

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: September 30, 2003

TO: The Federal Labor Relations Authority

FROM: ELI NASH
Chief Administrative Law Judge

SUBJECT: DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Respondent

AND

Case No. WA-CA-02-0145

NATIONAL TREASURY EMPLOYEES UNION

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

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

DEPARTMENT OF COMMERCE PATENT AND TRADEMARK OFFICE Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. WA-CA-02-0145

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 **NOVEMBER 3, 2003**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, N.W., Suite 201
Washington, DC 20424

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Judge

ELI NASH
Chief Administrative Law

Dated: September 30, 2003

Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF COMMERCE PATENT AND TRADEMARK OFFICE Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. WA-CA-02-0145

Thomas F. Bianco, Esquire
For the General Counsel

Sandra Humphries Riviears, Esquire
For the Charging Party

Susan Kane, Esquire
Caitlin Riley, Esquire
For the Respondent

Before: ELI NASH
Chief Administrative Law Judge

DECISION

Statement of the Case

On September 30, 2002, the Regional Director for the Washington Region of the Federal Labor Relations Authority (herein called the Authority), issued a Complaint and Notice of Hearing in the captioned matter. The complaint was amended on April 2, 2003. This proceeding was initiated by an unfair labor practice charge filed on December 6, 2001, by the National Treasury Employees Union (herein called the Union or NTEU). The Complaint, as amended, alleged that the Department of Commerce, Patent and Trademark Office (herein called PTO or Respondent) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (herein called the Statute) by implementing a change in the practice of assigning electronically filed trademark applications without providing the Union with prior notice and an opportunity to bargain. The amended complaint further alleges that the Respondent also violated section 7116(a)(1) and (5) by denying the Union's request to bargain over the assignment of the electronically filed applications.

A hearing was held in the captioned matter 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. The Respondent and the General Counsel submitted post hearing briefs which have been fully considered.

Findings of Fact

Background

The Union holds exclusive recognition for a bargaining unit that consists of trademark attorneys and the interlocutory attorneys employed by the PTO.

Trademark attorneys employed at PTO are responsible for reviewing applications that seek to register trademarks used or intended for use in commerce and determining whether registration should be granted. Trademarks consist of such things as names, words, symbols or designs used by providers to distinguish their “goods” and “services” from those of competitors. For purposes of trademark registration, goods and services are classified using 45 classes listed in the “International Schedule of Classes of Goods and Services.” Goods are placed in classes 1 through 34 and services are placed in classes 35 through 45.

Applications for trademark registration are usually filed with PTO by law firms, corporations, or individuals acting *pro se*. PTO does not require use of a particular format for applications; however, certain information and documents are required to be included in the application. Among other requirements, the application has to be signed and include certain declarations, a drawing of the trademark, and a “specimen,” which is an example of how the trademark is used.¹

The trademark component of PTO, which processes the applications, is organized into law offices consisting of approximately 25 trademark attorneys each. As to goods, most of the law offices are specialized as to subject areas and are assigned applications relating to the assigned subject areas and classes of goods. All law offices are, however, assigned all classes of services. Some law offices overlap insofar as the assignment of subject areas and goods classifications. There are circumstances in which an attorney in a law office may handle an application that involves classes not normally within the subject area of the law office to which he/she is assigned. For example, if an application involves multiple subject areas or classes, it is assigned to the law office to which the class having the lowest number would be assigned. Additionally, GS-14 trademark attorneys are considered to be legal experts in all international classes and are expected to handle applications in all classes where necessary to achieve balance “in new case pendency.” (Resp. Exh. 3 at 2)

The performance plan of trademark attorneys consists of five critical elements — “Production,” “Quality of Examination: Statutory Refusals,” “Quality of Examination: Practice and Procedure and Searching,” “Docket Management,”

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Although both depict the trademark, the drawing and specimen are separate items.

