UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF COMMERCE U.S. PATENT AND TRADEMARK OFFICE Respondent and NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 245 Charging Party	Case No. 3-CA-10478

James R. Lawrence, Esq.
For the Respondent

Laurence Evans, Esq.
Counsel for the General Counsel

Aileen Johnson, Esq.
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on July 31, 1991 by the Regional Director, Federal Labor Relations Authority, Washington Region Office, a hearing was held before the undersigned on October 29, 1991 at Washington, DC.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (herein called the Statute). It is based on a charge filed by the National Treasury Employees Union, Chapter 245 (herein called the Union) on April 22, 1991 against the Department of Commerce, U.S. Patent and Trademark Office (herein called the Respondent or Agency).

The Complaint alleged, in substance, that on or about March 8, 1991 Respondent implemented changes in its Signatory Authority Program[1/] without completing bargaining over the impact and implementation proposals submitted by the Union on January 8, 1991 - all in violation of section 7116(a)(1) and (5) of the Statute.

Respondent's Answer, dated September 9, 1991, while admitting that the Union made certain proposals re the aforesaid Program, denied that Respondent implemented the Signatory Authority Plan in violation of the Statute as alleged in the Complaint.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Briefs were filed with the undersigned which have been duly considered.

Upon the entire record, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has been, and still is, the certified bargaining representative of an appropriate unit of Respondent's employees.

2. Respondent's trademark operations consist of approximately 400 employees. Included therein are 176 examining attorneys who review trademark applications involving the registration thereof. Such applications are either approved or ultimately denied.

3. A system is utilized by Respondent which governs the responsibility and authority of examining attorneys to sign their actions in respect to trademark applications. This is known as the Signatory Authority Program.

4. After an attorney begins as an examiner, he is not permitted to sign his actions without approval from a mentor or senior attorney. When he meets certain criteria re his performance, he is eligible to be granted Partial Signatory

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1/ Referred to at times as Procedures, Program or Plan.

Authority to sign all non-final actions or dispositions. In preparation for Full Signatory Authority the attorney may be granted temporary authority to sign all final actions. That authority is designated as Probationary Full Signatory Authority. He then may be given Full Signatory Authority, which is permanent authority to sign and take final actions without approval from a senior attorney.

5. In the fall of 1990 Respondent sent Mary F. Bruce, president of the union, a draft of proposed changes in the "Signatory Authority Procedures." These Procedures[2/] provide for the grant of independent signatory authority in stages based on the evaluation of the attorney's performance and ability to act independently. Three types of signatory authority are covered: Partial Signatory Authority, Probationary Full Signatory Authority, and Full Signatory Authority.

In respect to all three stages and the granting of authority at each one, the Procedures set forth (a) the necessary criteria in order to be awarded the grant of authority, and (b) the necessary steps in the recommendation for granting authority. In regard to the grant of Partial Signatory Authority, the Program provides that the attorney's mentor may recommend such authority for the attorney if the latter has at least four months in office experience and a total of at least 300 actions.

As to the grant of Probationary Full and Full Signatory Authority to attorneys, the new Program provides for the review by the managing attorney of 10 cases of the attorney before he is granted either authority. Provision is also made in regard to each of these two grants of authority for the review by the senior attorney of cases handled by the examining attorney. Evaluation is made of the performance by the attorney as well as the quality of the latter's actions. Further, in respect to Probationary Full Authority and Full Signatory Authority, the Plan sets forth an appeal to the Administrator for Trademark Policy when the managing attorney denies a grant of either such authority.

6. On or about December 6, 1990 a meeting was held between Union officials and management representatives concerning the proposed changes. The Union was concerned as

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2/ While only a summarization is set forth by the undersigned, the complete Program is contained in G.C. Exh. No. 2.

to the impact of the changes and the matter was discussed. Respondent's group said it believed that no substantial changes had been made and any impact was insignificant. Union officials stated they would submit proposals in that regard.

