UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF COMMERCE, PATENT AND TRADEMARK OFFICE, Respondent and PATENT OFFICE PROFESSIONAL ASSOCIATION Charging Party	Case No. WA-CA-40743

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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **AUGUST 12, 1996**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER

Administrative Law Judge

Dated: July 9, 1996
Washington, DC

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

MEMORANDUM DATE: July 9, 1996

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF COMMERCE,
PATENT AND TRADEMARK OFFICE,

Respondent

and Case No. WA-CA-40743

PATENT OFFICE PROFESSIONAL
ASSOCIATION

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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

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

U.S. DEPARTMENT OF COMMERCE, PATENT AND TRADEMARK OFFICE, Respondent and PATENT OFFICE PROFESSIONAL ASSOCIATION Charging Party	Case No. WA-CA-40743

Barbara S. Mintz
Counsel for the Respondent

Pamela R. Schwartz
Counsel for the Charging Party

Marilyn Blandford
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

I. Statement of the Case

The unfair labor practice complaint alleges that the U.S. Department of Commerce, Patent and Trademark Office (Respondent or Agency) 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 using two-year term appointments to fill patent examiner (computer science) positions without providing the Charging Party (Union) with an opportunity to negotiate to the extent required by the Statute. In support of this allegation, the complaint also alleges that by issuing Executive Order 12,871, the President exercised the Respondent's discretion to negotiate over section 7106(b)(1) subjects. The

complaint alleges that "[s]ince on or about June 20, 1994, the Respondent has refused to negotiate with the Charging Party over the use of two-year appointments to fill the subject positions."

The Respondent claims that the General Counsel and the Charging Party have failed to meet the burden of establishing that the Agency committed an unfair labor practice. The Respondent contends that (1) the Union never requested that the Agency negotiate over the use of term appointments, (2) there was no change in the conditions of employment of any bargaining unit members that would have triggered an impact and implementation bargaining obligation on the Agency's part; (3) the Agency's hiring decision fell within section 7106(a) as a management right, thus taking the matter outside the duty to bargain, (4) even if the Agency's actions were found to constitute a staffing decision within section 7106(b)(1), the Agency's inadvertent failure to adhere to Executive Order 12,871 does not provide the Authority with enforcement rights concerning compliance with the Order, and (5) throughout the events that gave rise to the charge, the Agency held the good faith belief that its hiring decisions were outside the duty to bargain and were not affected by Executive Order 12,871.

For the reasons set out below, I conclude that the Respondent violated section 7116(a)(1) and (5) of the Statute by failing to bargain with the Union on the impact and implementation of its decision to use two-year term appointments to fill patent examiner (computer science) positions in the bargaining unit. I also conclude that Respondent did not violate the Statute by refusing to negotiate pursuant to section 7106(b)(1) of the Statute. The Respondent has not exercised its discretion to negotiate pursuant to section 7106(b)(1), and the President's directive to the heads of agencies in Executive Order 12,871 did not exercise that discretion.

A hearing was held in Washington, D.C. The Respondent, Charging Party, and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Each of the parties filed an excellent brief.

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.

II. Findings of Fact

The Union represents a bargaining unit of approximately 2,200 patent examiners at the Respondent. Patent examiners analyze applications for patents for new inventions.

Examiners are categorized into different examining groups and subgroups (called "art units") according to the specific type of technology with which they deal. Prior to the Agency's actions that resulted in the instant unfair labor practice charge, the Agency's patent corps did not have a specific computer science specialty within the various examiner specialties.

For some time prior to the events that gave rise to this complaint, the Agency had desired to expand the scope of computer science knowledge in the patent corps. However, Agency management was concerned that computer scientists might have problems performing the duties of patent examiners. As one option, the Agency considered the possibility of an apprentice program, with the computer scientists hired on an assistant level with limited duties. These discussions eventually led to the actual preparation of a vacancy announcement and package concerning the assistant-type position; however, the apprentice program was ultimately not accepted by management.

Instead, the Agency decided to expand the categories of examiner specialties to include computer science and to hire the computer science specialists as full examiners -- but on two-year term appointments so that management could reevaluate whether the expansion of the examiner disciplines to include computer science had been a good decision.

The Agency discussed with the Union the creation of a computer science specialty, and the Union supported the idea. However, the Agency did not notify the Union that the new specialty would be implemented on a two-year trial basis.