and “Organizational Effectiveness.” There are five levels of ratings for each element and the overall rating. With respect to the element “Production,” attorneys must achieve a specified number of “action” points per year in order to achieve different levels of ratings. The number of action points that must be achieved varies based on the grade of the attorney. For example, to receive a rating of fully successful, a GS-14 must have 1.3 action points per examining hour. To receive that same rating, a GS-11 must have 1.0 action points per examining hour. Action points are awarded when specified stages or events in the processing of an application are accomplished. More than one action point may be awarded during the processing of a single application.² Witnesses estimated that it was not unusual for a trademark attorney to process 2,000 applications in a year.³

For purposes of applying the two “quality” elements, supervisors in each law office review at least three applications assigned to each attorney on a monthly basis, evaluate them and determine the attorney’s quality ratings for that month.

Attorneys who are rated outstanding or commendable, the two highest ratings, can earn monetary awards based on the quality of their performance or their productivity.

Introduction of Trademark Electronic Application System

Historically, applications were submitted to PTO on paper. In 1997, however, PTO made the Trademark Electronic Application System (TEAS) available for use. TEAS provides applicants the option of submitting applications to PTO electronically using an on-line application form. Such applications are referred to as E-TEAS. TEAS also allows applicants to use the same on-line application form, but print it out and submit it in paper format in lieu of submitting it electronically. Those applications are referred to as Prin-TEAS. Once received by PTO, E-TEAS applications are printed out on paper prior to being assigned to a law office for examination. A summary sheet of data extracted from the application is also prepared and included with the printed copy of the E-TEAS application that is provided the examiner. Thus, the examiner is provided a hard copy of the application to work with and is not required to work with the application in electronic form.

When TEAS was first introduced, applications filed under that system were assigned to the law office having responsibility for the subject matter or class involved in the particular application. That is, they were assigned like any other

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Under the performance system that applies to trademark attorneys, one action point is awarded for the following: first actions (initial examination); final actions (during initial examination and after the filing of a statement of use); approvals for publication (unless a final credit has already been taken); and abandonments (during initial examination only). One-half action point is awarded for the following: first actions denying amendment to allege use; first actions denying statement of use; and approvals of statement of use.

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Another figure cited by witnesses as likely was 1600 applications per year.

application. In May 2000, PTO and NTEU entered into an agreement to conduct an E-Commerce Law Office Pilot Program. The purposes of the pilot program as set forth in the agreement were: to encourage the electronic filing of applications; to develop procedures for processing and examining applications filed electronically; to optimize use of technology; and to improve pendency. The pilot program was to begin no later than October 1, 2000, and its stated duration was until September 30, 2001. Under the agreement, a decision on whether the pilot would continue or be modified would be made no later than September 30, 2001.

Under the pilot program, two law offices became the E-Commerce law offices. Attorneys assigned to the E-Commerce offices were required to examine all classes of goods and services and were expected to communicate with applicants via e-mail. Attorneys participating in the pilot program were given a 10% production adjustment.⁴

On or about August 1, 2000, law offices 102 and 112 began functioning as the E-Commerce offices under the pilot program. At that point, all E-TEAS applications were funneled to those two offices. Prin-TEAS applications, however, continued to be assigned to the various law offices based on subject matter and class. When the number of E-TEAS applications exceeded the ability of those two offices to handle, a third office—law office 110—was designated as an E-Commerce office in January 2001. The influx of E-TEAS continued to grow and PTO attempted to establish a fourth E-Commerce office but couldn't reach agreement with NTEU concerning the matter.

Transfer of E-TEAS applications to non-E-Commerce law offices

By e-mail dated June 8, 2001, Deborah Cohn, the Group Director for the Trademark Law Offices, informed Howard Friedman, the President of NTEU Chapter 245, that PTO would be transferring some TEAS applications from the E-Commerce docket to the dockets of the non-E-Commerce law offices. In the e-mail, Cohn cited the increasing backlog of TEAS filings as the reason for this action. Cohn also stated that all TEAS files transferred would be for classes that were normally handled by the receiving law office. At the hearing, Cohn testified that the four offices, 101, 104, 111 and 114, chosen as recipients of the transferred cases were running low on their regular filings.

