UNITED STATES OF AMERICA
**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

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| SOCIAL SECURITY ADMINISTRATION<br>OFFICE OF HEARINGS AND APPEALS<br>NASHVILLE, TENNESSEE<br><br>Respondent<br><br>and<br><br>ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, IFPTE<br><br>Charging Party | Case No. CH-CA-01-0347 |
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NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MAY 28, 2002**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, NW., Suite 415
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: April 26, 2002

Washington, DC

UNITED STATES OF AMERICA
**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: April 26, 2002

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
NASHVILLE, TENNESSEE

Respondent

and Case No. CH-CA-01-0347

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES
IFPTE

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

**FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges OALJ

02-34

WASHINGTON, D.C.

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| SOCIAL SECURITY ADMINISTRATION<br>OFFICE OF HEARINGS AND APPEALS<br>NASHVILLE, TENNESSEE<br><br>Respondent<br><br>and<br><br>ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, IFPTE<br><br>Charging Party | Case No. CH-CA-01-0347 |
| | |

Ms. Catherine M. Six, Esquire
For the Respondent

H. Scott Williams, Esquire
For the Charging Party

Sandra J. LeBold, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

**DECISION**

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.[1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et

[1] 1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71" of the statutory reference, i.e., Section 7116 (a)(5) will be referred to, simply, as, "§ 16(a)(5)."

seq., concerns: a) Whether Respondent changed conditions of employment of ALJs in its Nashville, OHA on, or about, October 31, 2000, by submitting cases for recommended On The Record (OTR) decision to ALJs without fully worked-up files?; and 2) Whether, if there were a change, was it more than de minimis?

This case was initiated by a charge filed on March 13, 2001 (G.C. Exh. 1(a)); the Complaint and Notice of Hearing issued on August 30, 2001, and set the hearing for December 4, 2001, at a place to be designated in Nashville; and on November 27, 2001, a Notice of Hearing Location issued, pursuant to which a hearing was duly held on December 4, 2001, in Nashville, Tennessee, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence hearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, by agreement of the parties for good cause shown, January 18, 2002, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed helpful briefs received on, or before, February 21, 2002, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions.

## FINDINGS

1. On October 1, 1999, the Association of Administrative Law Judges, International Federation of Professional and Technical Engineers, AFL-CIO (hereinafter, "Union"), was certified as the exclusive representative of all ALJs of the Office of Hearings and Appeals, Social Security Administration, nationwide (G.C. Exh. 1(b) para. 2 and G.C. Exh. 1(d) para. 2).

2. Before a case is set for hearing or pre-hearing review (Tr. 44), it is "marked", "pulled" or "worked-up", the terms being used interchangeably, which means that the file is organized in a five or six part folder with exhibits marked and an exhibit list (Tr. 19, 44, 45 and 93).

3. SSA is beset with burgeoning case loads that bring to mind the "saying" commonly found on Amish artifacts in Pennsylvania,

"the hurrier I go the behinder I get"

Nashville HOCALJ Ron Lee Miller said, for example, that there are 10 ALJs in Nashville; some 5,500 pending cases; 3800 of which have not been worked up, i.e., only one- third of the cases have been worked up; and about 500 new cases are received each month (Tr. 78).

4. Before 1995 or 1996, when Respondent initiated a screening process by Senior Attorney Advisors, and an unspecified earlier period when Screening Units, more fully described hereinafter, were tried, cases came to ALJs in Nashville only when ready for hearing which meant they were worked up and, as Judge John P. Gardner stated, ". . . we were getting files worked up on sixty-year-old claimants. Nobody made any distinction . . . before they came to the judges. So when I picked up a file with a sixty-year-old claimant, my first question was, why is it here?" (Tr. 94). Former Nashville, HOCALJ Peter Edison, who became an ALJ in about 1978 and was HOCALJ from 1985 to March 2000, said that at some point there were Screening Units (Tr. 67) whose function was to go through unworked cases and try to pick out cases they thought could be paid OTR. They would send those files, which were entirety unworked, to ALJs (Tr. 68). Judge Edison while HOCALJ personally screened raw files for cases appropriate for OTR and issued OTR decisions, a practice he commended to Judge Garner who, after trying it, found that it didn't work for him (Tr. 96).

