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

U.S. PATENT AND TRADEMARK OFFICE Respondent and	
PATENT OFFICE PROFESSIONAL ASSOCIATION Charging Party	Case No. 3-CA-10483

Phillip Boyer, Esquire
For the Respondent

Pamela Schwartz, Esquire
For the Charging Party

Laurence Evans, Esquire
For the General Counsel

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on April 25, 1991, by the Patent Office Professional Association, (hereinafter called the Union), a Complaint and Notice of Hearing was issued on July 31, 1991, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C. The Complaint alleges that the U.S. Patent and Trademark Office, (hereinafter called the Respondent), violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management

Relations Statute, (hereinafter called the Statute), by virtue of its actions in implementing a change in "the productivity policy for overtime eligibility" in Group 350 without affording the Union notice and an opportunity to negotiate over the impact and manner of implementation of the change.

A hearing was held in the captioned matter on October 2, 1991, in Washington, D.C. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Respondent and the General Counsel submitted post hearing briefs on November 4, 1991, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact[1/]

The Union is the certified exclusive representative of a unit of Respondent's employees appropriate for collective bargaining.

The Patent and Trademark Office is divided into sixteen examining groups, each of which is headed by a Group Director. Each group is further divided along technological lines into art units which are headed by Supervisory Patent Examiners, (SPEs). The amount of overtime available to be worked each year is not allocated equally among the aforementioned examining groups, rather, within any given fiscal year, widely differing amounts of overtime work are allocated to the various examining groups based upon a computer program analysis which takes into consideration the group's workload, staffing, etc.

Within each group, the decisions on how overtime is to be allocated to the employees and what productivity requirements are to be met by the employees to be eligible for overtime work are left to the Group Director. For Group 350, the group which is the subject of the instant complaint, the decision as to the productivity requirements

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1/ The facts concerning the awarding of overtime in Group 350 from 1987 until November 26, 1990 for the most part are not in dispute. To the extent that the statement of facts set forth in Respondent's post hearing brief comports with the record, I have adopted same.

for the assignment of overtime work is made by Group Director Al Smith in consultation with his subordinate SPEs.

As noted above, because different examining groups are allocated different amounts of overtime to be worked each year, the other examining groups, which are not the subject of the instant complaint, appear to have had different productivity requirements for the assignment of overtime than Group 350 over the past four years. While the collective bargaining contract requires a certain degree of uniformity for overtime work distribution within each "cost center", a term not defined in the contract, there is no contractual requirement that the different groups have identical overtime distribution policies.

Prior to 1987, Group 350, like most other groups, had a large volume of work and was allocated an enormous amount of overtime in order to clean up its pending workload. As a consequence, like other groups, Group 350 adopted a very liberal overtime work policy under which any employee whose productivity and work quality were satisfactory could work overtime. By 1987, Group 350's workload had shrunk to the point where it had a very small amount of work per employee. With a new case pendency of only 5.3 months, it had a small workload per employee and some art units were virtually running out of work before years end.

Because of the aforementioned shortage of work, Group 350 in 1987 implemented a requirement that was designed to allow its employees to work some overtime and not run out of work. To this end, employees in order to remain eligible to work overtime had to be performing at 100 percent of their respective productivity goals at the end of each quarter of the year. The policy took into consideration the human factors affecting employees at the beginning of each quarter and allowed them to be at a productivity level of less than 100 percent for the first two pay periods of the quarter, so long as they had raised their level of productivity to 90 percent by the end of the third pay period and reached 100 percent of productivity by the end of the quarter.2/

2/ The grace period at the beginning of a quarter only applied to the employee's production for that individual quarter. The employee's productivity for prior quarters still had to be at 100 percent in order for the employee to be eligible in the first instance for overtime work.

With minor variations, the policy of allocating overtime on the basis of work available and productivity remained in effect for Group 350 from 1987 until November 26, 1990, when the change which is the subject of the instant complaint occurred. During this period, while the productivity requirement for overtime eligibility in Group 350 fluctuated in different years or quarters between 100 percent and 110 percent, it never dropped below 100 percent for any quarter and never approached the 80 percent productivity standard referenced in Arbitrator Ables award.3/ Additionally, since the productivity of patent examiners is measured on a quarterly basis, Group 350's policy consistently took into account various factors affecting employees productivity at the beginning of a quarter, e.g. post-quarterly cleanup, fatigue, etc., by allowing the employees a three pay-period grace period to get their productivity up to the required level for eligibility for overtime work.

For fiscal years 1987, 1988 and the first half of fiscal year 1989, Group 350 maintained the policy set forth at the beginning of 1987. For the second half of fiscal year 1989, Group 350 continued to retain its overtime policy with respect to working overtime but upped the productivity requirement to 110 percent. At the beginning of fiscal year 1990 Group 350's overtime policy again remained unchanged, but the productivity requirement was lowered back to 100 percent for the first two quarters. At the beginning of the third quarter of fiscal year, March 1990, the productivity requirement was again raised to 110 percent, and remained there until November 26, 1990.