Thomas Shaw, the managing attorney for law office 102, testified that he gave a list of the classes of goods that those four offices normally examined to his docket clerks with instructions to pull applications involving those classes and

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One witness who was involved in the development of the pilot program testified that the reasons for this production adjustment were concerns that productivity would decline as a consequence of (1) employees handling classes of goods that they hadn't previously handled, (2) employees using electronic communications to an extent that they hadn't before, and (3) growing pains that people were going to have to go through. Another witness testified that the reason for the production adjustment was to induce employees to test some of the technology involved in processing the E-TEAS applications.

transfer them to the appropriate law office.⁵ Several thousand E-TEAS applications were transferred to non-E-Commerce law offices during the period June 2001 through December 2001.⁶

By letter dated July 9, 2001, Friedman requested to bargain concerning the assignment of the E-TEAS applications to the four non-E-Commerce offices. By memorandum dated August 6, 2001, an agency representative responded asserting that the agency had no duty to bargain.

The E-Commerce Pilot Program terminated in October 2002. On its termination, E-TEAS applications were assigned throughout the trademark law offices in PTO.

Effect of the transfer of E-TEAS applications on examiners

Employees in the receiving non-E-Commerce offices were instructed to examine the E-TEAS applications in the same manner as other applications. There were conflicting views offered at the hearing on whether E-TEAS applications are harder to work on than traditional paper applications.

Julie Watson, an employee in one of the receiving law offices, stated that she was assigned approximately 65 to 70 E-TEAS applications during the period June through September 2001. Watson estimated that it took her, on average, 5 minutes longer to process an E-TEAS application.⁷ Watson cited several factors responsible for the difference in processing time. One was that *pro se* applicants, whose skill levels are often less than those demonstrated by law firms and corporations, tend to use E-TEAS and *pro se* applications that are more likely to present greater problems in examination.⁸ Watson also asserted that the format of TEAS applications was different from what she was used to seeing and that the difference in format by itself complicated matters. Also, the summary sheet that was attached to the

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Shaw acknowledged that he did not personally oversee the work of the docket clerk but assumed that his instructions were followed. Shaw described pulling the files as a very labor intensive operation.

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The transfer of E-TEAS applications to non-E-Commerce law offices continued after December 2001.

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Watson also testified that it took her an average of approximately 3 to 5 minutes longer to examine a Prin-TEAS application than a paper application. Although Watson could not confidently provide a reliable estimate regarding what portion of her work involved Prin-TEAS applications, she thought that such applications amounted to maybe 5 to 10 percent of her assignments during 2001.

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Watson began working at PTO in August 1998—after TEAS was implemented. Consequently, her testimony is not helpful in establishing whether the number of applicants filing *pro se* increased after the introduction of TEAS. Thus, it is unclear whether TEAS encouraged more *pro se* applicants to file applications or simply induced *pro se* applicants to shift from using traditional paper applications to TEAS. It appears, however, that some paper applications continued to be filed by *pro se* applicants after the introduction of TEAS.

application resulted in additional work because it had to be marked designating which of the information contained on it should appear on the registration and which should not.

Although the employees in the non-E-Commerce law offices were not required to use e-mail to communicate with applicants, Watson stated that some applicants filing E-TEAS applications failed to provide a telephone number. Another factor cited by Watson that made E-TEAS applications more difficult was that E-TEAS applications were not accompanied by a real specimen but rather by a scanned copy of the specimen.⁹ Watson asserted that at times it was difficult to distinguish between the drawing and the copy of the specimen. According to Watson, she could be hurt on her quality review if in performing an examination she confused the drawing and the specimen. Additionally, Watson asserted that the scanned copy of the specimen could at times be hard to read. Watson testified that in her experience her supervisors did not have the ability to answer questions about electronic filings and would refer her to one of the E-Commerce offices. Watson also stated that approximately 27-28 of the 65-70 E-TEAS applications she was assigned to involved class 9 goods—a computer goods classification. Although Watson had received training in class 9 prior to June 2001, she did not frequently receive many applications involving that class.¹⁰ Watson stated that class 9 tended to be more difficult to examine than other classes.