7. Under date of January 8, 1991 Union President Bruce sent Director David E. Bucher the Union's proposals[3/] regarding the Signatory Authority Procedures. It also indicated its desire to commence bargaining on the issue.

8. Article 1 of the Union's proposals deals with Partial Signatory Authority. It provides, in substance:

> (a) For the recommendation of attorneys for this authority after six months employment, and recommendations to be by the Senior Attorney with concurrence of the examining attorney. After one year, it may be initiated by the Senior Attorney alone.
>
> (b) The criteria for such recommendation.
>
> (c) For the review of the recommendation by the Managing Attorney and for an explanation in writing if the grant of such authority is denied.
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> (d) That the office instruct Senior Attorneys to provide new employees with the policy re this authority.
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> (e) The office will not use quality review results as the sole basis for terminating an employee who is granted this authority in his first year.
>
> (f) For a reevaluation of a grant of this authority if made in the first year of an attorney's employment; for additional training if quality review indicates additional training would benefit the attorney; for automatic reinstatement to this authority at the end of four months additional training of the attorney.

3/ These proposals by the Union are set forth in G.C. Exhibit No. 3.

(g) That a failure to recommend an attorney for this authority will not be used by the Office in selection of employees for promotion, details or special projects.

9. Article 2 of the Union's proposals deals with Probationary Full Signatory Authority. It provides, in substance:

(a) For the eligibility of an attorney for this authority six months prior to his eligibility for full signatory authority.

(b) For initiating a recommendation of the attorney for this authority by the Managing Attorney at least two weeks before the pay period in which the attorney becomes eligible.

(c) The eligibility requirements for the recommendation.

(d) The period in which the attorney will remain in this status, and the modification of the period where the recommendation was untimely made or delayed.

10. Article 3 of the Union's proposals deals with Full Signatory Authority and provides, in substance:

(a) Requirements for recommending eligibility for this authority, and for initiation of a recommendation by the Manager within 90 days after the attorney is first denied such authority.

(b) For the grant of authority to an attorney rated commendable or higher on critical elements and quality of writing without a need for a further review of cases.

(c) For the eligibility of an attorney for this authority who is rated at least fully successful in the critical elements under a specified system. This system provides for a review of the attorney's cases by a committee of two Senior Attorneys in accord with Respondent's proposal in Section E (3), but with an exception that only the most recent error by an attorney be counted; that the Managing Attorney would review all selected cases and appeal briefs, and under

what circumstances he will deny full signatory authority; that errors found by the Managing Attorney resulting in a denial of such authority will be submitted to the Administrator for Trademark Policies and Procedures for de novo review.

Under the aforesaid system it is proposed that full authority be granted if the Managing Authority finds fewer than one substantive or three procedural errors in cases; that, if authority be denied, 10 additional cases of the attorney be reviewed; that the review of cases be completed within one month of the process and any grant of authority and the promotion to GS-13 be retroactive if management delays the review; and that a second review be initiated in 90 days after a denial of this Authority.

11. Article 4 of the Union's proposals provides as follows:

A. Production requirements will be determined by the grade level of the employee, rather than being linked to signatory authority status.

12. Article 5 of the Union's proposals provides as follows:

A. Until a final plea for grants of signatory authority is established, the procedure outlined in the March 3, 1986 memo concerning signatory authority will remain in effect.

13. In reply to the aforesaid proposals the Respondent wrote Bruce on January 31, 1991. The letter advised the Union that management felt it had no duty to bargain. It deemed most of the proposals interfered with management rights and are nonnegotiable. The remainder, it was felt, were unrelated to the changes proposed by management and beyond the scope of bargaining. Respondent stated that the Union's proposals were not appropriate impact or implementation proposals.

14. The Union responded on February 11, 1991 by a letter addressed to Assistant Commissioner Jeffrey M. Samuels wherein the Union expressed its willingness to examine any negotiability issue and consider redrafting its proposals. Further, the Union stated its desire to meet and discuss the negotiability concerns of management.

