

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

.
UNITED STATES IMMIGRATION .
AND NATURALIZATION SERVICE .
UNITED STATES BORDER PATROL, .
DEL RIO, TEXAS .
Respondent .
and . Case No. 6-CA-10606
AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, .
NATIONAL BORDER PATROL .
COUNCIL, LOCAL 2366, AFL-CIO .
Charging Party .
.

M. Barbara Burgess
Richard Linnemann
Representatives of the Respondent
Luis E. Solis
Representative of the Charging Party
Joseph T. Merli
Counsel for the General Counsel, FLRA
Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent reduced the number of Border Patrol Agents assigned from the Brackettville Border Patrol Station to the highway 90 east checkpoint from three to two agents without providing the Charging Party with notice and an opportunity to negotiate the impact and implementation of the change. The complaint alleges that by this conduct Respondent

committed an unfair labor practice in violation of section 7116 (a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (5).

Respondent's answer denied the commission of an unfair labor practice and alleged that the designation of a third agent as a backup at the checkpoint was merely a reaffirmation of the traditional function of the third man in traffic check operations and not a change in past practice. Respondent also asserted that this function had been specifically required since 1990 and, therefore, if it was a bargainable change, the charge was untimely.

A hearing was held in Del Rio, Texas. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The American Federation of Government Employees, National Border Patrol Council, AFL-CIO (NBPC) is the certified exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining at the United States Immigration and Naturalization Service (INS), United States Border Patrol, including employees located in the Del Rio, Texas Sector. The Del Rio Sector of the United States Border Patrol has ten stations, including one at Brackettville, Texas. The Charging Party (Union) is an agent of NBPC for the purpose of representing unit employees at Respondent's Brackettville, Texas facility.

Since early 1989 the Brackettville Border Patrol Station has operated a permanent traffic checkpoint on highway 90 in Cline, Texas 24 hours a day through three shifts. The mission of the checkpoint is to intercept illegal aliens, alien smugglers, drugs, drug traffickers, and provide lookout assistance for other law enforcement agencies who have outstanding warrants for wanted criminals. Based on its mission, the checkpoint has the potential to be a very dangerous place to work and personnel safety is of paramount importance.

Border Patrol Agents Edward Sepulveda and Cesar Arguelles, who have been assigned to the Brackettville Station for nearly seven years each, testified that prior to March 1991 three agents were assigned to work the checkpoint each shift. According to Sepulveda and Arguelles, these three agents remained at the checkpoint as a team and did not split up during their shift. If one agent had to leave the area to check on aliens trying to go around the checkpoint, the other two agents would close the checkpoint. Sepulveda and Arguelles testified that management was aware of this arrangement as supervisors (unnamed) visited the site about every two weeks or so and would observe three agents working at the checkpoint. Both Sepulveda and Arguelles were supervised by Supervisory Patrol Agent Alexander for two years or more prior to being assigned to Supervisor Conlin. Agents now change supervisors once a year.

Agents Sepulveda and Arguelles testified that a change was made in March 1991 when the daily duty rosters specifically assigned two agents to the checkpoint and one as backup to the checkpoint. The main duty of the backup agent is to patrol for aliens seeking to elude the checkpoint. This agent does not normally assist at the checkpoint. According to Sepulveda and Arguelles, this lack of a third agent created a potential safety problem, increased the work of the other two agents left at the checkpoint, and increased the rotation time of the agent on the primary inspection point.

James S. Runyan, Patrol Agent in Charge, Brackettville, Texas, testified that he established the permanent checkpoint at Cline in early 1989 in accordance with the Border Patrol Agent's handbook, which refers to a two agent checkpoint, and consistent with his previous experience at checkpoints, where two agents were utilized on the checkpoint with a third agent serving as a roving agent on either side of the checkpoint. Runyan testified that he periodically discussed how the checkpoint would operate with supervisors and at station meetings with all agents. He acknowledged that there may have been some confusion on the part of agents during the period March 87 to February 1990 when INS, Dallas had a teletype in effect requiring increased security measures, including three uniformed officers at all checkpoints, because of specific threats made against law enforcement officers. Runyan was not in Brackettville when the teletype was received, was unaware of it, and considered any noncompliance with the policy he established in 1989 to be a training problem.

Runyan stated that when he visited the checkpoint, or assigned himself to work the checkpoint, and observed a third agent there who was not busy, he ordered the agent to get in his car and do what he is assigned to do. Runyan had memoranda issued to supervisors on April 5, 1990 and November 26, 1990 reminding them that the third man was supposed to work backup away from the checkpoint.

John Conlin, a Supervisory Border Patrol Agent at Brackettville for three years, testified that originally three agents were assigned to the checkpoint without their duties being differentiated, but with the instruction and expectation that one would go out as a rover. That procedure did not work well, so since July 1990 he has specifically assigned two agents to the checkpoint and one agent as backup. He referred to the backup agent as the "Cline unit," as distinguished from assignment to "T-911," the designation for the Cline checkpoint, in a memorandum to agents dated July 1, 1990. The memorandum explained that the "Cline unit, although a one man unit, is to signcut and roam while maintaining contact with T-911." Conlin testified that he had assigned two agents to the checkpoint and one as backup since then. Conlin testified that there are three other supervisors at the station and they may have implemented the policy differently.

On November 29, 1990 and February 28, 1991 the Union requested to bargain over the change in "past practice of having three Agents at the 90 East Checkpoint at all times, to only two Agents at all times." On March 11, 1991 Respondent refused to bargain claiming there had been no change.

Discussion and Conclusions

Section 2423.18 of the Rules and Regulations, 5 C.F.R. section 2423.18, based on section 7118 (a) (7) and (8) of the Statute, provides that the General Counsel "shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." I found the testimony of Patrol Agent in Charge James S. Runyan and Supervisory Patrol Agent John Conlin to be competent, credible, and persuasive supported as it was by documentary evidence. Based on this credibility resolution and the entire record, I conclude that there was no past practice of having the highway 90 east checkpoint operated at all times by a three agent team. A preponderance of the evidence does not establish that the alleged practice was consistently exercised for an extended period of time with the agency's knowledge and express or implied consent. See Norfolk Naval

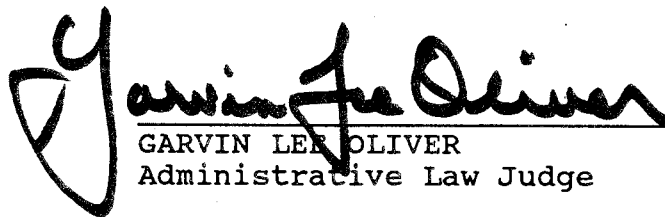
Shipyard, 25 FLRA 277, 286-87 (1987). Respondent's designation in March 1991 of two agents assigned to the checkpoint and one agent assigned as a backup was consistent with conditions of employment as they have existed since 1989. Responsible management sought to combat the problem of noncompliance by agents or laxness by some supervisors with reminder memoranda, staff meetings, on-site visits, and direct orders.

It is concluded that Respondent did not implement a change in conditions of employment on March 6, 1991 which required that the Union be provided notice and an opportunity to bargain consistent with the Statute. Therefore, Respondent did not commit an unfair labor practice as alleged. Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, June 17, 1992.


GARVIN LEE OLIVER
Administrative Law Judge