Watson's rating in her production element during the rating year of 2001 was outstanding and she received a number of awards that were based on her performance during that year.

Marlene Bell, an examiner assigned to law office 105, testified that prior to November 2002 she examined eight E-TEAS applications. Bell estimated that it took her an average of 5 minutes longer to examine an E-TEAS application. Reasons for this that Bell cited were difficulties in understanding what the specimen represented and the need to mark the material on the summary sheets with notations identifying which material should be included on the registration and which should not.

Supervisory employees who testified at the hearing were of the view that the TEAS applications took less time to process than paper applications. Shaw testified that the potential for flaws in E-TEAS applications is reduced by a validation feature that operates to ensure that entries are made in all necessary fields. Shaw acknowledged, however, that the validation feature does not ensure that adequate information is placed in the field but only that some information is entered. Shaw cited the uniformity in the lay-out and content of the E-TEAS applications as an advantage that promoted efficiency. Shaw asserted that

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Watson testified that “maybe” 10 percent of paper use-based applications did not include the actual specimen. (Tr. 180)

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Watson also stated that everyone received training in class 9 because the tremendous number of class 9 filings produced the need to distribute them among the various law offices.

applications filed by law firms could be very wordy and that law firms were free to come up with their own forms. Shaw also felt that the summary sheet was an aid in examining the E-TEAS applications.

Christopher Doninger, the senior supervisory attorney in law office 105, testified that in his experience, other things being equal, E-TEAS applications were less difficult to examine than other types of applications. One advantage that Doninger saw in the E-TEAS applications was the fact that certain required declarations were set forth in a uniform manner and, unlike paper applications, the examiner did not have to search through the application to ensure that all the necessary declarations were present.

Analysis and Conclusions

The Positions of the Parties

The General Counsel

The General Counsel alleges that the Respondent violated section 7116(a) (1) and (5) by failing to provide NTEU an opportunity to bargain prior to assigning E-TEAS applications to employees in non-E-Commerce offices and by failing to engage in post-implementation bargaining when requested to do so by NTEU.

The General Counsel contends that the assignment of the E-TEAS applications to non-E-Commerce offices that began in June 2001 constituted a change in conditions of employment of bargaining unit employees that was more than *de minimis*.¹¹ The General Counsel argues that although E-TEAS applications were assigned throughout the law offices in PTO at an earlier point, that practice ceased in the summer of 2000 and was supplanted by a practice of assigning E-TEAS applications exclusively to the E-Commerce offices. The General Counsel asserts that this latter constituted the established practice when the Respondent began assigning E-TEAS applications to non-E-Commerce offices beginning in June 2001. The General Counsel argues that despite Respondent's instructions to employees to examine E-TEAS applications in the same manner as other applications, the differences between E-TEAS and other types of applications resulted in additional burdens on the employees in the non-E-Commerce offices and amounted to a change in their working conditions.

In support of its claim that the change in conditions of employment had more than a *de minimis* impact on employees, the General Counsel contends that the assignment of E-TEAS applications to examiners in non-E-Commerce offices affected them adversely with respect to productivity awards. According to the General Counsel's computations of the additional time required to process E-TEAS applications, hypothetical examiners were denied the opportunity to open 6-9 new trademark applications during one-half of the appraisal year. The General Counsel contends that since productivity awards are based on the number of action points accumulated during a 6-month period, a likely

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The General Counsel does not dispute that the Respondent was engaged in an exercise of management's right to assign work when it assigned the E-TEAS applications to the four non-E-Commerce offices.

consequence of the additional time absorbed by the E-TEAS applications was that some examiners suffered a loss of income as a result of reduced productivity awards. The General Counsel also argues that the additional time demands of the E-TEAS applications also adversely affected performance appraisals by reducing the number of action points that an examiner could earn during the appraisal period.

