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

U.S. PATENT AND TRADEMARK OFFICE Respondent and	Case No. WA-CA-80515
PATENT OFFICE PROFESSIONAL ASSOCIATION Charging Party	

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 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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JANUARY 18, 2000**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424

_____
GARVIN LEE OLIVER
Administrative Law Judge

Dated: December 16, 1999
Washington, DC

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

MEMORANDUM DATE: December 16, 1999

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: U.S. PATENT AND TRADEMARK OFFICE

Respondent

and Case No. WA-CA-80515

PATENT OFFICE PROFESSIONAL ASSOCIATION

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 00-09
WASHINGTON, D.C.

U.S. PATENT AND TRADEMARK OFFICE Respondent and	Case No. WA-CA-80515
PATENT OFFICE PROFESSIONAL ASSOCIATION Charging Party	

Mary E. Leary
Counsel for the Respondent

Pamela R. Schwartz
Counsel for the Charging Party

Thomas F. Bianco
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 (Agency or PTO) 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: (1) establishing a Recruitment Bonus Plan for certain classifications of bargaining unit employees, electrical engineers, computer engineers, and computer sciences, on or about January 6, 1998; (2) holding a job fair at which it offered recruitment bonuses to these prospective job applicants on or about January 23 and 24, 1998; (3) sending the Charging Party (Union or POPA) memoranda dated January 28 and February 20, 1998, agreeing to bargain over recruitment bonuses and relocation allowances, but not over the other subjects raised in a January 9, 1998, memorandum f rom the Union or an attachment thereto; (4) refusing to

bargain on March 3, 1998 and on unspecified subsequent occasions on subjects addressed by bargaining proposals offered by POPA on January 9, 1998, except for recruitment bonuses and relocation allowances; and (5) paying recruitment bonuses to certain unit employees hired in February 1998 and thereafter.

Respondent denied any violation of the Statute. It contended that the allegations must be dismissed as outside the statute of limitations provided by section 7118(a)(4)(A) of the Statute; that the Agency had no obligation to bargain over any matters which flowed from the Union's requests to bargain pursuant to Article 14 of the disapproved collective bargaining agreement; and the Agency met its bargaining obligation by negotiating in good faith on numerous occasions, reaching tentative agreements on various proposals, and by submitting the matter to the Federal Mediation and Conciliation Service (FMCS) when the parties reached impasse.

For the reasons explained below, I conclude that the Respondent violated the Statute as alleged.

A hearing was held in Washington, D.C.[1] The parties were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. They 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

A. Background

POPA was granted exclusive recognition of professional employees of PTO by the Commissioner of PTO in 1965. *U.S. Patent and Trademark Office*, 7 A/SLMR 512, 514 (1977). *See also* Un. Exh. 1 at 3, Article 1, Section 1. Such recognitions continued under Executive Order 11491. *See U.S. Department of the Air Force, 434th S.O.W., Air Force Reserve, Grissom Air Force Base, Peru, Indiana*, 2 A/SLMR 215 (1972). The Commissioner's grant of exclusive recognition of POPA continued under the Statute, pursuant to section

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[1] Case No. WA-CA-80405, involving the same parties and many of the same witnesses, was consolidated with this case for hearing. A separate decision was issued in that case on this date.

7135(a)(1). *U.S. Army, Natick Research and Development Laboratories*, 9 FLRA 25 (1982).

The parties began bargaining over the subject of performance appraisals and over a collective bargaining agreement in 1981. Those negotiations were merged in 1986. When an impasse was reached later that year, the parties requested the assistance of the Federal Service Impasses Panel (Panel). Pursuant to the Panel's direction, the parties selected Arbitrator Marvin Johnson to resolve their dispute.

Arbitrator Johnson issued a series of awards during the second quarter of 1986 directing the parties to adopt nearly three dozen articles as their collective bargaining agreement. However, Arbitrator Johnson declined to include substantive performance appraisal issues in the award, noting that these issues were the subject of several negotiability appeals pending before the Federal Labor Relations Authority (the Authority). He directed, in Article 19, the parties to continue further negotiations on the performance appraisal issues pursuant to Article 14, Mid-Term Bargaining,[2] and retained jurisdiction to resolve any resulting impasse on the performance appraisal issues. He also directed the parties to bargain further over the subject of signatory authority, which was designated Article 22, pursuant to Article 14. (Un. Exh. 1 at 51, 57).

The first award issued by Arbitrator Johnson, in April 1986, concerned Article 14, entitled Mid-term Bargaining, and Article 15, Section 5, which concerned aspects of official time for POPA representatives. The PTO submitted this award for agency head review pursuant to 5 U.S.C. § 7114(c). By memorandum dated May 30, 1986, the agency head disapproved Article 14, Section 1[3] and Article 15, Sections 5(B) & (C) as contrary to law.

POPA filed a negotiability appeal. The Authority denied POPA's appeal on the ground that section 7114(c) did not apply to interest arbitration awards. *Patent Office Professional Association and Patent and Trademark Office, Department of Commerce*, 28 FLRA 3 (1987)(*POPA*).

