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-80405
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-80405

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 00-08
WASHINGTON, D.C.

U.S. PATENT AND TRADEMARK OFFICE Respondent and	Case No. WA-CA-80405
PATENT OFFICE PROFESSIONAL ASSOCIATION Charging Party	

Mary E. Leary
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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 not replying to an April 20, 1998, memorandum from the Charging Party (Union or POPA) stating that the Union wished to resume negotiations over the subject of performance appraisals and by refusing to negotiate with the Union over the subject of performance appraisals since that time.

Respondent denied any violation of the Statute. It contended that, although the Union sought to bargain over performance appraisals, as part of its so-called mid-term proposals, the Agency's obligation regarding performance appraisal bargaining was limited to the Agency's announced changes. Respondent claims that once it withdrew the proposed changes to the existing practice, its bargaining

obligation regarding performance appraisals ceased, and 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.

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 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

[1] Case No. WA-CA-80515, 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.

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*).

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

[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.

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.

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), *rev'd on other grounds sub nom. U.S. 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). Deanna L. Shepherd, Chief of PTO's Labor

Relations Division since 1991, and the Agency's spokesperson on labor relations, also sent notices to Ron 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. 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 January 12, 1998, POPA was notified in writing by PTO, through Shepherd, that it proposed "to change the existing practice used in exercising its right to establish performance appraisal systems and/or performance requirements, including standards, for POPA bargaining unit employees." (G.C. Exh. 2).

Stern, President of POPA, replied by memorandum dated January 16, 1998, entitled "Mid-Term Bargaining" effectively stating that POPA wished to bargain over the entire subject of performance appraisals and that negotiations would be conducted pursuant to Article 14 of the collective bargaining agreement. He stated, in part:

> The subject of performance appraisal is particularly ripe for continued negotiations in light of the D.C. Circuit's decision to affirm the conclusion of the General Counsel of the FLRA that we need to return to the bargaining table. (G.C. Exh. 3).

The parties' bargaining teams met twice, on February 25 and March 5. Stern, POPA's chief negotiator, presented POPA's bargaining proposals at the first meeting. They were the proposals the Authority and the court of appeals, respectively, had held to be negotiable in *DOC*, 47 FLRA at 10; *PTO*, 26 F.3d at 1148.

At both sessions, Stern reiterated that POPA wished to bargain over the entire subject of performance appraisals. Although Stern also stated that the parties had a collective bargaining agreement, he never stated that POPA conditioned its bargaining request on the existence of a collective bargaining agreement. Mr. Stern explained that they may or may not have a contract; that POPA's proposals were both mid-term and term negotiations as they arose out of the term negotiations and proceedings before Arbitrator Johnson in 1986 and were really a continuation of those negotiations concerning performance appraisals. He was not requesting term negotiations for a completely new agreement.

PTO negotiators steadfastly refused to bargain over anything other than the change it had proposed on January 12. They disputed whether a contract existed, but also maintained that there was no duty to bargain over union-initiated mid-

term bargaining proposals based on the 1993 decision of the Court of Appeals for the Fourth Circuit.

Shepherd sent Stern a memorandum on April 6, 1998, withdrawing the January 12 notice and stating that PTO did not intend to make the change it had proposed and "no . . . other aspects of bargaining will be conducted on this matter." (G.C. Exh. 4).

Stern sent Shepherd a memorandum on April 20, 1998, stating that POPA still wished to bargain over the subject of performance appraisals. Stern attached a copy of POPA's proposals and indicated that the bargaining proposals held to be nonnegotiable by the Authority and the court of appeals had been lined out. Stern also stated:

> [T]he General Counsel of the FLRA strongly believes that when an agency head disapproval of an interest arbitrator's award is upheld on appeal, the parties have to return to the bargaining table so as to achieve a meeting of the minds with respect to all matters to be included in their agreement. We continue to maintain that we are at the stage where we must return to the bargaining table. We wish to resume negotiations regarding performance appraisals immediately. Please contact me this week to schedule our next session. (G.C. Exh. 5).

PTO never responded to Stern's memorandum. The parties have no agreement addressing the subject of performance appraisals.

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 mid-term 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. POPA

also claims that the negotiations were in fact a continuation of the bargaining process the parties were directed to follow by Arbitrator Johnson who directed in Article 19 that the continued negotiations on performance appraisal were to be conducted pursuant to Article 14, the article on mid-term negotiations. Consequently, according to POPA, the references to the performance appraisal negotiations as mid-term prior to April 20, 1998, was mid-term in a "procedural" sense.

