 2, 1988 advising Cozart that the union was seeking the assistance of the Federal Mediation and Conciliation Service.

The mediator met with the parties for about three to five hours on March 30, 1988. The discussion primarily involved union proposal "B", that the body armor could be worn over the uniform shirt, but only if covered by an item of uniform outerwear, and the agency's counterproposal 3 that the body armor could only be worn under the uniform shirt. The representatives of the San Diego Sector suggested, as a compromise, that in emergency situations agents could wear their body armor over the uniform shirt. The parties could not agree on what constituted an emergency and, absent an acceptable agreement as to what constituted an emergency, AFGE Local 1613 rejected the offer.

During this meeting with the mediator as the parties discussed AFGE Local 1613 proposal "B" the union made it clear that the word "covered" in proposal "B" meant completely concealed. The San Diego Sector representatives acknowledged that they fully understood this, but they did not want to police such an agreement and make sure that no part of the body armor was exposed. AFGE Local 1613 representatives pointed out that the agency would have to police the agency policy of wearing the vest under the shirt.

No agreement was reached at this meeting and an impasse was declared. On April 11, 1988 AFGE Local 1613 submitted the matter to the Federal Services Impasse Panel. In its summary of issues and position the union explained that it was "virtually impossible to detect" whether body armor was worn under a uniform shirt or over the shirt if worn with a jacket that is fully zipped or buttoned up. The union also

stated that it would propose language requiring that the shirt-tails be concealed. This summary also stated, "The Union also feels . . . that the shirt-tail feature does little if anything to enhance the stability of body armor. In fact, most manufacturers of body armor offer their product both with or without the shirt-tail feature. Regarding the Agency's reticence to enforce regulations concerning wearing body armor under outer apparel . . . the Agency was unable to distinguish how that would differ from enforcing its own proposals. . . ."

FSIP notified the parties on June 16, 1988 that it declined to assert jurisdiction over the dispute because the agency had raised allegations of nonnegotiability regarding the union's proposals.

By letter dated August 3, 1988 Veal advised AFGE Local 1613 that San Diego Sector "will be standardizing the wear of body armor concealed beneath the uniform shirt."

By letter dated August 6, 1988 AFGE Local 1613 demanded to continue bargain about the decision to implement the standardization of wearing body armor under the uniform shirt. The union also demanded that the status quo be maintained until all issues have been resolved, "including those requiring third party resolution".

By letter dated August 11, 1988 Cozart advised Bonner that the agency considers soft body armor as a "means" of performing agency work under section 7106(b)(1) of the Statute and the agency "elects not to bargain over the manner in which it will be worn".

By letter dated August 17, 1988 Cozart advised Patrol Agents in Charge that they must ensure that all officers wear their bullet proof vests concealed under the uniform shirts or flight suits in order to maximize the protection such a vest can provide. The letter explained that wearing the body armor over the shirt compromises its effectiveness because an assailant will direct his attack to an unprotected area of the officer's body and it may preclude the ready recognition of the officer as a Border Patrol Agent.

By letter to INS dated August 26, 1988 American Federation of Government Employees, AFL-CIO, herein referred to as AFGE, requested a formal declaration of nonnegotiability concerning AFGE Local 1613's proposals "A", "B", "C", and "D". INS did not respond so AFGE submitted a

negotiability appeal to the FLRA by letter dated September 26, 1988. The agency filed its brief on October 17, 1988 and AFGE filed its brief dated November 4, 1988.

Because the policy concerning the wearing of vests had been implemented the charge in the subject case was filed and the union elected to proceed under the Unfair Labor Practice procedures.

Based upon photographs received in evidence herein I find that when soft body armor is worn over the uniform shirt, but under a fully fastened rough duty jacket, commando sweater or dress storm coat it appears exactly the same as when the body armor is worn under the uniform shirt and the agent wears a fully fastened rough duty jacket, commando sweater or dress storm coat. The agents badge and nameplate are worn on the rough duty jacket, commando sweater and storm coat, when any of those uniform articles are worn. The body armor can not be fully covered if worn outside the uniform shirt but under the dress uniform Eisenhower jacket.

The evidence establishes that the shirt-tails on the forest green body armor provide an anchoring feature to the vest and, when the shirt-tails are tucked inside the agent's pants, the shirt-tails keep the vest from bunching up or riding up on the agent while he is wearing it. This keeps the vest in position providing maximum protection.