15. About a week later the parties met. The Union mentioned its concern re a "blanket push" of new attorneys

to partial signatory authority before they were ready and received adequate training. Management repeated its feeling that it did not have a duty to negotiate with the Union.

16. Under date of February 25, 1991 Respondent wrote Bruce that, as a result of the Union's concerns, management would amend its program in four respects; (a) consultation to take place between the attorney and the senior/mentor attorney prior to the latter's recommendation for partial signatory authority; (b) denial of partial signatory authority by managing attorneys must be in writing with the reasons for denial; (c) automatic review or appeal of all error determinations by the Administrator for Trademark policy and procedure where managing attorneys finally denys either probationary or full signatory authority;4/ (d) after final denial of either probationary or full signatory authority, the attorney becomes eligible again in three months rather than in six months as earlier provided.

The letter also advised Bruce that, as a result of the amendments, management saw no need to negotiate further with the Union.

17. With respect to the aforesaid amendments Bruce testified that as to No. 1 (consultation), the Union may want other procedures to protect attorneys; as to No. 2 (written denial of partial signatory authority), this conformed to the Union's desires; as to No. 3 (automatic review by the Administrator of error determinations), the Union wanted to discuss and be involved in drafting a proposal if there was an appeal procedure; as to No. 4 (eligibility in 3 months after denial for probationary full signatory authority or full signatory authority), that did address the Union's concerns.

18. Further testimony by Bruce reflects the Union was also concerned as to: (a) the effect of receiving early probationary full signatory authority which would not allow for adequate training; (b) delays in initiating the processing of full signatory authority procedures which prevent attorneys from receiving promotions in a timely fashion; (c) disparate treatment in respect to an attorney's qualification for full signatory authority, since under the

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4/ This amendment by Respondent was made to meet the Union's concern re the change whereby each of the 13 managers decided whether to grant authority to the examining attorney in his office.

new procedures a review of the attorney's work is delegated to the manager in each office. The Union contended this could result in disparate treatment of attorneys since each manager could come to a different conclusion as to an individual's qualifications, which would leave room for subjective determinations in regard to an individual's qualifications.

19. Record facts show the same training exists under the new Plan as previously, the training period covers 12 weeks with a series of lectures, and each attorney is assigned a senior/mentor attorney. The shortened eligibility period (4 months vs. 1 year) for the grant of partial signatory authority was occasioned by the fact that many new attorneys had extensive trademark experience before coming to Respondent. Management wanted a system permitting said attorneys to be treated as full-fledged professionals.

20. Respondent implemented the changed Signatory Authority Program on March 8, 1991 and sent a copy thereof to its examining attorneys.

Conclusions

The Complaint alleges that Respondent implemented its Signatory Authority Program without completing negotiations with the Union over the negotiable impact and implementation proposals submitted by the Union.5/

While acknowledging that it changed its Program re the grant of signatory authority, Respondent contends the changes were de minimis in nature and created no duty to bargain. Further, it asserts that the proposals submitted by the Union were nonnegotiable and thus imposed no duty to bargain with the Union in respect thereto.

5/ Note is taken that the Complaint refers to a refusal to negotiate with the Union over its negotiable impact and implementation proposals. However, the record supports an allegation that Respondent refused to bargain over the impact and implementation of the change itself. Record facts disclose that this was in issue and was addressed by the parties. Accordingly, since the issue was argued and litigated, I conclude that the impact and implementation of the change instituted by Respondent without completing negotiations thereof is in issue. Cf. Internal Revenue Service, Louisville District, Louisville, Kentucky, 42 FLRA 137, (footnote 2 at 143).