2
Article 14, Sections 2-7 set forth the procedures for bargaining. Section 1, which was disapproved on May 30, 1986, provided that nothing in the article "shall affect the authority of the Office to take actions that are absolutely necessary for the functioning of the agency."

3
See n.2 above.

PTO filed exceptions to the Arbitrator's award, as modified on May 27, 1986, with respect to Article 15, section 5 on June 25, 1986. The Authority denied PTO's exceptions on the ground that they were untimely because they were filed more than 30 days after the award was issued. *U.S. Department of Commerce, Patent and Trademark Office and Patent Office Professional Association*, 24 FLRA 835 (1986).

The remaining awards made by the Arbitrator between May 1 and June 9, 1986, were subsequently submitted for agency head review. By memorandum dated June 26, 1986, the agency head disapproved fifteen provisions in these awards. The Union again filed an appeal. The Authority again initially dismissed the appeal, holding that the interest arbitrator's awards were not subject to agency head review. *POPA*, 28 FLRA at 8-9.

In January 1988, the Union submitted a revised package of performance appraisal proposals to PTO. The revised package contained new proposals that the parties had not discussed and had not been before Arbitrator Johnson in 1986. The Agency advised the Union in writing during July 1988 that it would not negotiate over most of the revised package of proposals, asserting that the proposals were either nonnegotiable or beyond the scope of the performance appraisal negotiations. The Agency reiterated this position in August 1988 and identified the proposals over which it refused to bargain. In particular, the Agency refused to bargain over those proposals not contained in the original submission to Arbitrator Johnson, those proposals found nonnegotiable by the Authority, and certain other proposals PTO considered nonnegotiable.

The parties continued to be unable to resolve their dispute over the revised package of performance appraisal proposals; therefore, proceedings before Arbitrator Johnson resumed in September 1989. As a threshold issue, the Agency asserted that the Arbitrator did not have jurisdiction to review the proposals submitted by the Union in January 1988, as the parties had not negotiated to impasse. The Arbitrator overruled the Agency's objection and conducted a hearing on all of the proposals in September 1989. The Agency did not participate in this proceeding, maintaining its objection to the arbitrator's jurisdiction. Arbitrator Johnson rendered his award on November 30, 1989. The award directed the parties to adopt certain proposals as Article 19 -- the performance appraisal article. Article 19 encompassed several of the proposals submitted by the Union in January 1988. Article 19 was disapproved in its entirety

pursuant to agency head review, and the Union filed a negotiability appeal with the Authority.

In *Patent Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office, Washington, DC*, 47 FLRA 10, 17-18 (1993)(*DOC*), the Authority rejected the Agency's jurisdictional arguments and proceeded to rule on the negotiability of the provisions imposed by Arbitrator Johnson. With respect to negotiability, the Authority found certain provisions to be within the Agency's obligation to bargain, but upheld the Agency's disapproval with respect to the others. Both the Agency and the Union appealed this decision to the D.C. Circuit. *Patent Office Professional Association v. FLRA*, 26 F.3d 1148 (D.C. Cir. 1994)(*PTO*).

Meanwhile, in a case involving another Federal agency, the Fourth Circuit overruled Authority precedent and held that an agency head may disapprove an interest arbitration award where the award results from involuntary binding arbitration ordered by the Panel. *Department of Defense, Office of Dependents Schools v. FLRA*, 879 F.2d 1220 (4th Cir. 1989)(*DODDS*). Based on the *DODDS* decision, on January 17, 1990, the Fourth Circuit granted the Agency's motion for summary reversal and remanded the two negotiability cases (28 FLRA 3 & 28 FLRA 7) to the Authority for further processing.

On remand, the Authority determined that the agency head disapproval of the provisions imposed by Arbitrator Johnson's award was timely and, therefore, properly before it. Specifically, the Authority found that the Agency's May 30, 1986 memo, disapproving the initial award of the Arbitrator, was premature for purposes of serving as a disapproval under section 7114(c), as the agreement was not ripe for agency head review. The Authority held that only after the arbitrator's entire award had been issued was agency head review proper. It went on to find that the June 26, 1986, memorandum constituted timely review of the agreement "and served to disapprove the entire agreement." Nevertheless, the Authority chose to treat the Agency's May 30, 1986, memo as tantamount to an unsolicited allegation of nonnegotiability and held that the Union's petition challenging the Agency's nonnegotiability allegations in the May 30 memo was properly before it. In its decision, the Authority concluded that certain provisions declared nonnegotiable were negotiable and others nonnegotiable. *Patent Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office*, 41 FLRA 795, 801-06 (1991)(*POPA-DOC*).

In *PTO*, 26 F.3d at 1148, the D.C. Circuit held that Arbitrator Johnson did not have jurisdiction over the new proposals submitted by the Union in January 1988, but affirmed the Authority's determination of their negotiability. With respect to the remaining provisions on appeal, the Court found that all were outside the Agency's obligation to bargain. *Id.* at 1154-57.

In an attempt to resolve the outstanding issues between them, the parties resumed negotiations after the D.C. Circuit's decision. Once again, the parties were unable to reach an agreement. The culmination of meetings between the parties in 1993 and 1994 was a dispute by the parties as to whether they had a contract and an assertion by POPA that it would litigate the issue.