Discussion and Conclusions of Law

General Counsel of the FLRA contends that Border Patrol San Diego Sector violated section 7116(a)(1) and (5) of the Statute when it instituted the policy of requiring the agents to wear their body armor under their uniform shirts without fulfilling and completing its bargaining obligation with AFGE Local 1613 concerning the substance of the policy or its implementation and arrangements for employees adversely affected by the policy, this latter referred to herein as impact and implementation bargaining. In this regard General Counsel of the FLRA contends specifically that San Diego Sector instituted the body armor policy before it had fulfilled its obligation to complete bargaining over AFGE Local 1613's proposals, particularly proposals "B" and "D", with the obligation to bargain over proposal "D" being dependent upon finding that the agency failed to fulfill its obligation to bargain about proposal "B". In addition AFGE Local 1613 contends that San Diego Sector instituted the policy before it had completed its obligation to bargain over union proposals "A" and "C".

Border Patrol San Diego Sector contends that under sections 7106(a)(1) and (2)(A), and 7106(b)(1) of the Statute it was permitted to institute the policy of agents wearing their body armor under the uniform shirt without first bargaining with AFGE Local 1613 concerning the substance of the policy and that the union's proposals were substantive in nature and were not impact and implementation proposals, and, additionally, that the proposals excessively and directly interfered with the agency's rights.

Section 7106(a)(1) of the Statute provides that the Statute does not affect an agency's authority to determine, among other things, its organization and internal security practices. Section 7106(a)(2)(A) of the Statute provides that the Statute does not affect an agency's authority to assign and direct its employees. Section 7106(b)(1) of the Statute provides that an agency need negotiate concerning the "technology, methods, and means of performing work" only at its own election. In this regard it must be noted that section 7106(b)(2) and (3) provides that an agency has to negotiate concerning the impact and implementation of the exercise of any authority under section 7106 of the Statute.

The record establishes that prior to the institution of the policy requiring agents who choose to wear body armor, to wear it under their uniform shirts, there was no standard practice requiring such body armor be worn under the uniform shirts. Rather some agents who chose to wear body armor wore it outside their shirts, so that the bullet proof vests were exposed and visible. Some agents wore the body armor so as to conceal their badges and nameplates. Still other agents apparently wore the body armor under their uniform shirts, and, of course, others chose not to wear body armor. This latter choice is still available to the agents. In this regard agents have at all times material had the option of whether to wear the body armor.

The requirement that the bullet proof vests be worn under the uniform shirt reduced the agents' flexibility of putting the vests on in the field and in a brief period of time. Rather, while dressing, or at some time when an agent has the time and place to partially disrobe, the agent must put on the body armor and then wear it until, again, he has sufficient time and privacy to partially disrobe to remove the bullet proof vest. Apparently some agents, especially in the heat, find the body armor uncomfortable to wear for extended periods of time.

The institution of the policy that requires agents who choose to wear body armor to wear it under the uniform shirt

constituted a change in conditions of employment, because, as described above, prior to the institution of this policy agents could decide whether to wear the bullet proof vests under or over uniform shirts.

As discussed above Border Patrol San Diego Sector claims that it was privileged under section 7106(a) and (b) of the Statute to make this policy change without bargaining with the union about the substance of the change and that the union's proposals were not appropriate impact and implementation proposals, because they excessively interfered with management's exercise of its rights.

AFGE Local 1613 contends that if any of the union's proposals were negotiable Border Patrol San Diego Sector violated the Statute when it instituted the policy requiring the wearing of body armor under the uniform shirt before it had fully bargained about all the union's proposal. The General Counsel of the FLRA contends the alleged violation is based only upon the failure to complete bargaining about proposal "B", and accordingly proposal "D", before the body armor policy was instituted. The complaint herein is broad enough to include AFGE Local 1613's rationale for the violation herein, noting that the complaint does not limit the basis for a violation to any specific union proposal, but rather refers in paragraph 9(b) to "some of the Local's proposals were negotiable." Accordingly, I must consider if any of the proposals were negotiable and if the San Diego Sector instituted a change without exhausting bargaining about the proposals that were relevant to the change.