At some date, 1995 to 1997 (Tr. 21, 91, 99) the Senior Attorney Advisor (SAA) program was introduced. Under this program the SAAs, inter alia, a) screened raw files for possible OTR cases; and b) with signature authority, issued OTR decisions. While possible OTR cases could be, and were, identified in the course of being worked up for hearing, or be identified by the ALJ in his prehearing review, in which cases it would be worked up, screening was directed at raw files and SAAs worked with raw--not worked- up--files.

5. In August 1999, Respondent announced its Hearing Process Improvement Plan (HPI), which was to be implemented

at OHA offices at various times, beginning in January 2000.[2]

The parties agree that HPI is not at issue in this case. Nevertheless, HPI was, and is, involved. First, HPI terminated the SAA signature authority. Second, the HPI Process Guide provides that upon receipt data will be entered into the Master Docket for each case and each case will be screened, inter alia, for possible OTR disposition and referred to a SAA (G.C. Exh. 2, p. 15) who will review the file and if he, or she, believes that an OTR decision without further evidentiary development is warranted, the SAA submits the recommendation to an ALJ (id. at 16).

6. HPI was implemented in Nashville on, or about, October 31, 2000 (Tr. 21, 80), and, upon implementation, the SAA signature authority ended. Thereafter, the SAA upon determining that a case was, in his, or her, opinion, appropriate for OTR decision would mark the documents that led to determination of disability and submit a recommendation to an ALJ. While Judge Scott Williams first said that SAAs did not go through exhibits or identify them (Tr. 33), he conceded the SAAs, ". . . look at the documents and, I think, they put Post-It notes on it and they put paperclips on it and that's how they give you a record." (Tr. 34). Judge Williams further said, if he agreed with the recommendation,

> "He or she [SAA], they issue a -- they draft a decision, and they refer to some documents in the record by the doctor or the hospital, that sort of thing. They may provide dates of those documents." (Tr. 34)

Judge William F. Taylor put it this way,

> "And that attorney [SAA] would then make a recommendation to me . . . .
>
> "Generally speaking with me, the attorney would come into my office, bring the file, discuss the file with me, give me a synopsis or summary of the medical evidence, summary of the claimant and the claimant's background, as far as employment is

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2/ My decision in Social Security Administration, Baltimore, Maryland, Case No. WA-CA-00104, 02-OALJ-15, issued on January 31, 2002. This, of course, concerned HPI.

concerned, and then recommend that there be issued a fully favorable decision.

"And what I'd typically do and still do is, if I agree with the attorney, then I ask the attorney to issue or to draft a decision for me for my review. And they'll bring the file and the decision draft back to me.

"I'll read the draft of the decision and then I'll look through the file to make sure that the draft decision, proposed decision, adequately and accurately reflects what is within the file.

. . . . ." (Tr. 47-48).

HOCALJ Miller stated,

"A Well, back then [i.e. before October 31, 2000] they were called the Senior Attorney decisions. The Senior Attorney . . . would evaluate the case based on a certain profile, would then write the decision . . . and sign off on it, and go into mailing it.

"Now, they don't have the signature authority. That has been taken away from them, and it's given back to the judges. So it'd be basically the same process.

. . .

"Q When a judge gets a case now from the Senior Attorneys, to what extent is it worked up?

"A Well, it'll have normal work-up. It'll have -- the medical exhibits will be in the F section, and the E section will be worked. It's minimal. There's no pagination. There are no exhibit numbers marked. There is no exhibit list made.

. . .