The Agency had not previously used term appointments for new examiners. It had only used such appointments for positions outside the bargaining unit.

On December 27, 1993, the Agency provided the Union with the required notification that it was creating a new position description for the position of Patent Examiner (Computer Science). Due to an oversight by an Office of Human Resources (OHR) staffperson, the copies of the position description that were delivered to the Union were erroneously coded as permanent, rather than term, positions.

Consistent with the information supplied previously by the Respondent, the position description indicated that the patent examiner (computer science) position was to be a permanent position located in the Charging Party's bargaining unit, with a target grade of GS-13. The Respondent also informed the Charging Party that it would shortly issue a vacancy announcement for the new position.

When the Charging Party received the position description for the new examiner specialty, it appeared to be consistent with the information provided by the Respondent up to that point. Consequently, the Charging Party did not request bargaining.

Respondent issued a vacancy announcement on January 18, 1994 seeking candidates for up to 10 patent examiner (computer science) positions. The positions were for the GS-5 level with promotion potential to GS-9 and at the GS-7 and GS-9 level with promotion potential to GS-11. The announcement correctly indicated that the position would be filled by term appointments. However, it erroneously described the new positions as performing "portions of patent research assignments to assist Patent Examiners."[1] The announcement opened on January 18, 1994, and was to remain open until April 29, 1994.

The Union learned of the vacancy announcement on February 24, 1994 and immediately wrote a memorandum to Lawrence J. Goffney, then Assistant Commissioner for Patents Designate, questioning the duties and use of term appointments for the positions. Mr. Stern wrote, in pertinent part:

> Today, a member showed me the attached vacancy announcement for what looks like a new twist on team examination. Our concern is based upon the description of the job as performing "*portions* of patent research assignments to *assist* patent examiner in the Computer Systems and Applications area" and that the job is a two-year temporary position.
>
> I hope we're not being overly paranoid about this, but no one has ever suggested that the new computer science positions would be anything less than full fledged patent examiners.

---

[1] The erroneous personnel documents were apparently the ones that had been drafted during consideration of the apprentice program that was not adopted by management.

> We would appreciate an explanation of what is really intended.

A few days after sending that memorandum, Mr. Stern also called Mr. Goffney to discuss the inconsistent duties and the use of term appointments. Mr. Goffney informed Mr. Stern that he "would have someone get back to" the Charging Party. It is undisputed that Mr. Goffney never got back in touch with Mr. Stern regarding these positions.[2]

At the same time, the Agency was receiving applications for these positions. The vacancy announcement closed on April 29, 1994, and within the next two months, all the applicants were screened to determine which ten would be selected.

On June 20, 1994, Mr. Stern again wrote to Mr. Goffney, reminding him of his earlier inquiry and again requesting clarification or an explanation of the discrepancies surrounding the patent examiner (computer science) positions. Mr. Stern's memorandum, captioned, "Vacancy Announcements for Temporary Examining Positions in Computer Science," provided, in part, as follows:

> The information that I had received for computer science positions showed positions that were permanent, positions that had promotion potential to grade 13, and positions having the duties of full fledged patent examiners (which include the drafting of actions). As we discussed previously, this information differs from the positions identified in the vacancy announcement.
>
> If the Office is not setting up a new program and only intends to establish computer science as an additional examiner specialty, please let us know.
>
> If, on the other hand, the Office is setting up a new program, we would like formal

---

[2] Colleen Woodward, then Respondent's Director of Human Resources, testified that she may have contacted Mr. Stern or someone else in the Union to explain the vacancy announcement error, but could not recall when. Ms. Woodward's memorandum to the Union of August 20, 1994 does not specify any such discussions prior to early July 1994. Mr. Stern did not recall ever receiving an explanation prior to July 19, 1994. I credit Mr. Stern's testimony in this respect.

notification and an opportunity to bargain on the negotiable aspects of the program.

Again, there was no immediate response from the Respondent.[3]

Ten applicants were appointed to the patent examiner (computer science) positions on a two-year term basis effective June 27, 1994.

At about the same time, Respondent issued a press release announcing that it had hired ten examiners with two-year appointments. The release repeated the erroneous information from the vacancy announcement, that the new examiners would assist other patent examiners.