On November 26, 1990, Group Director Smith issued a memorandum4/ which continued into fiscal year 1991 the overtime policy which had been previously in effect for the last two quarters of 1990. The memorandum did however, temporarily relax or lower the existing standard relative to eligibility for overtime by allowing those employee's who had previously been excluded from overtime by failing to meet the 110 percent standard to requalify for overtime if they had attained at least 100 percent productivity during the prior fiscal year.

3/ Arbitrator Ables award will be discussed infra.

4/ The November 26, 1990 Memorandum reads in pertinent part as follows:

Footnote continued on next page.)

Thus, while prior to November 26, 1990, an employee in order to be eligible to work overtime must have been working at 110 percent productivity, starting in the first quarter of the 1991 fiscal year an employee would be eligible for overtime work if he had attained at least 100 percent productivity for the prior fiscal year. The change reduced the requirements for working overtime since it allowed employees who had been ineligible for overtime due to the fact that they were not meeting the 110 percent productivity standard to qualify for overtime work if their productivity in the preceding fiscal year was at least 100 percent. The employees, however, to remain eligible for the overtime work had to reach 110 percent productivity by the end of the first quarter.

The record indicates that the November 26, 1990 change in the eligibility requirements for overtime work was effected without any prior notice or discussion of any kind with the Union.

The Ables Award:

On January 29, 1987, the production standards were raised in Art Unit 221 which appears to be a component of Group 220. Although not clear from the record, it further appears that the supervisor in Art Unit 221 raised the

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(Footnote Continued from previous page.)

SUBJECT: Overtime Eligibility

Effective today, the temporary, reduced, week-by-week, overtime allocations were lifted. Consequently, overtime may be authorized up to 32 hours per pay period. Exceptions to the 32 hour limit must be approved by the Director in advance.

The Group's overtime productivity policy of last fiscal year remains in effect for FY 1991, with the following easing of requirements for the first quarter:

> During the first quarter of this fiscal year (FY 1991), any examiner who attained at least 100 percent for the prior fiscal year will be eligible to work overtime upon reaching 100 percent cumulative at any time during the first quarter of FY '91. In order to continue on overtime into the second quarter, they must attain at least 110 percent for the first quarter.

percentage of work that a patent examiner in his unit had to complete before being eligible for overtime to between 95 and 100 percent.

On February 18, 1987, the Union filed a grievance alleging that the Respondent violated Article 9, Section 2 of the existing collective bargaining contract by unilaterally "increasing the percentage of work that a patent examiner had to complete before being eligible for overtime". Respondent defended on the ground that its action in raising the percentages was authorized by Article 3, the management rights clause, of the collective bargaining agreement.

On March 31, 1989, Arbitrator Robert Ables issued his decision in the matter, finding among other things, that since the inception of the collective bargaining contract in 1986 and for approximately 15 years, "no patent examiner who had attained an 80 percent productivity level had been denied overtime". Despite this finding with respect to the 80 percent productivity level, Arbitrator Ables did reference in footnote 2 of his decision the fact that the Group Director in Group 110, a Mr. Talbert, had raised production standards in his group to 110 percent in connection with a quality step increase.

Although he found that the January 29, 1987 change in production standards in Art Unit 221 of Group 110 was in violation of Article 9 of the collective bargaining contract, Arbitrator Ables concluded, among other things, that he was unable to make an award in the Union's favor since such action would abrogate the rights accorded a "federal employer" under Section 7106(a) of the Statute. In support of his decision Arbitrator Ables cited an earlier decision of the Authority, Social Security Administration, Office of Hearings and Appeals, 31 FLRA 1172, wherein, in his opinion, the Authority reached a similar decision on the basis of similar facts.

On May 8, 1989, the Union filed exceptions to Arbitrator Ables decision. Subsequently, the Authority on October 26, 1990 issued a decision wherein it remanded the matter to the Arbitrator for further consideration. The Authority found that the disputed contractual provision, Article 9, Section 2, constituted an arrangement for employees adversely affected by the excerise of management's right to assign work, that the contractual provision did not abrogate management's rights and that the Arbitrator could not refuse to enforce such provision.

In its decision, the Authority noted on a number of occasions, that the Arbitrator had specifically found that prior to the change in productivity for Art Unit 221 to between 95 percent and 100 percent for eligibility for overtime work the productivity level had been 80 percent throughout the Patent Trade Office. From a reading of the Authority's decision it does not appear that Respondent excepted to this latter finding of the Arbitrator.