It is not disputed that Respondent may institute new Signatory Authority Procedures as a management right without bargaining as to its decision in that regard. However, the General Counsel and the Union assert that, notwithstanding this prerogative, an agency is required to negotiate as to the impact and implementation of such changes. Contrary to Respondent, they also contend that management herein did not bargain as to the effect of the changed Procedures, but implemented them prior to completing negotiations thereon.

The Authority has recognized that the exercise of a reserved management right to change conditions of employment can carry with it a correlative duty to bargain re the impact and implementation of such changes. 56th Combat Support Group (TAG), MacDill Air Force Base, Florida, 43 FLRA 434; Department of Transportation, Federal Aviation Administration, Washington, DC, 20 FLRA 486.

Respondent's contention that since the Union failed to either revise its proposals or file a negotiability appeal, no duty devolved upon it to bargain with the Union. This argument is rejected. The thrust of the Complaint herein concerns the refusal to negotiate as to the changes made by Respondent in its Signatory Authority Procedures. The issue centered on the obligation of management, as contended by the General Counsel, to bargain as to the impact and implementation of such changes. It did not rise to the level of a negotiability appeal concerning the proposals made by the Union, and the latter did not see fit to institute such an appeal. The proposals made by the Union were initiated to conduct impact and implementation bargaining. There was no requirement, under these circumstances, that it resort to the negotiability procedures set up by the Authority's regulations.6/

Apart from the negotiability of the Union's proposals, I am persuaded that Respondent had no intention to bargain with the Union as to the new Signatory Authority Procedures. While management listened to the Union's concerns as to: there being less time for training, disparate review by 13 managing attorneys before granting signatory authority to examining attorneys, and the proposed automatic appeal procedures, it did not engage in negotiations with respect thereto. Respondent indicated in its letters to the Union of January 31, 1991 and February 25, 1991 that it did not

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6/ Section 2424.1, et seq. of the Rules and Regulations.

believe it was necessary to bargain with the Union. This position is borne out by Union President Bruce's testimony that management said at a meeting in January 1991 there was no need to meet with the Union. Further, Respondent's Deputy Assistant Commissioner testified that management met with the Union in February 1991 to have an informal conversation, but the agency felt there was no duty to bargain. Anderson testified that no management official indicated it would engage in formal bargaining on the new program.

An employer does not meet or fulfill its duty to bargain by merely meeting with the Union and listening to its concerns. It must manifest an intention to reach a negotiated agreement. In the instant case the record is persuasive that Respondent did not bargain in good faith as to the new program and the particular features which the Union sought to negotiate. Thus, the implementation of the program without bargaining thereon would, unless otherwise excused, be violative of the Statute. See Social Security Administration, 18 FLRA 511.

There is a sharp dispute as to whether the changes in the program herein were de minimis in nature. Respondent insists that the changes in its Signatory Authority Procedures had little impact on working conditions and thus created no duty to bargain.

The Authority laid down its revised standards for determining whether a change is de minimis in Department of Health and Human Services, Social Security Administration, 24 FLRA 403 (1986). It concluded that emphasis would be placed on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change in conditions of employment. Further, equitable considerations would be considered in balancing the various interests involved; the number of affected employees and the history of collective bargaining would be given limited application; and the size of the unit would no longer be a factor.

Applying the foregoing yardsticks to the case at hand, I am satisfied that the particular changes in the Signatory Authority Procedures, which the Union insists are bargainable as to their impact and implementation, are more than de minimis.

In respect to the change of eligibility for Partial Signatory Authority from one year to four months, this may

well impinge upon the training time of the examining attorneys. While it may be true, as the Respondent argues, that no attorney has been denied this authority, the shortened period could affect his experienced capability concerning the work product. The change which cuts eligibility eight months, is not mandatory and impacts upon the guidance afforded the attorney and his ultimate skill.

The change in the initial review of an attorney's work is substantial in nature. Delegating this task to 13 different managers in place of the earlier procedure whereby review was made by the Administrator, does result in less uniformity in respect to the inspection and grading of the work of an attorney. This could well result in differing standards being applied as to an attorney's readiness for the grant of signatory authority. That disparate treatment could ensue is truly foreseeable and could have a marked effect upon the treatment of the attorneys in this regard.