During a scheduled orientation session for new employees on June 27, 1994, the Union discovered that the Respondent had hired 10 employees on a two-year term basis to fill the patent examiner (computer science) vacancies.

The Union filed the unfair labor practice charge in this case on July 18, 1994. The charge alleged that Respondent violated the Statute "by hiring patent examiners having only limited terms and by denying these examiners the training and responsibility necessary for advancement previously available to all examiners, without providing the union with advance notice and an opportunity to negotiate." The charge referred to the diminished employment security and limited duties of the term employees and the effect on experienced employees of the junior examiners. The charge stated, "Negotiable aspects of impact and implementation of these changes include: items related to training and performance evaluation for both the term and experienced employees and procedures for reporting and accounting for the work of the term employees and the time spent by the experienced employees training the term employees and evaluating their search results. In addition, pursuant to a recent Executive Order, the numbers and types of employees assigned to any particular work project has become a negotiable item."

Representatives of the Respondent and the Charging Party met the following day, on July 19, 1994, to discuss

[3] Ms. Woodward testified that a "new program" was something that was "very different from something that had occurred before" and that this was not a "new program." But she also testified that from her dealings with Mr. Stern, she believed Mr. Stern would have considered the hiring of examiners under term appointments to be "very different." (Tr. 107-108).

the matter. At that meeting, the Respondent's representatives explained to the Charging Party's satisfaction that the duties of the patent examiner (computer science) positions were those of a regular patent examiner and not that of an assistant, as described erroneously in the vacancy announcement.

The parties also discussed Respondent's decision to make the positions term appointments. The Charging Party informed the Respondent that it believed the decision to use term appointments for the positions was substantively negotiable under section 7106(b)(1) of the Statute and that impact and implementation issues flowing from that decision were also negotiable. The Charging Party claimed that the term appointments were an evasion of the probationary period afforded other employees, and the new employees should have the same notice of deficiencies in their work and an opportunity to defend themselves as anyone else in the bargaining unit. Respondent's representatives replied that they had no obligation to negotiate over the use of term appointments because the decision to use those appointments involved the exercise of management rights and there was no effect on employees in the bargaining unit.

On August 10, 1994, Respondent sent the Union a memorandum responding to the Union's inquiries of February 24, 1994 and June 20, 1994 and information requests made by the Union at the July 19, 1994 meeting. The memorandum expressly did not address the unfair labor practice charge filed by the Union.

The record reflects that the patent examiners (computer science) were appointed to two-year terms, with only GS-9 or GS-11 promotion potential, but with the same type of duties and responsibilities as other examiners. The new examiners were also hired under the same performance appraisal plan that was used at that time for all other examiners. The new examiners did not affect the duties and responsibilities of the existing examiners, who continued to handle their own dockets.

The record does not reflect the current status of the patent examiner (computer science) discipline. Respondent intended to recruit for the positions on a permanent basis at the end of the two-year terms if satisfied with the long-term value of the discipline. In that event, the current term employees could compete for permanent positions. As of the date of the hearing, five term examiners had left the employ of the Agency, and the Union had received a report that one examiner was informed she would not be rehired when her two-year period was up on June 27, 1996.

III. Applicable Statutory Provisions

Section 7106 of the Statute provides, in pertinent part:

> § 7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> . . .
>
> (2) in accordance with applicable laws--
>
> (A) to hire . . . ;
>
> . . .
>
> (C) with respect to filling positions, to make selections for appointments . . . .
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
>
> (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Section 7116(a)(1) and (5) provides:

> § 7116. Unfair labor practices
>
> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency —

> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . .
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]

IV. Issues Presented

Whether the Union made a valid request to bargain over Respondent's use of term appointments to fill patent examiner (computer science) positions.

Whether there was a change in conditions of employment of bargaining unit employees.

Whether the Respondent's decision to use two-year term appointments fell within section 7106(a), thus placing its decision outside the duty to bargain.

Whether Executive Order 12,871 exercised the Respondent's discretion so that it was required to negotiate pursuant to section 7106(b)(1).

Whether the use of term appointments had a reasonably foreseeable effect on bargaining unit employees which gave rise to a duty to bargain pursuant to section 7106(b)(2) and (3).

Whether the Respondent's belief as to the propriety of its actions precludes the finding of a violation for failure to bargain in good faith.