With respect to proposal "A", dealing with agents retaining the right to decide whether to wear body armor, there was no change in the existing practice of letting the agents determine whether to wear body armor. Because there has been no change in this practice, San Diego Sector's declaration that this matter was nonnegotiable is more appropriately resolved through the Statute's negotiability determination procedures, section 7117(b) and (c) of the Statute, and the FLRA's Rules and Regulations, 5 C.F.R. § 2424. It can be reasonably argued that proposal "A" was a proposal sufficiently closely related to the new policy on the wearing of body armor as to constitute an arrangement for employees adversely affected by the change. However, because there had been no change in the existing practice of permitting the agents to decide whether to wear the body armor and the agency had agreed with AFGE Local 1613 that this practice would continue, I conclude Border Patrol San Diego Sector did not violate the Statute when it instituted

the new body armor policy and declared proposal "A" nonnegotiable.

Further, proposal "A" is nonnegotiable because it interferes with the agency's right under section 7106(a)(1) of the Statute to determine internal security practices. National Association of Government Employees, SEIU, Local R7-51 and Department of the Navy, Navy Public Works Center, Great Lakes, Illinois, 30 FLRA 415 (1987), hereinafter referred to as Navy Public Works Center, and Department of the Navy, United States Marine Corps, 26 FLRA 704 (1987), hereinafter referred to as Marine Corps. To the extent proposal "A" was an arrangement for employees adversely affected by the new policy, proposal "A" abrogated the agency's right to determine internal security practices. Department of the Treasury, U.S. Customs Service, and National Treasury Employees Union, 37 FLRA 309 (1990), hereinafter called Customs Service.

Border Patrol San Diego Sector instituted the new policy of requiring agents to wear the body armor under the uniform shirt because Veal had observed an agent wearing body armor over his uniform, covering his badge and nameplate and the body armor could clearly be seen by anyone the agent attempted to apprehend.

Proposal "B" provides that the body armor can be worn under the outermost article of uniform apparel and the body armor can be worn over the uniform shirt ". . . as long as it is covered by a uniform jacket or other approved article of uniform apparel." During the various meetings between the representatives of the union and the agency, the representatives of AFGE Local 1613 explained and clarified that this proposal permitted wearing the body armor over the uniform shirt only when the body armor was completely concealed and covered by the uniform jacket or other article of uniform apparel, although no specific kinds of uniform jackets or apparel were specifically mentioned. It is also noted when a uniform jacket or other uniform outer apparel is worn, the badge and nameplate is affixed to such outer apparel. In light of the foregoing, I conclude that under proposal "B" the body armor could only be worn over the uniform shirt when the bulletproof vest is completely covered and concealed by the uniform jacket or other outer garment, and that this was explained to and understood by the representatives of the Border Patrol San Diego Sector.

Based upon the record herein, including photographs, I conclude that an agent wearing body armor completely covered

and concealed by a rough duty jacket, commando sweater, or storm coat looks exactly like an agent wearing the body armor under the uniform shirt who is also wearing a rough duty jacket, commando sweater or storm coat. When the body armor is concealed by the outergarment, an observer can not tell whether the bullet proof vest is under the uniform shirt or under the outergarment. In fact when an agent is wearing a fully fastened rough duty jacket, commando sweater, or storm coat an observer would find it difficult, if not impossible, to tell whether such an agent is wearing body armor at all, be it under the uniform shirt or outergarment.

Border Patrol San Diego Sector decided to institute the policy requiring that body armor be worn beneath the uniform shirt because when Veal had observed an agent apprehending suspects when such agent wore his body armor on the outside of his uniform, in plain sight, covering the badge and nameplate, the shirt tails of the body armor were hanging down on the outside.

There is no dispute that the requirement that border patrol agents wear a uniform constitutes the exercise of managements right to determine the method and means of performing work under section 7106(b)(1) of the Statute. See, U.S. Department of Justice, Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California, 38 FLRA No. 63 (1990), hereinafter referred to as INS.

I reject the argument of Border Patrol San Diego Sector that maintaining a uniform is an integral component of its rights to determine organization and mission under section 7106(a)(1) of the Statute. Id. at 7-9.

Veal's observation of the border patrol agent wearing the bullet proof vest over his uniform illustrated, among other things, a situation where the wearing of the vest in that manner covered up the uniform and concealed from the person being apprehended that the agent was a uniformed member of the border patrol and prevented the identification of the agent by concealing his nameplate. The requirement that border patrol agents wear a uniform is based upon the agency's decision that it enhances the agents' morale, discipline, esprit de corps, uniformity, recognition, identification and professional appearance. In light of the foregoing, I conclude that one of the purposes of the new policy concerning the wearing of body armor under the uniform shirt was an attempt by management to preserve the

appearance and functioning of the agents' uniform as an effective means of performing the agency's function and mission. Thus, in this respect the body armor is not a part of the uniform that is to be worn properly; rather it is an item that was to be worn so as not to interfere with the uniform or to compromise the uniform's purpose.

