

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 .
DEL RIO, TEXAS .

Respondent .

and .

Case No. 6-CA-10619 .

AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, .
NATIONAL BORDER PATROL .
COUNCIL, LOCAL 2366, AFL-CIO .

Charging Party .

.....

M. Barbara Burgess
Richard A. 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 violated 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), by abolishing the Employee Labor Relations/Border Patrol Criminal Alien Program (ELR/BORCAP) unit at the Del Rio Border Patrol Station without negotiating with the Charging Party over the impact and implementation of the change.

Respondent's answer denied the commission of any unfair labor practice.

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 at Del Rio, Texas. The Charging Party (Union) is an agent of NBPC for the purpose of representing unit employees at Respondent's Del Rio, Texas facility.

ELR/BORCAP stands for Employee Labor Relations/Border Patrol Criminal Alien Program. The ELR/BORCAP unit was established in early 1988. The ELR function was designed to carry out some of the mandates of the Immigration Reform and Control Act of 1986 which, following an educational phase, imposed fines and sanctions on employers for employing illegal aliens. All Border Patrol Agents at the Del Rio Station were involved in the early task of advising employers and the public of the law's provisions. The educational phase was followed by the initial enforcement phase which was the motivation for forming the separate unit. Duties connected with ELR cases included educating employers about the Act, checking relevant employer and employee forms and pay stubs, and gathering evidence to prosecute sanctions against an employer.

Duties connected with BORCAP cases included contacting the local jail by telephone or in person to check for illegal aliens convicted of crimes who could be deported when they finished their sentences. Agents also conducted record checks for relevant documents.

The ELR/BORCAP unit operated Monday through Friday from 7 a.m. to 3 p.m. There were approximately two or three GS-11 bargaining unit agents assigned to the unit. ELR/BORCAP is

part of the job description of all GS-11 agents. Agents were assigned to this unit for at least one year and did not rotate on a monthly basis between three different shifts as did the three standard duty units. The agents also did not work weekends or wear their uniforms as did agents assigned to the rotating units. They gained specialized experience in ELR/BORCAP duties.

Following the initial enforcement phase, the number of ELR cases dropped steadily each year from 11 in 1988, to nine in 1989, to six in 1990, to only three from the first of January 1991 through the end of July 1991. The ELR activity is minimal in Del Rio because there is little local employment opportunity in the Del Rio area. Illegal aliens try to move beyond the border area to the employment opportunities in San Antonio and beyond.

The decreasing workload, including BORCAP which averaged about 8 per year, resulted in only three employees -- two bargaining unit members and one supervisor -- being assigned to the unit the final year of its existence. Most of the time the work was handled by the supervisor and one bargaining unit employee with the other employee being on an extended detail. There were also times when only the supervisor performed the function.

On January 29, 1991 Respondent announced its intention to abolish the ELR/BORCAP unit at the Del Rio Border Patrol Station effective April 21, 1991. Respondent denied the Union's requests of February 8, 1991 and March 7, 1991 for pre-implementation bargaining. Other units at the Del Rio Station had been formed and abolished without bargaining the impact and implementation with the Union, but there is no evidence that they existed for as long as the ELR/BORCAP unit.

Following the abolishment of the unit as scheduled, ELR/BORCAP duties were assigned to employees designated to wear plain clothes on one of the rotating day shift units. Agents designated to wear plain clothes can be either GS-9 or GS-11. Approximately 30 GS-9 agents have been assigned to such plain clothes duty since the change. An agent might not be assigned to plain clothes duty at all or could be assigned from two to five non-consecutive days during the month the employee is on the day shift.

Agents Solis and Fuentes testified that the abolishment of the ELR/BORCAP unit has had an adverse effect. The one or two GS-11 employees who might have been assigned to the

unit missed out on the unit's desirable work schedule, its career-enhancing specialized experience for one year, and not having to wear the uniform. They testified that the change increased the workload of the agents assigned to the day shift. They were also concerned that if an untrained GS-9 agent handled an ELR/BORCAP case incorrectly, this could have an adverse effect on the agent's performance appraisal.

The record as a whole, including the testimony of Patrol Agent in Charge Simon Garza, Jr., demonstrates that the ELR/BORCAP unit was a dying unit. It is highly speculative rather than reasonably foreseeable that any GS-11 bargaining unit agents would have been assigned to the unit after April 21, 1991 due to the declining caseload. The supervisor handled all such duties by herself from February 24, 1991 until that date.

The record also reflects that it is not necessary to have specialized experience to advance in the Border Patrol. In any event, such experience is only worth three points out of 100 on the officer corps rating. While some agents enjoy going on special details, and the agents assigned to ELR/BORCAP were assigned to such details, agents assigned to the regular rotating units are also equally eligible for such details.

The abolishment of the unit did not have any appreciable effect on the workload of agents assigned to the day shift. ELR/BORCAP duties are not the primary duties of such plain clothed agents. Their primary functions are to patrol the border, monitor sensors, and apprehend illegal aliens. It would be a rare occasion for an agent to handle an ELR/BORCAP case given the extremely small number of cases. Border Patrol Agent Luis E. Solis, GS-9, did not handle any ELR/BORCAP cases on the days he was assigned to plain clothes. Even Senior Border Patrol Agent Juan Carlos Fuentes, who is a GS-11, has handled only one such matter in a five month period. As of the date of the hearing, there were no pending ELR investigations and no active BORCAP cases.

On the infrequent occasions when an ELR case arises in the Del Rio Station it normally consists of the agent interviewing the alien and filling out a simple fill-in-the-blank form or two that refers the complaint for follow-up to Immigration personnel in other cities. All agents are trained in interviewing techniques and have regular contacts with aliens, employers, motel operators, and other law enforcement personnel. A less-experienced GS-9 agent faced with one of the rare ELR/BORCAP cases while on plain clothes

duty may refer to training manuals with sample forms, and immediate supervisors, experienced senior GS-11 agents, and the enforcement unit of the Del Rio Sector are available for assistance as needed. No agents have been disciplined, and the record contains no evidence of counseling in connection with ELR or BORCAP cases.

Conclusions of Law

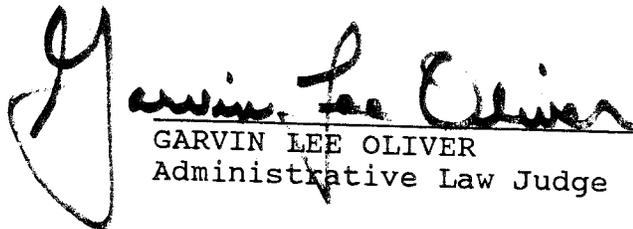
Section 2423.18 of the Rules and Regulations, 5 C.F.R. section 2423.18, based on section 7118(a)(7) and (8) of the Statute, provides that the General Counsel "shall have the burden of proving the allegations of the complaint by a preponderance of the evidence."

Based on the above findings, it is concluded that a preponderance of the evidence does not establish that the abolishment of the ELR/BORCAP unit had an effect or reasonably foreseeable effect on the conditions of employment of bargaining unit employees which was more than de minimis so as to trigger an obligation on the part of Respondent to bargain over the impact and implementation of the decision. Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 45 FLRA No. 49 (1992); Department of Health and Human Services, Social Security Administration, 24 FLRA 403, 408 (1986). Accordingly, Respondent did not violate section 7116(a)(1) and (5) of the Statute, as alleged, and it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, August 19, 1992


GARVIN LEE OLIVER
Administrative Law Judge