In September 1994, the Union requested the Agency to adopt, as Article 19, the provisions imposed by Arbitrator Johnson that the D.C. Circuit determined were properly before him. The Union excluded the provisions found nonnegotiable by both the Court and the Authority. The Agency did not respond formally to this request. As a result, the Union filed an unfair labor practice charge, in March 1995, alleging that the Agency's refusal to implement the agreement on Article 19, which only contained undisputed provisions violated section 7116(a)(1), (5) and (8) of the Statute.

The Regional Director determined that the Agency's actions did not violate the Statute. In reaching this determination, the Regional Director stated that the Agency had no obligation to implement the negotiable provisions in Article 19, separate and apart from an overall collective bargaining agreement, because the parties did not have a collective bargaining agreement. (Res. Exh. 5 at 3-4). The Union appealed this determination to the General Counsel. The General Counsel found it unnecessary to reach the issue of the existence of a basic agreement, determining instead that there was no meeting of the minds on performance appraisal:

> [S]ince the parties did not agree to another arrangement after the Authority's and Circuit Court's decisions, consummation of their agreement on Article 19 was dependent on their return to the bargaining table. (Res. Exh.6).

Subsequent attempts to have that denial reversed by the United States Court of Appeals for the District of Columbia

Circuit and the Supreme Court were rebuffed by those bodies in November 1997 and March 1998, respectively. *Patent Office Professional Association v. FLRA,* 128 F.3d 751 (D.C. Cir. 1997) cert denied, 118 S.Ct. 1189 (1998).

B. Other Actions of the Parties Regarding Provisions of the Collective Bargaining Agreement

Since the Agency head disapproval in 1986 of the collective bargaining agreement, the parties have entered into several agreements and followed practices that gave effect to, and made enforceable, some of the provisions of the disapproved agreement that were not specifically disapproved.

Following the disapproval, PTO was advised by the Department of Commerce that PTO, by mutual agreement with POPA, could make approved articles of the contract effective retroactively. Therefore, the parties made certain sections of Article 15, dealing with official time, Article 14, dealing with the procedures for mid-term bargaining, and Article 11, dealing with grievance procedures, effective in 1986. (Un. Exh. 5).

In October 1986, PTO advised bargaining unit employees that POPA had distributed the award of Arbitrator Johnson as the "Agreement Between" the parties. PTO stated, in part, that the "provisions of the Arbitrator's award which were disapproved because of their illegality are not part of the new Agreement." (Un. Exh. 6). In December 1987, PTO agreed to pay POPA one-half the costs incurred by POPA "in printing the basic agreement." PTO and POPA agreed that such payment did not affect their respective positions concerning the disputed sections of the agreement. (Un. Exh. 7).

In June 1987, PTO and POPA entered into a memorandum of understanding in relation to what they described as "Article 14, Section 2, of the currently effective PTO-POPA Basic Agreement [which] provides, in part, that mid-term changes in conditions of employment shall be proposed on a quarterly basis." The agreement clarified that mid-term changes submitted in accordance with Article 14, Section 3A "shall coincide with the 10th day in each of the months of January, April, July, and October, and shall continue in this fashion until superceded by a new Agreement. Initial proposals submitted . . . after the 10th day of January, April, July, and October shall be considered to have an effective submission date which is the 10th day of the next quarter." This was done, according to the agreement, "to

promote more effective bargaining and take into account the need of all participants to schedule time[.]" (Un. Exh. 2).

In his requests to bargain since 1987, Union president Stern most frequently has referred to the bargaining as "mid-term" since bargaining has been conducted pursuant to Article 14. Prior to the subject matter at issue in this case, Respondent has refused to bargain in response to a union proposal on the ground that POPA sought mid-term bargaining in only one instance. This was asserted in 1991 when POPA proposed bargaining over pay-related matters independent of any management-proposed change in conditions of employment.

Stern testified that, since execution of that agreement, the parties consistently have treated management notices of proposed changes in conditions of employment dated after the 10th day of the first month in a quarter as having an effective date of the 10th day of the first month of the following quarter. In October 1997, Deanna Shepherd, PTO's Director of Labor Relations since 1991, clearly acknowledged that POPA has insisted on compliance with such a practice when she asked for a waiver of it so that PTO could implement a change without waiting for the following quarter. (G.C. Exh. 7).

In approximately the early 90s, the Union filed a grievance against PTO alleging that about 38 separate sections of the agreement had been violated. Since 1986 grievances and arbitrations have been conducted under the procedures in the agreement. Just prior to the grievance going to hearing, POPA received a letter from PTO admitting to the violation of about 15 to 20 sections of the agreement and stating that the Agency would comply with those sections in the future. With respect to other alleged violations, the letter stated that there were questions of contract interpretation with regard to some sections and the Agency would not comply with others. No further action has been taken regarding the grievance.

In December 1992, PTO and POPA reached agreement on the topic of signatory authority. They agreed that new sections "shall replace the interim language of original Article 22 as contained in the parties' Collective Bargaining Agreement." Shortly after that, the parties identified several errors in the agreement and, in January 1993, signed a memorandum of understanding correcting those errors. (Un. Exh. 8-9).