"The Senior Attorney would then review the file to see if it meets the criteria. If it does, in our office one of the Senior Attorneys goes to

the judge, . . . and say, 'Judge, here are the facts of the case. I think it's an OTR. What do you think?' If he or she agrees . . . then the Senior Attorney writes the decision and sends the file and the decision back to the Attorney (sic) for review.

"He or she would flag the exhibits that are important, such as the medical source statements, whatever she's based her decision on.

. . .

"Q So the exhibits that the Senior Attorney determines to be the most relevant would be tagged in some way and marked?

"A Right.

"Q And would that marked file go to the judge?

"A Yes.

"Q So the judge would be able to look through the file without having to read through all the exhibits, could pick out the ones that were marked?

"A Yes." (Tr. 81-83).

7. Judge Garner said that during the Senior Attorney Program,

". . . the Senior Attorneys got all of the -- got most of the fully favorable because they were profiled when they came into the office, and they were funneled from ALJs to the Senior Attorneys.

"Q When did the early screening process start, or cases were screened before they got to either the Senior Attorneys or the judges?

"A Somewhere around '97, '96.

. . .

"Q Cases were prescreened during that time; is that correct?

"A That's true.

"Q Wasn't one of the things they were looking at were cases that could be decided on the record?

"A I think that was the only thing they were looking at.

. . .

"They began to profile the cases on the basis, I believe, almost exclusively on the claimant's age. They identified cases where the claimant was over fifty years of age, and those cases were, I guess, marked when they came in the front door for special handling for the purpose of seeing if they could be paid on the record.

. . .

"Q Is it true that during this time cases got referred directly from legal assistants to judges for possible on-the-record decisions?

. . .

"A It's possible, a few, not very many; but it's possible that a few were so directed.

"Q Isn't it true that they could get to the judges that way without having been fully worked up with exhibit lists and exhibit numbers?

"A I have no recollection of that happening to me. I don't know if it happened to anybody else . . .

"Q Are you getting on-the-record cases now both that are worked up and not worked up?

"A Very few on-the-record cases that are worked up, I get. Occasionally one will come through that hasn't been identified in the front office as a potential on-the-record fully favorable." (Tr. 99-102).

## CONCLUSIONS

For at least three years before October 31, 2000, and possibly two years earlier, the Senior Attorney Program and pre-screening of cases had been in effect in Nashville. Under the pre-screening program, cases upon receipt were examined for claimants over 50 years of age and such cases were sent to Senior Attorney Advisors (SAAs) for screening for possible OTR decision. If the SAA determined that a case was appropriate for an OTR decision, the SAA issued a Senior Attorney decision. SAAs dealt with essentially raw files, i.e., they would have only minimal work-up: medical exhibits would be in the "F" section and the "E" section would be worked. There was no pagination, no exhibit numbers and no exhibit list. The objective was to identify, early, cases which were appropriate for OTR decision and thus: (a) provide claimants benefits more expeditiously by avoiding the 9 to 12 month delay for mark-up; and (b) reduce the number of cases requiring mark-up.

Implementation of HPI in Nashville on, or about, October 31, 2000, terminated the SAA signature authority. Otherwise, the procedure of pre-screening, referral to a SAA and screening by an SAA remained unchanged; however, after evaluation by an SAA, the SAA upon identification of a case he, or she, believed appropriate for OTR decision, the SAA now could only recommend to an ALJ that the case be decided OTR. Thus, the SAA marked the documents relied upon with paper clips and/or post-it notes, took the file to an ALJ, reviewed the case with the ALJ and explained why he, or she, believed it was appropriate for an OTR decision. If the ALJ agreed, the SAA would be asked to prepare a draft decision for the ALJ's review and when the draft decision satisfied the ALJ, the ALJ issued the OTR decision. If the ALJ did not agree that the case was appropriate for OTR decision, the case would go back for full work-up for preparation for hearing.