Proposal "B" did not interfere with the agency's management right to designate and use the uniform or its right to insure that the body armor did not interfere with the uniform's functioning. Proposal "B" required that body armor could be worn on the outside of the uniform shirt only when the body armor was completely concealed and covered by the outer uniform garment. As found above, this requirement of complete concealment was clearly and explicitly explained to the agency's representatives by the union representatives. Further, as explained above, when the body armor was worn as described in proposal "B", the uniform worn by the agent looked exactly like the uniform when worn with the body armor under the shirt. Wearing the body armor as described in proposal "B" in no way compromised the effectiveness of the uniform and did not in any way interfere with the agency's performance of its mission. See INS, supra, at 9. In this regard San Diego Sector's arguments that the body armor could be seen under the Eisenhower jacket or would otherwise cover up the badge and nameplate are without merit because it had been made clear that proposal "B" required that the outergarments must fully cover the body armor.

In light of all of the foregoing I conclude, with respect to the use of a uniform, that proposal "B" did not interfere with or abrogate the Border Patrol San Diego Sector's section 7106(b)(1) right to determine the methods and means of performing its work. Cf. Department of Health and Human Services, Public Health Service, Health Resources and Services Administration, Oklahoma City Area, Indian Health Service, Oklahoma City, Oklahoma, 31 FLRA 498 (1988), hereinafter called Indian Health Service; and Customs Service, supra.

Veal's concern that the wearing of the body armor so it can be seen enabled assailants to shoot around the vest at unprotected areas was another reason the new body armor policy was instituted. In this regard the new policy was an exercise by the agency of its right under section 7106(a)(1) of the Statute to "determine the . . . internal security practices of the agency. . . ." The FLRA has recognized that this portion of section 7106(a)(1) includes the right to set policies which are aimed at safeguarding the agency's

personnel. Navy Public Works Center, supra, and Marine Corps, supra.

Proposal "B" provided that the body armor must be totally covered by the uniform jacket or other outer garment, or else it would have to be worn under the uniform shirt. Thus proposal "B" did not interfere with management's section 7106(a)(1) right to protect its agents by requiring that the body armor be concealed so that assailants would not shoot around it. Accordingly, in this regard, proposal "B" is negotiable. See Indian Health Service, supra.

As previously discussed the wearing of the body armor under the uniform shirt limited agents' flexibility in putting on and taking off the bullet proof vests. Further, some agents apparently considered wearing the body armor for long periods of time to be uncomfortable. Thus, if it were determined that proposal "B" was an attempt to bargain about the substance of the new policy and it was nonnegotiable because it interfered with the agency's right to determine internal security practices, proposal "B" is also an attempt to bargain under section 7106(b)(3) of the Statute about appropriate arrangements for employees adversely affected by the new policy.

In determining whether a union proposal is an appropriate arrangement for adversely affected employees it must first be determined if it is an arrangement, and then if it is appropriate. Navy Public Works Center, supra. If such a proposed arrangement does not excessively interfere with or abrogate management's exercise of its right, the arrangement is appropriate. Navy Public Works Center, supra; Customs Service, supra; and National Association of Government Employees, Local R14-87 and Kansas National Guard, 21 FLRA 24 (1986).

With respect to the visibility of the body armor aspect change in policy, I conclude that proposal "B" is an arrangement for adversely affected employees that is appropriate because it does not excessively interfere with or abrogate management's exercise of its rights. In so concluding I rely on balancing the agents' interest in avoiding discomfort and the agency's interest in concealing the vests, and the fact that the proposal "B" accomplishes this aim as well as does the new policy. Accordingly, proposal "B" is a negotiable appropriate arrangement under section 7106(b)(3) as far as the agency's rights to determine internal security practices by covering the vests.