The General Counsel contends that Respondent failed in its statutory obligation to provide the Union an opportunity to bargain over the change prior to effecting the change. The General Counsel asserts that the Respondent also had the obligation to engage in post-implementation bargaining on request of the Union and that it failed to meet that obligation as well.

As a remedy, the General Counsel requests a general cease and desist order limited to conduct that is like that involved in this case.¹² The General Counsel also requests that a notice to employees be posted throughout the buildings occupied by PTO employees and signed by the Commissioner of PTO. The General Counsel further requests that employees be made whole for any losses suffered with respect to monetary awards. As an alternative to a make-whole remedy, the General Counsel requests that a retroactive bargaining order be issued.

The Respondent

The Respondent contends that it did not change conditions of employment when it assigned E-TEAS cases to non-E-Commerce offices. Respondent asserts that employees examined E-TEAS applications for 2½ years prior to the creation of the E-Commerce offices and that there was only a limited period of time during which the E-TEAS applications were not assigned to employees in law offices 101, 104, 111 and 114. Additionally, Respondent contends that when assignment of E-TEAS applications to those four offices resumed, the assignments were done in the same manner as other applications and as prior to the institution of the E-Commerce offices. Moreover, Respondent asserts that E-TEAS applications were printed on paper, examined in the same manner as other applications and did not constitute an extra assignment to the examiners in the four offices.

Respondent argues that even assuming that the assignment constituted a change in conditions of employment, the impact of the change was no more than *de minimis* and that the working conditions of the examiners in the four offices remained the same before and after they received E-TEAS applications to examine. In support of its *de minimis* argument, the Respondent reiterates many of the same assertions set forth immediately above. The Respondent also contends that E-TEAS applications are subject to the same procedural and substantive rules as other applications and have the same format as Prin-TEAS applications, which have consistently been assigned to employees in the four offices. The Respondent argues that the average number of E-TEAS

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The General Counsel states that there is no need for an order requiring the Respondent to cease and desist from assigning E-TEAS applications to any examiners because the parties have reached an agreement on the subject.

applications assigned to employees in the four offices was low relative to the number of applications normally assigned to employees.¹³

The Respondent contends that the E-TEAS format and process has beneficial features such as uniformity and assistance to filers that could reasonably be expected to facilitate examination. Respondent asserts that there is no evidence that employees in the four offices complained of adverse effects.

The Respondent argues that the testimony of Watson should not be credited because her demeanor was poor and a number of her statements were improbable and misleading.

In conclusion, the Respondent contends that it had no obligation to bargain over the assignment of E-TEAS applications to the non-E-Commerce offices and did not violate the Statute.

Prior to implementing a change in conditions of employment of bargaining unit employees, an agency generally is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *See, e.g., Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 55 FLRA 848, 852 (1999) (*FCI, Bastrop*). With limited exceptions, parties must satisfy their mutual obligation to bargain before changes in conditions of employment are implemented. *See, e.g., id.* Where a change in a condition of employment entails the exercise of a management right under section 7106 of the Statute, the agency has a statutory obligation to bargain concerning the impact and implementation of such change but only if the change would result in an impact on employees that is more than *de minimis* in nature. *See, e.g., id.*

In this case, it is undisputed that the assignment of the E-TEAS applications to the non-E-Commerce offices constituted the exercise of management rights under section 7106 of the Statute.