The pre-screening of cases, their screening and evaluation by SAAs for possible OTR decisions was unchanged from at least 1997; but implementation of HPI terminated the SAA signature authority and after October 31, 2000, ALJs received essentially raw files, with only minimal work-up, for evaluation as appropriate for OTR decision which changed

a condition of their employment inasmuch as they had not previously been part of the early screening process for possible OTR decisions, notwithstanding that former HOCALJ Edison personally had done so.

Was the change more that de mimimis? When told during the training on HPI that files for possible OTR decision would be referred to them without being worked up, Judge Williams said he could not make a decision without an identifiable record (Tr. 22) and he was assigned none until, in January, 2001, when he requested to be put into the rotation to receive cases reviewed by SAAs for possible OTR decision (Tr. 26). Judge Williams borrowed a mechanical numbering stamp and numbered each page (Tr. 27). With all deference, Judge Williams' numbering of all pages of exhibit files appears unnecessary and unwarranted except to satisfy a personal idiosyncrasy. To be sure, it is nice to have exhibit numbers and an exhibit index, or in Judge Williams' practice numbered pages; but these simply are methods of identifying and locating material and other means of accomplishing the same identity and location may be used. Here, the SAAs, after making an evaluation that he, or she, believes the case is appropriate for OTR decision, marks each document relied upon for this decision, takes the file to an ALJ, discusses the case and states why he, or she, believes it is appropriate for OTR decision. The ALJ can look at the documents marked and either agree or disagree with the recommendation. If the ALJ agrees, he, or she, will request the SAA to prepare a draft decision for review by the ALJ. If the ALJ disagrees, the case will go back for full mark-up in preparation for hearing.

General Counsel contends that Respondent's Hearing Office Litigation Manual (HALLEX) requires an Exhibit List. This is true except that,

> "If the ALJ issues a fully favorable decision, a draft exhibit list may be used in the claim file. . . ." (G.C. Exh. 3, I-2-120)(see, also, G.C. Exh. 4, p. 3 and G.C. Exh. 5, p. 1).

The record does not show any definition of "a draft exhibit list" and the language does not prohibit the listing of documents marked as relied upon for the decision to issue the OTR disposition. Moreover, the March, 2001, HPI Processing Guide may have amended by implication any

requirement for even a draft exhibit list for OTR decisions (G.C. Exh. 2, p. 2). In any event, the ALJ can insist that the decision identify the documents relied upon (id.).

In cases where a change results in very slight change in conditions of employment, the seriousness depends to a large extent on, "whose's ox is being gored". In General Services Administration, Region 9, San Francisco, California, 52 FLRA 1107 (1997), I concluded that the collective changes of an employee's conditions of employment as the result of a temporary move, which actually lasted eleven months, was more than de minimis (id. at 1127). The majority of the Authority disagreed (id. at 1112), with Chair, Phyllis N. Segal, dissenting (id. at 1114-1116). See, also, U.S. Department of Labor, Washington, D.C. and U.S. Department of Labor, Employment Standards Administration, Chicago, Illinois, 30 FLRA 572, 579 (1987) (reassignment to a job for which typing was a critical element, was no more than de minimis.)

For reasons set forth above, I do not find the change more

than de minimis. While the ALJ is not provided a file with marked exhibits nor an exhibit list, nevertheless, the documents relied upon are marked and identified for the ALJ. If the ALJ agrees that the documents marked and identified justify an OTR decision he, or she, can tell the SAA to prepare a draft decision for review by the ALJ. If the ALJ does not agree, the case goes back for full work-up and hearing. I fully appreciate that the Union's true objective was to achieve bargaining; but in this instance, Respondent was not obligated to bargain because the effect of the change on conditions of employment of ALJs was de minimis.

Accordingly, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. CH-CA-01-0347 be, and the same is hereby, dismissed.

_____
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: April 26, 2002
Washington, D.C.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. CH-CA-01-0347, were sent to the following parties:

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_____
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DATED: APRIL 26, 2002
WASHINGTON, DC