In *U.S. Patent and Trademark Office*, 45 FLRA 1090 (1992) (*U.S. Patent*) *rev.'d. on other grounds sub nom. Patent and Trademark Office v. FLRA*, No. 92-2347, the Authority held that PTO violated the Statute in April 1991 by refusing to bargain concerning pay issues as requested by the Union under the mid-term provisions of Article 14 of the agreement. On a petition for review and cross application for enforcement, the United States Court of Appeals for the Fourth Circuit accepted the representations that the parties had a collective bargaining agreement and held that, under the court's previous ruling, the Statute did not require Federal agencies to bargain over union-initiated mid-term proposals. (G.C. Exh. 13).

The parties met in 1993 and 1994 in an effort to resolve outstanding issues. At the culmination of those meetings, PTO asserted that the parties had no agreement and since that time has referred to the agreement on numerous occasions as the "defunct" agreement, the "non-existing contract," the "null and void contract."

From about 1989 to 1994, Union president Stern spoke to newly hired employees on behalf of POPA and distributed copies of the agreement pursuant to Article 6, Section 3. PTO was aware of his presentations.

In 1994, several group directors advised Mr. Stern of meetings they were having with employees "[i]n accordance with Article 3, Section 6 of the PTO/POPA contract[.]" (Un. Exh. 10-13). Ms. Shepherd, the Agency's spokesperson on labor relations, also sent notices to Stern, as President of POPA, dated from late 1994 through July 1995 stating that the notices were "in accordance with" Article 3, Section 2, 4, or 6, or Article 6, Section 2, or Article 7, Section 6, "of the labor agreement." (Un. Exh. 14-17). The managers in charge of monitoring the official time usage of the union officials and representatives also sent reports to Mr. Stern in April 1992 and May 1995 referring to Article 15 "of the basic agreement." (Un. Exh. 18-19).

In 1995, PTO's Associate Commissioner for Finance and Planning sought POPA's support for H.R. 2533, a bill to establish the United States Intellectual Property Organization and for other purposes. Among other things, the bill asserted in its transition provisions that the "collective bargaining agreements between [PTO and other unions] . . . and the [PTO] and [POPA], dated October 6, 1986, as well as the recognition . . . shall remain in effect until modified, superseded, or set aside by the parties." (Un. Exh. 20).

Shepherd acknowledges that the parties have cited and followed various provisions of the "defunct" contract as past practices. As noted, on October 10, 1997, Shepherd furnished POPA formal written notice concerning PTO's proposal to develop a new consolidated facility. Shepherd noted that POPA had not agreed "to waive the past practice to notice POPA of any change in working conditions by October 10, one of the windows available each year." (G.C. Exh. 10). This was a reference to the quarterly "windows" provided by the parties' June 1987 memorandum of understanding concerning Article 14, Section 2.

C. Current Issues

1. Facts

On December 10, 1997, the Union received a memorandum from Shepherd notifying the Union of management's proposed implementation of a recruitment bonus program. The memorandum provided, in pertinent part, as follows:

> In accordance with 5 CFR Chapter 1, Part 575, Subpart A, . . . the U.S. Patent and Trademark Office (PTO) proposes to pay a recruitment bonus of ten percent (10%) of the annual rate of basic pay to newly appointed employees in the positions of Patent Examiner (Electrical & Computer Engineers) or Patent Examiners (Computer Science) at the entry-level grades of GS-5/7/9/11.
>
> Before the recruitment bonus is paid, the PTO will require that an employee sign a written service agreement to complete a period of employment of a minimum of 24 months with the PTO in return for payment of a recruitment bonus. Should an employee fail to complete the one-year period of employment established under a service agreement, the employee will be indebted to the Federal Government and must repay the recruitment bonus on a pro rata basis. (G.C. Exh. 7.)

The memorandum did not specify when PTO intended to begin paying the bonus. PTO had advised POPA in early 1997 that a hiring freeze was in effect, apparently because of budget problems, but POPA had not been advised when hiring would begin again. Prior to sending POPA the above

memorandum PTO had decided to hire about 400 examiners and conduct job fairs toward the end of January 1998.

On or about January 6, 1998, officials of PTO approved the proposed recruitment plan (Res. Exh. 14), and, on January 8, 1998, placed advertisements in the *Washington Post* announcing a job fair for January 23 and 24 and recruitment bonuses. (Res. Exh. 16).

On January 9, 1998, POPA, by Stern, sent PTO's Commissioner a request to bargain over management's proposal, and other pay and pay-related issues.[4] POPA explained that through supervisors, POPA had also become aware of proposed changes in payment of relocation expenses. Attached to the request was a set of bargaining proposals that addressed all of the subjects over which Stern requested to bargain, including recruitment bonuses, travel and transportation expenses, relocation bonuses, expense allowances, retention allowances, advanced pay, transit subsidies, payment for technical and legal training, special pay rates, and pay survey. POPA stated that the proposals were directed to a number of matters considered to be "inextricably intertwined pay matters affecting the attractiveness of employment at the PTO for new recruits" and were drawn from proposals initially submitted in 1991 when PTO's refusal to bargain had been upheld by the Fourth Circuit on the basis that the Statute prohibited union-initiated mid-term bargaining. (G.C. Exh. 8, 9).