V. Discussion and Conclusions

A. The Union Made A Valid Request To Bargain

In order to meet its burden of proving the commission of an unfair labor practice based on failure to bargain in good faith, a charging party must initially demonstrate that the agency refused a clearly communicated request to bargain from the union. Department of the Air Force, Air Force Logistics Command, 22 FLRA 15, 18 (1986).

Respondent claims that because the term appointments did not meet the criteria for a "new program" specified by the Union in Mr. Stern's June 20, 1994 request to bargain, the Respondent did not refuse a clearly communicated request to bargain from the Union. Respondent claims that the Union's concern had focused only on the possibility of team

examination and that is what the Union meant by a "new program."

The June 20, 1994 request to bargain was as clear as it could be under the circumstances and encompassed a request to bargain on term appointments. The Respondent was responsible for the Union's confusion until July 19, 1994 over just what was being implemented for the new examiners, whether permanent or term appointments or limited or full duties. At that time, the Union made a clear request to negotiate over the use of term appointments.

The Union's February 24, 1994 inquiry identified the Union's concern with the vacancy announcement as involving both the limited duties and the two-year temporary positions. The Union's June 20, 1994 memorandum reiterated the request for clarification between the initial information provided it regarding permanent positions with full duties or the positions identified in the vacancy announcement with limited duties and two-year appointments. Thus, the Union's request--"If the Office is not setting up a new program and only intends to establish computer science as an additional examiner specialty, please let us know. If, on the other hand, the Office is setting up a new program, we would like formal notification and an opportunity to bargain on the negotiable aspects of the program." -- encompassed a request to bargain on the term appointments. As noted, when the errors were explained to the Union at the July 19, 1994 meeting and the Union was clearly informed that the computer science examiners, hired for two-year terms, would not be assisting the other examiners, the Union made a request to bargain over its remaining concern, the term appointments.4

B. <u>There Was A Change In Conditions Of Employment</u>

Section 7103(a)(14) of the Statute defines conditions of employment, with exceptions not relevant here, as "personnel policies, practices and matters, whether established by rule, regulation, or otherwise, affecting working conditions[.]" An agency's bargaining obligation is limited to such matters affecting bargaining unit employees. 5 U.S.C. § 7103(a)(12).

4
As noted, the complaint alleges in paragraph 10(h), "Since on or about June 20, 1994, the Respondent has refused to negotiate with the Charging Party over the use of two-year, term appointments to fill the subject position." Issues relating to events subsequent to June 20, 1994 were fully litigated at the hearing.

In deciding whether a matter involves a condition of employment of bargaining unit employees, the Authority considers whether: (1) the matter pertains to bargaining unit employees; and (2) the record establishes that there is a direct connection between the matter and the work situation or employment relationship of bargaining unit employees. Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA 235, 236-38 (1986) (Antilles).

In Federal Employees Metal Trades Council, AFL-CIO and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, 25 FLRA 465 (1987), the Authority held that where a proposal relating to pay distribution referred to new hires, but related solely to individuals designated for employment in bargaining unit positions, and had relevance specifically to employment in those positions, and became operative only after an individual had been employed, the matter pertained to bargaining unit employees under the first factor stated in Antilles. See also Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, 22 FLRA 351, 352 (1986) (proposal one, orientation information mailing to selectees for bargaining unit positions negotiable), appealed on other grounds, 827 F.2d 814 (D.C. Cir., 1987).

Similarly, in American Federation of Government Employees, AFL-CIO, Local 2024 and Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 11 FLRA 125, 126 (1983), the union proposed, among other things, that the basic rate of pay for new employees who previously worked as Federal employees would be established through the exercise of sound and reasonable managerial discretion. In finding the proposal negotiable, the Authority rejected the agency's argument that the proposal did not concern conditions of employment because it pertained to nonbargaining unit members. Instead, the Authority found that the proposal would benefit former employees only "if and when they are reemployed in bargaining unit positions." Consequently, the Authority concluded that the proposal involved conditions of employment and was within the duty to bargain under the Statute.

The same reasoning of these cases is applicable here. In this case, the record clearly establishes that, as a result of Respondent's decision to use term appointments to fill the positions, the Charging Party sought to negotiate over post-hiring matters affecting those positions, such as notice of termination of appointment, notice of any performance deficiencies, training and performance

evaluation. (Tr. 66-67; G.C. Exh. 1(a) at page 4). No benefit would have been derived from the subject of the requested negotiations until after applicants were employed in bargaining unit positions.