The record reflects concern by the Union as to the automatic appeal to the Administrator when the managing attorney denies signatory authority. This change provides for ultimate determination by the individual who previously reviewed the attorney's cases and work product. Since the change is part of the entire review process, albeit providing for an automatic appeal, it does affect the standing and status of the attorney who has been denied such authority. As such, it does have an impact upon his conditions of employment, and the Union might want to discuss the procedures involved in such appeals and their part therein.

The nature of those changes made by Respondent lead me to conclude that they do have a foreseeable effect upon the working conditions of the examining attorneys. The various concerns raised by the Union which relate to training, disparate treatment of attorney's work by different managing attorneys, and the automatic appeal procedures - all are factors affecting a significant number of employees and are not of a limited nature. Thus, I conclude the said changes in the program are more than de minimis. Respondent's failure and refusal to bargain therein over the impact and implementation of changes in the Signatory Authority Procedures violated section 7116(a)(1) and (5) of the Statute.

Turning to the proposals by the Union in regard to the Signatory Authority Program, Respondent insists it had no

obligation to bargain thereon since they are nonnegotiable. It adverts to the similar authority program, which involved Respondent's patent examiners, that was discussed by the Authority in Patent Office Professional Association and Department of Commerce, Patent and Trademark Office (herein called POPA), 39 FLRA 783. Respondent contends that many of the proposals in the cited case, which are similar to ones proposed by the Union herein, were found by the Authority to directly interfere with management's right to assign work and are therefore not negotiable.

The proposals by the Union concern the grant to attorneys of authority which may be partial, probationary full, or full. In determining the negotiability of those proposals, note must be taken of the Authority's decision in National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA 24. In that case the Authority set forth the necessary considerations where management alleges a union proposal is not negotiable because it conflicts with management rights in section 7106(a) or (b)(1). Firstly, it must be ascertained whether a proposal is intended to be an arrangement for employees adversely affected by the exercise of such rights. The union must, nevertheless, articulate how employees will be detrimentally affected by management's actions and how the proposal will address any adverse effects. If it be concluded that the proposal is intended as an arrangement, then it must be determined whether the arrangement is appropriate. Should it be decided that the proposal excessively interferes with the exercise of management's rights, the proposal will be deemed inappropriate and in conflict with section 7106(b)(3). In evaluating whether a proposal is a proper procedure for negotiations under section 7106(b)(2), the applicable test is whether the proposal was a "direct interference" with a management right.

Partial Signatory Authority Proposals (Article 1)

In respect to Proposals A, B and C under this category, Respondent insists they restrict its ability to assign this authority to examining attorneys. Further, it is asserted they interfere with that right since they attempt to define the time period, amount of work and level of performance in order to receive partial signatory authority. Such proposals, it is argued, are controlled by the Authority's decision in the POPA case, supra. (Proposal No. 1).

The particular proposals in A do not purport to restrict Respondent's assignment of partial signatory authority. It

is provided that an attorney may be recommended for this grant of authority after six months of employment; that it would be initiated at the request of the attorney; that the Senior Attorney may recommend this assignment. This proposal differs markedly from Proposal 1 in the POPA case, which Respondent refers to as dispositive in finding the one at hand to be nonnegotiable. The POPA proposal requires that an examiner be granted partial signatory authority when performing subspectorily for six months at the GS-13 level. It also stipulates the number of minimum hours of performing his functions with a requirement that, if competence be established, the attorney be granted this authority. There is no attempt under A herein to abridge management's right under section 7106. Neither is this proposal an interference with management's right to assign since it is left for management to decide whether to recommend the attorney. I conclude the A proposal is a negotiable matter and Respondent was under an obligation to bargain thereon as to its impact and implementation.