On January 16, 1998, POPA, by memorandum entitled, "Mid-Term Bargaining," responded to an Agency memorandum regarding a change in performance appraisal systems, but also addressed other issues, including PTO's December 10, 1997, proposal to pay recruitment bonuses. The Union stated, in part:

> Pursuant to Article 14 of our basic Agreement, mid-term changes are to be negotiated only on a quarterly basis. The reason for this was a recognition by the interest arbitrator that otherwise the number of separate negotiations would proliferate excessively. Consequently, all of these topics will be assigned to one POPA bargaining team, of which I will be the chief negotiator.

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4 He waited until January 9 because January 10 was the effective date of the notice from PTO, under the parties' practice adopting Article 14 as explained above.

> Since these negotiations will involve performance appraisal (plus other complicated topics), they are considered "comprehensive" under Article 14, Sections 3-5.
>
> To get negotiations started, I propose we meet for clarification next Wednesday, January 21, 1998[.] . . . (G.C. Exh. 3)__

PTO held the job fair on January 23 and 24, 1998, as advertised, at which prospective applicants were informed that a ten percent recruitment bonus would be paid to employees newly-appointed to the Patent Examiner positions identified above. PTO did not give POPA advance notice of the job fair, and POPA did not obtain such notice from another source.

On January 28, 1998, PTO responded to POPA's January 9, 1998, request to bargain. PTO stated that the second sentence of the December 10 memorandum should have referenced a two-year period of employment rather than a one-year period. PTO also stated, in part:

> Our notice was provided in anticipation of preparing for and announcing the 10% bonus at the Job Fair scheduled for January 23 and 24, 1998. For this reason, the Office did not consider it practicable to delay a prospective benefit to new hires which would have resulted from waiting until the "window" of January 10 to notice you of this change.
>
> Thirty calendar days passed from your receipt of our notice to delivery of your request to bargain. In the interim, to promote attendance at the Job Fair, the Office placed advertisements in major newspapers throughout the county [sic] announcing the bonus for Electrical and Computer Science Engineers . . . In addition, the Recruitment Bonus Plan for Electrical Engineers, Computer Engineers, and Computer Scientists, GS-1224-5,7,9, and 11 . . . was completed which addresses and supports the need for the bonus in order to meet the mission requirements of the Office.

> Although the Office did not expect to receive a request to bargain over this matter since it was not filed until 30 days from our notice, we would be amenable to bargaining over the 10% bonus incentive retroactively. We believe that bargaining retroactively over the impact and implementation of this initiative will ensure that prospective hires will not be disadvantaged and that POPA's bargaining rights will be protected.
>
> With regard to POPA-initiated proposals filed on January 9, 1998, those proposals, entitled TRAVEL AND TRANSPORTATION EXPENSES, RELOCATION BONUSES, RETENTION ALLOWANCES, ADVANCED PAY, TRANSIT SUBSIDIES, SPECIAL RATES, PAY SURVEY, and the REOPENER PROVISION on these topics, cannot be entertained inasmuch as they are not management-initiated proposals.
>
> Your proposals headed, TECHNICAL TRAINING TUITION REIMBURSEMENT and LEGAL TRAINING TUITION REIMBURSEMENT, should be dealt with, as you determine appropriate, in connection with your agreement, dated January 16, 1998, to enter into a joint partnership effort to establish non-duty time training programs for patent professionals.
>
> With regard to your proposals under the headings RECRUITMENT BONUSES and RELOCATION EXPENSES, we will be able to meet with you within on week from the date of this notice. . . . (G.C. Exh. 11).

POPA, by Stern, sent PTO a message by electronic e-mail, on February 4 reiterating POPA's interest in bargaining, including bargaining over the subjects PTO would not entertain. He stated that POPA's request was timely under the June 30, 1987, memorandum of understanding. He also stated that POPA had not received prior notice of the hiring plans, the newspaper advertisements, or the job fair. He suggested that negotiations commence on February 10. (Res. Exh. 9).

From about February 1998 to date, the Respondent has paid recruitment bonuses of ten percent to electrical engineers, computer engineers and computer scientists. PTO

had not paid recruitment bonuses to employees who had been appointed to those positions during the previous two years.

PTO, by Shepherd replied in writing on February 20 to POPA's message of February 4. PTO stated, in part, that PTO "intends only to negotiate, upon your request, over those issues we have proposed to implement." PTO also stated that a room had been reserved for February 26 to meet with POPA to clarify the proposals regarding the subjects of recruitment bonuses and relocation allowances. (G.C. Exh. 12).

The actual negotiations started in March 1998. There were seven or eight of these sessions from the beginning of March until mid-May. Additional sessions were held on September 2, September 15, September 24, October 8, October 13, and October 15, 1998.