Discussions and Conclusions

The General Counsel takes the position that Respondent violated Sections 7116(a)(1) and (5) of the Statute by virtue of its actions in unilaterally changing the productivity level for overtime eligibility without first giving the Union notice and the opportunity to bargain over the adverse impact on unit employees and the manner of implementation.

In support of its position that there had been a change in a condition of employment, namely an increase in the productivity level necessary to be eligible for overtime employment, the General Counsel relies on the earlier decision of Arbitrator Ables wherein he found that "for at least 15 years, no patent examiner who had attained an 80 percent productivity level had been denied overtime".5/ Inasmuch as the current or instant record establishes that Respondent ignored such 80 percent standard in Group 350 for several years and instituted on November 26, 1990 a change in eligibility for overtime from 110 percent to 100 percent for Group 350 patent examiners, the General Counsel would find that an unlawful change occurred since it was instituted without prior notice and/or impact and implementation bargaining. Although not entirely clear from the record, it appears that the General Counsel, relying on the Ables decision, would find the change in productivity to be from 80 percent to 100 percent.

Respondent, on the other hand, takes the position that (1) the Smith memorandum did not constitute a change in Group 350's existing overtime policy which had been consistently followed from 1987 until the alleged change in November 1990, and (2) even assuming a change, there was no

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5/ According to the General Counsel, the findings of fact made by Arbitrator Ables are res judicata, and therefore are not litigable in the instant proceeding.

obligation to bargain over the impact and manner of implementation of the change since it did not adversely impact on the Group 350 unit employees but rather relaxed the eligibility standards then effect for working overtime.

Contrary to the position of the General Counsel, I can not find any persuasive authority for his position that the factual findings of Arbitrator Ables with respect to the productivity levels in existence throughout the PTO as of June 29, 1987 are "res judicata" and that I am therefore precluded from considering any factual evidence which might support conflicting or contrary conclusions as to the productivity standard for eligibility for overtime work in Group 350.

In Order, for the doctrine of res judicata to apply to any given situation it must be shown that the parties and the issues are the same and that the prior decision was final. Here we have different parties, a different art group and no final decision of the arbitrator. Accordingly, I reject the General Counsel's contention that I must be bound by the factual findings made by Arbitrator Ables in connection with the alleged changes made on January 29, 1987 in Art Unit 221 of Group 220.

With respect to Group 350 where the alleged change in conditions of employment occurred, the record establishes that on November 26, 1990 Mr. Smith, Director of Group 350, issued a memorandum to the SPE's wherein he set forth the "overtime eligibility" standards for FY 1991. The memorandum stated that overtime may be authorized up to 32 hours per pay period and that "the Group's overtime productivity policy of last fiscal year would remain in effect for FY 1991" with one exception, which would ease the productivity requirements for the first quarter.

The one and only exception allowed patent examiners who had not been previously eligible to work overtime because they were not working at 110 percent productivity, (the FY 1990 standard), to qualify for overtime in the first quarter of FY 1991 if they had attained at least 100 percent productivity for FY 1990. However, in order to continue to remain eligible for overtime work for the second quarter of FY 1991 they must have reached a cumulative average of 110 percent productivity for the entire first quarter.

The effect of the change, at least for the first quarter, was to allow those patent examiners who had a cumulative productivity average of between 100 percent and

110 percent during FY 1990 to become eligible for overtime work. Those patent examiners who had achieved the FY 1990 110 percent productivity standards, of course, still remained eligible for overtime work.

While Mr. Smith's memorandum is ambiguous with respect to whether the "32 hours per pay period" of overtime is for the entire unit or for each patent examiner, a reading of Respondent's Exhibit No. 5, paragraph 5, and Mr. Smith's credited testimony makes it clear that the "32 hours per pay period" was for each qualified patent examiner.

Accordingly, based upon the above considerations, as well as the existing prior practice, I find that the effect or reasonably forseeable effect of the change on conditions of employment on bargaining unit employees will be minimal since it will increase the chances of a number of unit employees, who were otherwise not eligible, to obtain overtime work while not decreasing the overtime work opportunities available to those employees who, on the basis of the prior existing standard, had already qualified for overtime work.

In view of the minimal impact upon the conditions of employment of the bargaining unit employees, I further find that the Respondent was not obligated to bargain with the Union in this matter and that by refusing and failing to do so the Respondent did not violate Section 7116(a)(1) and (5) of the Statute. Department of Health and Human Services, Social Security Administration, 24 FLRA 403.

Having found that the Respondent did not violate the Statute, it is hereby recommended that the Authority adopt the following order dismissing the Complaint in its entirety.

ORDER

It is hereby Ordered that the Complaint should be, and hereby is, dismissed in its entirety.

Issued, January 10, 1992, Washington, D.C.

Burton S. Sternburg

BURTON S. STERNBURG
Administrative Law Judge