Similarly I conclude that proposal B is negotiable since it merely sets forth basic eligibility requirements for this grant of authority which management would require before ever assigning it. It does not provide for a mandatory grant, and in no way interferes with management's rights under section 7106. In truth, the same provisions are contained in Respondent's new Program which it implemented in March 1991.

With respect to C re the managing attorney reviewing the recommendation for partial signatory authority and the written notification to an attorney of any denial thereof, I conclude this is a negotiable proposal. It tracks the Respondent's provision in its new Signatory Program set forth in C (3) (Approval/Denial of Partial Signatory Authority), and reflects no interference with management's right to assign work since it is in line with Respondent's proposal in this regard.

Respondent contends that the D proposal is nonnegotiable since it assigns work to specific managers within a particular time period. I conclude that this proposal constitutes a negotiable procedure under section 7106(b)(2) of the Statute. This merely calls for Respondent to have the senior attorneys provide new employees with a copy of the partial signatory authority policy during their first month of employment. It places no substantive restriction

on the agency's ability to act re its reserved rights and is within the duty to bargain.7/

Respondent contends that proposal E is a direct interference with its ability to retain employees or take disciplinary action against them. This provision does restrict management's rights under section 7106(a)(2)(A) of the Statute. It is not articulated how employees could be detrimentally affected by management's action and thus intended as an appropriate arrangement. The proposal would, moreover, excessively interfere with management's right to decide as to termination of an employee. I conclude this is not a negotiable proposal and outside the duty to bargain.8/

The proposal in F provides that management may reevaluate its grant of this authority when granted during the first year of employment. If the reviews in the first two months after the grant indicate the attorney could benefit from additional training, Respondent may review that attorney's cases for four months and provide additional training to enable him to perform effectively. Further, at the end of four months training partial signatory authority will be automatically reinstated.

Respondent insists this proposal interferes with its ability to review an employee's work and therefore violates section 7106(a)(2)(A) and (B) of the Statute.

With respect to the proposed training of attorneys under the aforesaid circumstances, this is a matter which affects the working conditions of these individuals. They have a substantial interest in evaluation and training. It is true that proposals requiring agencies to provide training have been found to directly interfere with management's right to assign work, Fort Eustis, 33 FLRA 395. However, in POPA the Authority held that a proposal to train examiners was a negotiable appropriate arrangement. The same conclusion is reached here with respect to the proposed additional training. It does not mandate the schedule or duration of

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7/ This proposal would not, in any event, excessively interfere with management's right to assign work and thus be deemed an appropriate arrangement under section 7106(b)(3).

8/ This proposal also deals with termination and not with the granting or denial of partial signatory authority.

the training, and as such is a negotiable arrangement. See American Federation of Government Employees, Local 3231 and Social Security Administration, 22 FLRA 868, 872-74.

The provision for reevaluating a grant during the two months following a grant of this authority is at the option of the Respondent, and is related to the additional training. The decision as to whether reevaluation should be made is left to management and does not excessively interfere with managements rights under the Statute. It is also negotiable as an appropriate arrangement.

The last clause in proposal 7 provides for the automatic reinstatement of partial signatory authority at the end of an additional four month training period. This interferes with management's right to assign work. While it may be said that this is an appropriate arrangement for negotiations. I consider this to be an excessive interference with management's right to assign work is and not negotiable.

In respect to proposal G, I agree with Respondent that it directly interferes with management's right to promote and assign work under section 7106(a)(2)(B). It is an excessive interference since the proposal would dictate the circumstances of the selection of employees for promotion or special projects, and hence cannot be deemed an appropriate arrangement.

Probationary Full Signatory Authority (Article 2)

The proposals under A and B of this authority grant do interfere directly with management's rights to assign work and are nonnegotiable. (See POPA, supra). The initial proposal mandates the eligibility period for probationary full signatory authority. Proposal B requires the Managing Attorney to recommend an examining attorney for this grant of authority under explicit standards. They set the required time for successful performances, call for the attorney in retaining partial signatory status for three months if he is ineligible for probationary full authority, and requires that where a grant is delayed due to the Managing Attorney within a specified time frame, the examining attorney shall remain in probationary full authority status (where approved) until he meets the requirements for promotion to GS-13.