PTO defends its conduct on the basis that there was no further obligation to bargain regarding the proposed change after the Agency withdrew the change and POPA "unequivocally requested to bargain mid-term pursuant to Article 14 of the [disapproved] contract; [therefore], the Agency did not violate the Statute by refusing to negotiate in response to the mid-term bargaining request."

PTO relies 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.

Discussion and Conclusions

As noted, the unfair labor practice complaint alleges that PTO violated section 7116(a)(1) and (5) of the Statute by not replying to an April 20, 1998, memorandum from POPA, requesting to resume negotiations over the subject of performance appraisals, and by refusing to negotiate with the Union over the subject of performance appraisals since that time.

Section 7116(a)(5) of the Statute makes it an unfair labor practice for an agency to fail or refuse to bargain in good faith with an exclusive representative of its employees.

The parties do not dispute that the proposals involved a condition of employment and were negotiable, and PTO does not contend that it was not obligated to bargain because the subject of performance appraisals is covered by an applicable collective bargaining agreement or that some provision of an agreement permitted its action.

In determining whether a party has fulfilled its bargaining obligation, the Authority considers the totality of the circumstances in a given case. *U.S. Department of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524, 531 (1990).

The complaint addresses Respondent's conduct after April 20, 1998, which was after PTO had withdrawn the proposed change and POPA requested to resume negotiations on its proposals. POPA's April 20, 1998, request to resume negotiations over the enclosed proposals did not "unequivocally request" to bargain mid-term, and unlike some of its earlier communications, it did not even use that term or refer to Article 14. POPA's April 20, 1998, request to continue negotiations on the matter of performance appraisal was a general request for negotiations on the matter and required a response and negotiations in good faith pursuant to section 7114(b)(1), (2) and (3) of the Statute. *U.S. Department of Justice, Immigration and Naturalization Service*, 55 FLRA 892, 900 (1999); *Army and Air Force Exchange Service, McClellan Base Exchange, McClellan Air Force Base, California*, 35 FLRA 764, 769 (1990). The request was not rendered moot by PTO's withdrawal of the proposed change. 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).

The record reflects that POPA never stated or implied that it would bargain *only* if the parties had a collective bargaining agreement. The background of the bargaining between the parties demonstrates that PTO could have no doubt about POPA's interest in bargaining over the subject of performance appraisals regardless of whether a collective bargaining agreement existed. The parties have been involved since 1981 in all phases of the collective bargaining process as well as an unfair labor practice proceeding with respect to the subject of performance appraisals. POPA's April 20, 1998, bargaining request expressly referred to the General Counsel's statement in the unfair labor practice case, that consummation of an agreement on that subject was dependent upon a return to the bargaining table, and POPA expressed its agreement with that observation. 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 April 20, 1998, 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, to the extent that POPA's statements prior to April 20, 1998, are relevant, Stern's reference to Article 14 and mid-term bargaining in his January 16 request was entirely appropriate.

It is concluded that the Respondent violated section 7116(a)(1) and (5) of the Statute, as alleged, by not replying to an April 20, 1998, memorandum from the Union stating that the Union wished to resume negotiations over the subject of performance appraisals and by refusing to negotiate with the Union over the subject of performance appraisals since that time.

POPA requests a retroactive bargaining order as a remedy for PTO's refusal to bargain. The proposals submitted by POPA have previously been determined to be negotiable, and the Authority has ordered a retroactive bargaining order in such a case. *See U.S. Department of Defense Dependents Schools, Dependents Schools Mediterranean Region, Madrid, Spain*, 38 FLRA 755 (1990). 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).

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) Failing and refusing to respond to, and bargain with, the Patent Office Professional Association (POPA), the exclusive representative of an appropriate unit of employees, over negotiable proposals concerning the subject of performance appraisals submitted by POPA on April 20, 1998.

(b) 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 negotiable proposals concerning the subject of performance appraisals submitted by POPA on April 20, 1998, and apply agreements reached pursuant to such negotiations retroactively to April 20, 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 fail and refuse to respond to, and bargain with, the Patent Office Professional Association (POPA), the exclusive representative of an appropriate unit of our employees, over negotiable proposals concerning the subject of performance appraisals submitted by POPA on April 20, 1998.

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 negotiable proposals concerning the subject of performance appraisals submitted by POPA on April 20, 1998, and apply agreements reached pursuant to such negotiations retroactively to April 20, 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-80405, 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