Ted Morris, the chief negotiator for the Agency, and Shepherd attended the March 3, 1998, meeting regarding recruitment bonuses and the union proposals submitted in response to the proposed change. The parties had discussions as to whether or not they had a contract. POPA maintained that it had a contract with the Agency or had in effect a contract by the parties' past practices. POPA also stated that even if the parties did not have a contract, the Union's proposals were appropriate as they were opened up by management's proposals under the Federal Employees Pay Comparability Act of 1990 and were the Union's opportunity to bargain over pay topics. PTO's position was consistent throughout that the parties did not have a contract and would not bargain Union-initiated mid-term proposals pursuant to Article 14 of the contract. PTO maintained that it was there to bargain recruitment bonuses and relocation expenses and on the service agreements for recruitment bonuses and would not bargain over the Union proposals that were unrelated to the proposed change.

The parties reached tentative agreements on proposals 2, 5 and 6 related to the recruitment bonuses and relocation expenses.[5] On December 16, 1998, PTO requested the assistance of the FMCS due to an impasse resulting from bargaining over the payment of recruitment bonuses and relocation expenses. (Res. Exh. 17).

[5] Apart from these negotiations, the parties, through partnership efforts or other forums, reached separate agreements concerning transit subsidies, technical training and legal training tuition reimbursement. POPA's proposals covered by these agreements are no longer extant. (Res. Exh. 1, 2, 3).

2. Positions of the Parties

The General Counsel and POPA claim that PTO violated the Statute regardless of whether the parties have a collective bargaining agreement. POPA additionally insists that the parties have demonstrated an intent to be bound by a term agreement which provides for midterm bargaining in Article 14, sections 2 and 3. POPA contends that while it is true that the interest arbitrator's award was not reduced to a document that contains the signatures of both parties, the award of Arbitrator Johnson matured into a binding agreement between the parties as a result of their actions. Those actions encompass memos and oral statements holding out to the employees, managers, arbitrators, and the courts that the parties considered themselves bound by the agreement.

PTO denies any violation of the Statute. It contends that the allegations must be dismissed as outside the statute of limitations provided by section 7118(a)(4)(A) of the Statute; that the Agency had no obligation to bargain over any matters outside the scope of the negotiations which flowed from the Union's requests to bargain pursuant to Article 14 of the disapproved collective bargaining agreement. PTO relies, in part, upon the Authority's decision in *United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas*, 51 FLRA 768 (1996) (*INS*) *reconsideration denied,* 51 FLRA 1561, 1565 (1996) *affirmed sub nom. AFGE, National Border Patrol Council, Local 2366, AFL-CIO v. FLRA*, 114 F.3d 1214 (D.C. Cir. 1997), and contends that there is no obligation to bargain mid-term under the terms of a disapproved agreement because there is no agreement in that situation. The Authority held in *INS* that, in the absence of a term agreement, proposals labeled as "mid-term" do not have to be bargained by an agency where no other theory was litigated or apparent. PTO also claims that the Agency met its bargaining obligation by negotiating in good faith on numerous occasions, reaching tentative agreements on various proposals, and by submitting the matter to the FMCS when the parties reached impasse.

Discussion and Conclusions

A. Statute of Limitations

Section 7118(a)(4)(A) of the Statute provides, in pertinent part, that: "[N]o complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the

Authority." The intent of this provision is to foster stable collective bargaining relationships and prevent the litigation of stale charges. *See Equal Employment Opportunity Commission, Washington, DC*, 53 FLRA 487, 495 (1997).

PTO contends that the complaint must be dismissed as outside the statute of limitations because the Union had notice of the proposed change on December 10, 1997, but failed to file the charge until July 10, 1998, more than six months later.

The six months time limit commences when the alleged unfair labor practice occurs, not when notice of a proposed change is given to the union. *U.S. Department of the Interior, Lower Colorado Dams Project, Water and Power Resources Service*, 14 FLRA 539, 543 (1984). The unfair labor practices alleged in this case were PTO's changes in conditions of employment without bargaining with POPA upon request and later refusing to bargain over Union-initiated proposals.

POPA's January 9, 1998, request to bargain was timely. Under the parties' practice, which was consistent with their June 1987 memorandum of understanding concerning Article 14, Section 2, PTO's December 10, 1997, notice was considered to have an effective submission date of the 10th day of the next quarter, which was January 10, 1998.

PTO's December 10, 1997, notice was not adequate as it did not state or otherwise indicate when hiring and/or implementation of the plan or payments of the recruitment bonuses would be offered or commenced. *Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 41 FLRA 690, 698 (1991); *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82 (1997). There is no evidence that POPA had notice until late January 1998, or upon receipt of PTO's letter of January 28, 1998, of PTO's actual issuance of the recruitment plan on or about January 6, 1998, the placing of advertisements for a job fair and recruitment bonuses on January 8, 1998, or the holding of the job fair and offering recruitment bonuses on January 23 and 24, 1998. Therefore, these alleged unfair labor practices are not outside the statute of limitations, the charge having been filed July 10, 1998. The alleged unfair labor practice of a refusal to bargain in February 1998 and thereafter, concerning paying recruitment bonuses, and the alleged refusal to bargain on January 28 and March 3, 1998, on Union-initiated proposals, were well within the six

months statute of limitations based on the July 10, 1998 charge.