Border Patrol San Diego Sector also instituted the new policy so that agents who choose to wear the issued vests would tuck in the tails of the issued forest green body armor. This prevents the body armor from shifting and bunching and therefore makes its use more effective. Thus, although the agency did not require the use of body armor, it had a reasonable interest in assuring that when body armor was used it would be used in as effective a manner as possible. In requiring that the body armor be worn under the uniform shirt, it was requiring that the tails be tucked in the agents' trousers and this was an exercise of its right to determine internal security practices under section 7106(a)(1). It is recognized that not all body armor owned and used by the agency to all agents did have such body armor issued by the agency to all agents did have such tails and was more effective when worn with the tails tucked in the trousers. Further it appears that this issued forest green body armor was the type most widely used by the agents.

Proposal "B" totally frustrates and prevents this safety aspect of the new policy. When it explained its proposal when the vest would be worn under an outer garment but over the uniform shirt AFGE Local 1613 indicated the tails would be pinned up under the body armor. This use of the tails would completely negate the agency's attempt to improve the effectiveness of the body armor. Therefore I conclude proposal "B" was ultimately nonnegotiable because it substantially prevented the agency from exercising this aspect of its section 7106(a)(1) right to determine internal security practices. See Customs Service, supra. International Association of Machinists and Aerospace Workers, Local Lodge 2424 and U.S. Army Aberdeen Proving Ground, Aberdeen, Maryland, 32 FLRA 200 (1988) is inapposite because the proposal therein specifically limited the request to wear shorts and not pants to non hazardous situations. In the subject case proposal "B" applies to all situations, including hazardous situations.

Similarly, to the extent proposal "B" was an arrangement for adversely affected employees under section 7106(b)(3), I conclude it was nonnegotiable because it excessively interfered with and abrogated managements' exercise of its right to determine internal security practices with respect to the use of the vests' tails. Thus, it totally prevented the agency from taking this step which was designed to protect its agents performing their duties. Navy Public Works Center, supra, and Customs Service, supra.

The right to direct employees as set forth in section 7106(a)(2)(A) encompasses the right to supervise and guide employees in the performance of their duties on the job. American Federation of Government Employees, Local 2761 and Department of the Army, Army Publications Distribution Center, St. Louis, Missouri, 32 FLRA 1006 (1988) at 1017. In the subject situation the agency's new policy involved an attempt to direct its agents in what the agency considered the best way to use body armor so as to protect the agents from assailants while the agents performed their duties. The agency was trying to direct its agents to perform their duties in as safe a manner as possible. This would directly enhance and otherwise affect the efficiency with which the agency performed its mission and achieved its objectives. It was an attempt by the San Diego Sector to exercise its rights under section 7106(a)(2)(B) to direct its employees.

Proposal "B" excessively interfered with and abrogated the agency's attempt to direct its agents so as to accomplish the agency's mission in as safe a way as possible. I conclude, therefore, that with respect to the agency's right to direct its employees proposal "B" was nonnegotiable.

Proposal "C" requires that violations of the body armor rules will be treated as uniform violations. I conclude this proposal is an excessive interference with Border Patrol San Diego Sector's right under section 7106(a)(2)(A) to discipline employees. National Association of Government Employees, Local R4-6 and Department of the Army, Fort Eustis, Virginia, 29 FLRA 966 (1987). In New York State Nurses Association and Veterans Administration, Bronx Medical Center, 30 FLRA 706 (1987), the FLRA, in finding a proposal negotiable, noted that the proposal did not restrict the agency's right to discipline because it provided the agency with the full range of discipline that exists under law. *Id.* at 732. Proposal "C" specifically limited the full range of discipline available to the agency herein. Accordingly, I conclude proposal "C" was nonnegotiable.

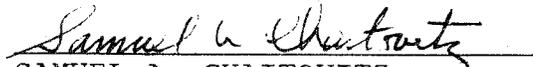
Proposal "D", in setting forth the duration during which the agreement was binding, was negotiable and meaningful only to the extent any of the previous proposals were negotiable. Because I concluded all the other proposals were nonnegotiable, I also conclude proposal "D" was nonnegotiable.

Having concluded that proposals "A", "B", "C", and "D" were nonnegotiable, I conclude further that Border Patrol San Diego Sector did not violate section 7116(a)(1) and (5) of the Statute when it instituted the new policy concerning the wearing of body armor after it declared AFGE Local 1613's proposals nonnegotiable. Accordingly, I recommend the Authority issue the following Order:

ORDER

It is hereby ordered that the Complaint in Case No. 8-CA-90083 be, and hereby is, dismissed.

Issued, Washington, D.C., January 17, 1991,


SAMUEL A. CHAITOVITZ
Administrative Law Judge