Moreover, on June 20, 1994, the Charging Party requested negotiations with the Respondent over the use of term appointments. At that point, and unknown to the Charging Party, the Respondent was one week away from bringing on-board the 10 people it had hired for the patent examiner (computer science) vacancies. By the time the Respondent finally met with the Charging Party to discuss this matter, the incumbents of the positions had been employees for approximately three weeks. Thus, the Charging Party initially sought to bargain over conditions of employment of unit positions, and then over conditions of employment pertaining to actual employees. Thus, the Union's request to bargain about the Respondent's use of term appointments to fill patent examiner (computer science) positions pertains to bargaining unit employees under the first factor stated in Antilles.

The record clearly establishes the second factor in Antilles, a direct connection between the matter, term appointments, and the employment relationship of bargaining unit employees. Term appointments directly affect the employment relationship of bargaining unit employees in this instance as they involve a personnel policy affecting their tenure and status.

Accordingly, contrary to the position of the Respondent, the matter involved a condition of employment of bargaining unit employees.

C. The Respondent's Actions In Hiring Examiners For Term Appointments Is Not Substantively Negotiable

The Respondent was not required to bargain over its decision to hire approximately 10 employees for two-year term appointments in the newly created patent examiner (computer science) positions. An agency has statutorily reserved discretion to make hiring decisions. The right "to hire" is one of the exclusive management rights specifically enumerated in section 7106(a). National Association of Government Employees, Local R1-109, AFL-CIO and Veterans Administration Medical Center, Newington, Connecticut, 26 FLRA 532, 533-34 (1987).

D. The Agency Did Not Violate The Statute By Refusing To Negotiate Pursuant To Section 7106(b)(1)

Section 7106(b)(1) makes it clear that matters concerning "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" are negotiable only at an agency's election. The General Counsel contends that the President exercised the Agency's discretion by issuing Executive Order 12,871 and, therefore, the Respondent violated section 7116 (a)(1) and (5) by refusing to negotiate over the use of term appointments to fill the patent examiner (computer science) positions, a matter encompassed within section 7106(b)(1).

The President did not exercise the Agency's discretion. Executive Order 12,871, "Labor-Management Partnerships", issued October 1, 1993 (58 Fed. Reg. 52201-52203, Oct. 6, 1993), at Sec. 2.(d) directs the head of each agency to "negotiate over the subjects set forth in 5 U.S.C. 7106(b) (1), and instruct subordinate officials to do the same[.]" Nevertheless, the Respondent has not exercised its discretion to negotiate pursuant to section 7106(b)(1) in this case. Therefore, the Respondent did not violate section 7116(a)(1) and (5) of the Statute in this respect, as alleged, assuming that the matter falls within section 7106(b)(1).[5]

E. The Use Of Term Appointments Had A Reasonably Foreseeable Effect On Bargaining Unit Employees Which Gave Rise To A Duty To Bargain

"[A]n agency's authority to exercise the rights enumerated in section 7106(a) is expressly made 'subject to' section 7106(b)." National Association of Government Employees, Local R5-184 and U.S. Department of Veterans Affairs, Medical Center, Lexington, Kentucky, 51 FLRA 386, 390 (1995). Therefore, Respondent's right "to hire" and "with respect to filling positions, to make selections for appointments" does not preclude it from negotiating,

5 The General Counsel claims that it has charged the Respondent "with failing to execute its statutory duty to bargain over 7106(b)(1) subjects" but "is not attempting to enforce any right which may or may not be created in the Executive Order." In this regard, the Respondent notes that, according to Section 3 of the Executive Order, it is "intended only to improve the internal management of the executive branch" and does not provide any enforcement rights to a third party. According to Respondent, "Should an agency inadver-tently fail to follow the President's instructions in Executive Order 12,871, it would be up to the President himself -- not the Authority or any other administrative or judicial body -- to enforce the Executive Order by whatever means available to him."

pursuant to section 7106(b) "(2) procedures which management officials of the agency will observe in exercising any authority under this section; or (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials."

The test established by the Authority in Department of Health and Human Services, Social Security Administration, 24 FLRA 403, 408 (1986) to determine whether a change has more than a de minimis impact on unit employees and requires impact and implementation bargaining involves consideration of "the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees." U.S. Equal Employment Opportunity Commission, 40 FLRA 1147, 1156 (1991).