B. Alleged Refusal to Bargain Before Implementing Recruitment Bonus

It is long established that an agency "must meet its obligation to negotiate prior to making changes in established conditions of employment[.]" *U.S. Department of Justice, Immigration and Naturalization Service,* 55 FLRA 892, 900 (1999)(*DOJ*); *Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA 9, 11 (1981); *U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Memphis, Tennessee,* 42 FLRA 712 (1991). An agency generally must bargain, on request, before implementing changes in unit employees' conditions of employment that are substantively negotiable, and before exercising a retained management right in a manner that will change the employees' conditions of employment and have more than a *de minimis* impact on the employees. *Department of Health and Human Services, Social Security Administration,* 24 FLRA 403 (1986). An agency violates section 7116(a)(1) and (5) of the Statute by failing to fulfill those bargaining obligations. *Id.*

PTO began making bonus payments after POPA requested to bargain but before bargaining commenced. The recruitment bonuses concerned conditions of employment, not pay within the meaning of section 7103(a)(14)(C) of the Statute, because they were paid pursuant to 5 U.S.C. § 5753, and regulations issued by the Office of Personnel Management under authority conferred by that statutory provision. *See National Treasury Employees Union and Internal Revenue Service,* 27 FLRA 132, 135-37 (1987). The fact that the decision to make the payments was made before the individuals were employed is irrelevant. *U.S. Department of Commerce, Patent and Trademark Office,* 53 FLRA 858, 867-69 (1997). Since no such bonuses were paid to employees during 1996 or 1997, PTO changed unit employees's working conditions when it made such payments. PTO does not dispute that payment of $1,000.00 are more than *de minimis*. Thus, PTO violated the Statute as alleged by implementing its bonus plan and paying employees a recruitment bonus before bargaining with POPA.

C. Alleged Refusal to Bargain Over All of the Subjects Addressed in the Bargaining Proposals POPA Submitted on January 9, 1998

POPA requested PTO to bargain over the pay-related subjects and submitted a set of bargaining proposals

addressing them. PTO does not contend that it was not obligated to bargain over the proposals because they were not negotiable. Because PTO refused to address the proposals or declare them nonnegotiable, there is no need to determine the negotiability of the proposals in this proceeding in order to determine whether PTO violated the Statute. *DOJ,* 55 FLRA at 900*; U.S. Patent*, 45 FLRA at 1107-11.

Nor does PTO contend that it was not obligated to bargain because the subject of pay-related proposals is covered by an applicable collective bargaining agreement or that the failure to bargain was permitted by an applicable collective bargaining agreement. Rather, PTO's defense is that it did not have a duty to bargain because POPA's request was predicated on the existence of a collective bargaining agreement between the parties and no such agreement exists.

POPA clearly took the position that the parties have a collective bargaining agreement that was established through their conduct over a course of years. POPA therefore believed that the bargaining it requested would take place while that contract was in effect, that is, the parties would engage in "mid-term" bargaining if PTO granted POPA's request. However,
POPA never stated or implied that it would bargain *only* if the parties had a collective bargaining agreement and maintained that the Union's proposals were appropriate as they were opened up by management's proposals under the Federal Employees Pay Comparability Act of 1990 and were the Union's opportunity to bargain over pay topics. Thus, POPA's request was not predicated on the existence of a collective bargaining agreement.

Unions may initiate bargaining, during the term of an agreement or before an agreement is reached, independent of proposals by management to change unit employees' conditions of employment. U.S. *Department of the Interior, Washington, DC and U.S. Geological Survey, Reston, Virginia*, 52 FLRA 475, 479-80 (1996) *remanded sub nom. National Federation of Federal Employees, Local 1309 v. Department of the Interior, Washington, DC et al.*, 119 S.Ct. 1003 (1999). Thus, PTO could not refuse to meet its obligation, required by section 7114(b) of the Statute, to bargain in good faith on POPA's proposals by concluding that in the absence of a collective bargaining agreement it had no obligation to honor POPA's request to bargain.

To the extent that a determination of whether a collective bargaining agreement exists is relevant, a

objective standard applies to the formation of a contract. As the Authority recently stated in I*nternal Revenue Service, North Florida District, Tampa Field Branch, Tampa, Florida*, 55 FLRA 222 (1999):

> In the private sector, the National Labor Relations Board applies similar standards for determining when parties reach agreement. "A meeting of the minds of the parties must occur before a labor contract is created." *Bobbie Brooks, Inc. v. International Ladies Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987). "Whether a collective bargaining agreement exists is a question of fact; [the] technical rules of contract law are not strictly binding." *Id.* (citation omitted). The surrounding circumstances and the parties' intentions may be considered to determine if a bargaining agreement exists; however, an objective standard applies to the formation of a contract, regardless of a meeting of the minds in a subjective sense. *Warehousemen's Union Local No. 206 v. Continental Can Co.*, 821 F.2d 1348, 1350 (9th Cir. 1987).