These proposals are an infringement upon management's right to assign work. They prescribe explicit criteria and circumstances for approval of this grant of authority and

are a direct interference with management's rights under the Statute.

Note is also taken that the record does not contain sufficient facts upon which to make a determination that these proposals would constitute an appropriate arrangement. A party who so contends is required to meet this burden or act at its peril. American Federation of Government Employees, Local 3272, and Department of Health and Human Services, Social Security Administration, Chicago Regional Office, 34 FLRA 675.

Full Signatory Authority (Article 3)

Proposals under A, B and C are the eligibility for recommendation requirements which include (1) being eligible for a promotion to a GS-13, (2) performing fully satisfactory for 90 days during a prescribed period, (3) initiation by the Manager within 90 days if the attorney fails to meet requirements in A and the attorney's performance improves to meet fully successful criteria, (4) mandating the grant of this authority without need of further case review when the attorney attains a specified rating on all critical elements and the quality of his writing in quality review while on probationary full authority.

The proposals in A, B and C are similar to those proposed by the Union in Article 2 dealing with Probationary Full Signatory Authority. They interfere with management's rights to assign work under section 7106(a)(2)(A) of the Statute. Proposals A (1) and (2) set the preliminary requirements for the recommendation of an attorney for full authority. In proposing that an attorney will be recommended for this grant of authority when he is eligible for promotion to a GS-13, the proposals conflict with management's right to assign work. Both A (1) and (2) dictate the circumstances under which an employee will be granted this authority and the time prerequisites for such recommendation. There is, moreover, no showing that these proposals are an appropriate arrangement. I conclude they are nonnegotiable.

With respect to A (3) of this article, I conclude that such a proposal is negotiable and warrants bargaining therein. The initial clause referring to the knowledge of trademark law as well as office practice as procedure conforms, in fact, to Respondent's new signatory authority plan as set forth in C (1) (c). The remainder of the proposal merely requires the Respondent to provide written explanation for any denial of full signatory authority. The

Authority has held that section 7106 does not limit the disclosure of information which is the product of its decision-making process involving the exercise of management's right. See American Federation of Government Employees, AFL-CIO, National Council of Field Assessment Locals and Department of Health and Human Services, Social Security Administration, 32 FLRA 982.

The proposals in C and D are also not negotiable matters. They mandate the granting of full signatory authority to an attorney provided he attains a certain rating on the critical elements. Further, they preclude any further review of the attorneys' cases. Under D it establishes the system under which attorneys, rated at least fully successful, will be eligible for recommendations to the status of full signatory authority.

This system calls for the Managing Attorney to direct a review of 10 cases of the attorney no later than 5 weeks prior to the latter's eligibility for a GS-13. It provides for the review of those cases by two senior attorneys and regulates the errors to be counted. It details a review by the Managing Attorney of the selected cases, and the circumstances under which substantive errors by the attorney justifies a provisional denial of full signatory authority or warrants granting it. The D (8) proposal requires the review to be completed in a month and for the retroactive grant of this authority if Respondent delays the review. Finally, it calls for a second review with the same procedure in 90 days if the attorney is finally denied this full signatory authority.

The right to assign work includes, as the Authority has held, the right to determine qualifications of employees as well as what data is required to make that determination. Limiting the agency's discretion to determine how many cases to review, the proposal interferes with the Respondent's right to determine what data it needs with respect to the assignment of the stages of the Signatory Authority Program. Thus, this aspect of the proposal directly interferes with management's right to assign work under section 7106(a)(2)(B) of the Statute. See POPA, at 805.