Term appointments had never previously been used to fill positions in the Charging Party's bargaining unit. After two years, the examiners appointed for two-year terms would be
summarily released, or, if Respondent decided to make the temporary program permanent, as was possible, they would have to compete for the permanent positions. Job performance as temporary employees would obviously be of some significance to management in making selections for permanent positions. Consequently, the use of term appointments gave rise to potential job retention consequences for the term employees which were reasonably foreseeable. As noted, the Charging Party sought to negotiate over post-hiring procedural matters affecting those positions, such as notice of, and an opportunity to reply to, performance deficiencies.

Accordingly, the impact of Respondent's decision to use term appointments in the bargaining unit was more than de minimis, and Respondent violated section 7116(a)(1) and (5) by refusing to negotiate with the Union over the impact and implementation of its decision. Cf. Federal Deposit Insurance Corporation, Washington,D.C., 48 FLRA 313 (1993)(FDIC), petition for review denied sub. nom. FDIC v. FLRA, No. 93-1694 (D.C. Cir., December 12, 1994)(unpublished opinion)(bargaining required regarding procedures and appropriate arrangements concerning the nonrenewal of temporary liquidation graded employees).

F. Respondent's Good Faith Belief As To The Propriety Of Its Action Does Not Preclude The Finding Of An Unfair Labor Practice

Respondent contends that it cannot be found to have refused to negotiate in good faith with the Union because it believed in good faith that its decision to hire new examiners for term appointments was a matter that did not affect bargaining unit members, was within its exclusive management rights under section 7106(a), and that no bargaining was being requested by the Union's June 20 memorandum.

Specific evidence of an intent by Respondent to evade or frustrate its bargaining obligation is not required since intent is not an element of a section 7116(a)(5) violation. Marine Corps Logistics Base, Barstow, California, 33 FLRA 196, 202 (1988); Internal Revenue Service, 16 FLRA 904, 922 (1984). Respondent's "belief" is, therefore, irrelevant. The legal consequences of its conduct have been treated herein.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order, modeled after the remedy discussed and afforded by the Authority in FDIC, 48 FLRA at 329-31, and which will effectuate the purposes of the Statute under the circumstances:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Department of Commerce, Patent and Trademark Office, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain with the Patent Office Professional Association, the exclusive representative of an appropriate unit of employees, over the impact and implementation of the decision of the Patent and Trademark Office to use term appointments in hiring patent examiners in the bargaining unit represented by such exclusive representative.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Bargain with the Patent Office Professional Association to the extent consistent with the Statute over the impact and implementation of the decision of the Patent and Trademark Office to use term appointments in hiring patent examiners and apply agreements reached pursuant to such negotiations retroactively to February 24, 1994.

(b) Based upon agreements reached pursuant to negotiations, make whole any bargaining unit employee for any losses suffered by such employee because of the failure to provide the Patent Office Professional Association prior notice and an opportunity to bargain over procedures to be observed in connection with the decision to use term appointments in hiring patent examiners and appropriate arrangements for affected employees.

(c) Post at the U.S. Department of Commerce, Patent and Trademark Office in Crystal City, Virginia, 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 Assistant Commissioner for Patents 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 insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, 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, July 9, 1996

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 the U.S. Department of Commerce, Patent and Trademark Office violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT fail and refuse to bargain with the Patent Office Professional Association, the exclusive representative of an appropriate unit of our employees, over the impact and implementation of our decision to use term appointments to hire certain patent examiners in the bargaining unit represented by such exclusive representative.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL bargain with the Patent Office Professional Association over the impact and implementation of our decision to use term appointments in hiring patent examiners to the extent consistent with the Statute, and we will apply agreements reached pursuant to such negotiations retroactively to February 24, 1994.

WE WILL, based upon agreements reached pursuant to negotiations, make whole any bargaining unit employee for any losses suffered by such employee because of our failure to provide the Patent Office Professional Association prior notice and an opportunity to bargain over procedures to be observed in connection with our decision to use term appointments in hiring patent examiners and appropriate arrangements for affected employees.

(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 of the Federal Labor Relations Authority, Washington Region, 1255 22nd Street, NW, Suite 400, Washington, DC 20037-1206, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. WA-CA-40743, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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U.S. Department of Commerce
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