Examining the record by an objective standard, the parties do not have a collective bargaining agreement. The Authority held in 1991 that the Agency head disapproval served on June 26, 1986, "was timely and served to disapprove the entire agreement." *POPA-DOC*, 41 FLRA at 805. Where an agency head timely disapproves an agreement under 7114(c) of the Statute, the agreement does not take effect and is not binding on the parties; however, the parties may agree to implement all portions of an agreement not specifically disapproved by the agency head. *Id.* at 802.

Despite written agreements in June 1987, concerning Article 14, and in December 1992, concerning Article 22, which expressly refer to the "currently effective PTO-POPA Basic Agreement" and "the parties' Collective Bargaining Agreement," and the representations to the Authority and the courts in the early 90's concerning an agreement, the record reflects that since the Authority upheld the 1986 Agency head disapproval in 1991, the parties have disagreed on whether they have an agreement consisting of *all* the

undisputed provisions of the disapproved agreement. Nevertheless, the parties have adopted certain provisions, either explicitly or by their actions, as past practices which are binding on the parties. *U.S. Department of the Treasury, Bureau of Engraving and Printing and International Plate Printers, Die Stampers and Engravers Union, and Washington Plate Printers Union Local 2*, 44 FLRA 926, 939-40 (1992). The parties had a practice applicable to this case concerning bargaining that was described by Article 14, Sections 2 and 3, and was made effective by the written agreement of the parties in July 1986 following Agency head disapproval of Article 14, Section 1. The procedures in Article 14 became the subject of a separate agreement which the parties executed in 1987 concerning that subject. Since that time the parties have followed that procedure as their practice. Therefore, Stern's reference to Article 14 and mid-term bargaining in his January 16 request was entirely appropriate.

Although PTO agreed to bargain retroactively on recruitment bonuses and relocation expenses, and tentative agreements were reached before the matter was submitted to the FMCS when the parties reached impasse, it is concluded that the Respondent violated section 7116(a)(1) and (5) of the Statute by implementing the alleged changes without first bargaining with POPA as requested and by failing to bargain to the extent required by the Statute on PTO's proposals over which the parties have not already reached agreement.

POPA requests a retroactive bargaining order as a remedy for PTO's refusal to bargain. A retroactive bargaining order is appropriate where a respondent's unlawful conduct has deprived the exclusive representative of an opportunity to bargain in a timely manner over negotiable conditions of employment affecting bargaining unit employees. *Federal Aviation Administration, Northwest Mountain Region, Renton, Washington*, 51 FLRA 35, 37 (1995); *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 22 FLRA 758 (1986) *rev'd on other grounds sub nom. U.S. Department of Energy, Western Area Power Administration, Golden, Colorado v. FLRA*, 880 F.2d 1163 (10th Cir. 1989).

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service

Labor-Management Relations Statute (the Statute), it is hereby ordered that the U.S. Patent and Trademark Office, shall:

1. Cease and desist from:

(a) Implementing recruitment bonuses for newly-hired employees without first fulfilling its obligation to bargain to the extent required by the Statute with the Patent Office Professional Association (POPA), the exclusive representative of an appropriate unit of employees.

(b) Failing and refusing to bargain with POPA to the extent required by the Statute over pay and pay-related proposals submitted on January 9, 1998, to the extent the parties have not already reached agreement.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Bargain with POPA to the extent consistent with the Statute over the payment of recruitment bonuses to newly-hired employees and over other pay and pay-related proposals submitted by POPA on or about January 9, 1998, to the extent the parties have not already reached agreement, and apply agreements reached pursuant to such negotiations retroactively to February 1, 1998.

(b) Post at its facilities where bargaining unit employees represented by the Patent Office Professional Association are located, 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 Commissioner and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other placed where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's

Rules and Regulations, notify the Regional Director, Washington Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, December 16, 1999.

GARVIN LEE OLIVER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Patent and Trademark Office has violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement recruitment bonuses for newly-hired employees without first fulfilling our obligation to bargain to the extent required by the Statute with the Patent Office Professional Association, the exclusive representative of an appropriate unit of our employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Statute.

WE WILL bargain with the Patent Office Professional Association to the extent consistent with the Statute over the payment of recruitment bonuses and over the other pay and pay-related proposals submitted by the Patent Office Professional Association on or about January 9, 1998, to the extent the parties have not already reached an agreement, and apply agreements reached pursuant to such negotiations retroactively to February 1, 1998.

(Activity)

Date: By:
(Signature)
(Title)

This Notice must remain posted for 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 any of its provisions, they may communicate directly with the Regional Director, Washington Regional

Office, Federal Labor Relations Authority, whose address is: 800 “K” Street, NW., Suite 910, Washington DC, 20001, and whose telephone number is: (202)482-6700.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. WA-CA-80515, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT	**CERTIFIED NOS**:
Thomas Bianco, Esquire Federal Labor Relations Authority 800 "K" Street, NW., Suite 910 Washington, DC 20001	P168-059-653
Pamela Schwartz, Director Unfair Labor Practices Patent Office Professional Association P.O. Box 2745 Arlington, VA 22202	P168-059-654
Mary Leary, Esquire Patent & Trademark Office OGC, Suite 225 2101 Crystal Plaza Arcade Arlington, VA 22202	P168-060-108

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: DECEMBER 16, 1999
WASHINGTON, DC