Further, setting the number of reviewers to be assigned to cases is a direct interference with the Agency's right to determine the number, types and grades of employees assigned to work under section 7106(b)(1).

In proposing under D (6) for the granting of full signatory authority based on the few errors found by the Managing Attorney, it does not negate a conclusion that such proposal interferes with the right to assign work. It does not restate, or refer to, 5 C.F.R. 335.104[9/] or state that determination re eligibility for promotion shall conform with governing regulations. Thus, the prerequisite that a grant of this authority will only be made to attorneys who are rated at least fully successful will not preclude the finding of interference. The proposals under D (7), (8) and (9) are also a direct interference with management's right to assign work. Once again the Agency is directed to review a specified number of an attorney's cases (10) upon a denial of full authority. Further, the Agency is required to review cases within a certain time frame, and to make retroactive any grant of this authority at a promotion to GS-13. These proposals infringe upon management's rights under section 7106 of the Statute, and are nonnegotiable. See POPA, supra.

In respect to those proposals found to be nonnegotiable based on a direct interference with Respondent's right to assign work, the record does not contain sufficient evidence to warrant finding they are appropriate arrangements. Record facts do not show the adverse effects upon employees as a result of management's actions and how the proposals by the Union are intended to address or compensate for the actual or anticipated effects of the exercise of management's rights. See Kansas Army National Guard, supra.

It is also contended that Respondent was obliged to fulfill its bargaining obligation before implementing the Signatory Authority Program. I agree. Although Respondent met with the Union and also amended certain changes of its Program, management did not complete its negotiations with the Union as to the changes. The Union indicated its desire to continue negotiations and made proposals in this regard.

9/ 335.104 states:

No employee shall receive a career ladder promotion unless his or her current rating of record under Part 430 of this chapter is "Fully Successful" (level 3) or higher. In addition, no employee may receive a career ladder promotion who has a rating below "Fully Successful" on a critical element that is also critical to performance at the next higher grade of the career ladder.

Implementation of the Program under these circumstances was violative of sections 7116(a)(1) and (5) of the Statute.10/

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

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 Department of Commerce, U.S. Patent and Trademark Office, shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate in good faith with the National Treasury Employees Union, Chapter 245, the exclusive representative of a unit of its employees, concerning procedures and appropriate arrangements affected by the change in its Signatory Authority Procedures.

(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) Upon request, negotiate in good faith with the National Treasury Employees Union, Chapter 245, the exclusive representative of a unit of its employees, concerning procedures and appropriate arrangements for employees adversely affected by the changes in its Signatory Authority Procedures, including the negotiable proposals made by the National Treasury Employees Union, Chapter 245.

(b) Post at its facilities where bargaining unit employees represented by the National Treasury Employees Union, Chapter 245 are located, copies of the attached

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10/ Circumstances may exist wherein a union waives the implementation of changes by management. The record herein does not support the conclusion that the Union waived its right to bargain as to the impact and implementation of the Program.

Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commissioner of Patent and Trademarks, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Regional Office, Federal Labor Relations Authority, 1111 18th Street, NW, 7th Floor, P.O. Box 33758, Washington, DC 20033-0758, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, March 11, 1992

WILLIAM NAIMARK
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to negotiate in good faith with the National Treasury Employees Union, Chapter 245, the exclusive representative of a unit of our employees, concerning procedures and appropriate arrangements affected by the change in our Signatory Authority Procedures.

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

WE WILL, upon request, negotiate in good faith with the National Treasury Employees Union, Chapter 245, the exclusive representative of a unit of our employees, concerning procedures and appropriate arrangements for employees adversely affected by the changes in our Signatory Authority Procedures, including the negotiable proposals made by the National Treasury Employees Union, Chapter 245.

_____

(Activity)

Dated: _____ 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 Regional Office, whose address is: 1111 18th Street, NW, 7th Floor, P.O. Box 33758, Washington, DC 20033-0758, and whose telephone number is: (202) 653-8500.