Respondent's action constituted a change in conditions of employment

Based on the evidence, I find that beginning in August 2000, the Respondent ceased assigning E-TEAS applications to law offices in general and began assigning them exclusively to the E-Commerce offices. This practice was in effect and consistently exercised for approximately 10 months when in June of 2001, the Respondent began assigning E-TEAS applications to some non-E-Commerce offices. I find that the practice of assigning E-TEAS applications exclusively to E-Commerce offices was consistently exercised over a significant period of time and followed by both parties. Consequently, it amounted to an established practice. *See, U.S. Department of the Navy, Naval Avionics Center,*

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In making this argument, the Respondent identifies the average number of E-TEAS applications as 70 and the comparison figure as 1600-2000 cases per year. It must be remembered that the figure of 70 applies to a period of only between 3 and 4 months and, consequently, it is somewhat misleading to suggest that the proper comparison is with figures that apply to the entire year.

Indianapolis, Indiana, 36 FLRA 567, 572 (1990) (consistent practice extending at least 6 months constituted an established practice).

I recognize that the practice of assigning E-TEAS applications exclusively to E-Commerce offices was done in the context of a pilot program and there was no assurance that the practices adopted during the pilot program would become permanent. The tentative nature of the pilot program does not change the fact that for the duration of that program the prior practice insofar as the assignment of E-TEAS applications had been replaced with a different practice. Moreover, there was no certainty regarding what would happen when the pilot program reached the end of its term; that is, whether it would be extended, modified or terminated and, in the event that the last occurred, what would replace the pilot program. The agreement reached by the parties indicates that whatever occurred at the end of the pilot program was to be subject to consultation and/or negotiation between the parties. Thus, it remains that the prior practice of assigning E-TEAS applications to non-E-Commerce offices was replaced by a new practice, albeit one with an uncertain future, and there was no certainty that the prior practice would be reinstated in the event that the newer practice was terminated.

I find that Respondent's action in June 2001 of assigning E-TEAS applications to non-E-Commerce offices constituted a change in conditions of employment of bargaining unit employees.

The effect of the change on bargaining unit employees was de minimis

In determining whether the effect of a change in conditions of employment is more than *de minimis*, the Authority looks to the nature and extent of either the effect or the reasonably foreseeable effect of the change on bargaining unit employees' conditions of employment. See, e.g., *U.S. Department of the Treasury, Internal Revenue Service*, 56 FLRA 906, 913 (2000).

It is undisputed that both types of TEAS applications as well as the traditional paper applications were subject to the same substantive and procedural requirements for processing. It is also undisputed that in all types of applications, the examiner was provided a hard copy of the application. The effects of the assignment of E-TEAS applications to non-E-Commerce offices that the General Counsel cites flow almost exclusively from differences in the materials that employees assigned to E-TEAS applications had to work with. The record established that there were indeed differences in the materials involved in E-TEAS applications as contrasted with both traditional paper applications and Prin-TEAS applications. The E-TEAS applications that were provided to the employees assigned to process them differed in format and content from the traditional paper applications. The E-TEAS applications had a uniform format, while the traditional paper applications did not. The E-TEAS applications were accompanied by a scanned copy of the specimen, while the traditional paper applications were usually accompanied by an actual specimen.¹⁴ Although the

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An exception occurred where the specimen was too large or bulky to be placed in the file forwarded to the employee.

E-TEAS applications shared a common format with the Prin-TEAS applications, they differed from the Prin-TEAS applications with respect to accompanying material. Specifically, the Prin-TEAS application material that was provided the employee to work with was more likely to include an actual specimen as contrasted with a scanned or other type of copy. Unlike both the traditional paper applications and Prin-TEAS applications, the materials relating to E-TEAS applications that were provided the employee included a summary sheet.

There were differing views as to whether the E-TEAS applications were more time-consuming or otherwise difficult to work with than the other types of applications, particularly the traditional paper application. The witnesses who testified about this matter did not offer any evidence to show that they actually kept track of the time spent working on individual applications. Thus, it appeared that they were giving general impressions and guesstimates. It is probable that different employees had different experiences with respect to the different types of applications. Those experiences may have been driven by the individual circumstances involved in individual applications and the personal proclivities of the individual. Thus, although one would normally expect that the uniformity afforded by the TEAS applications would promote speed and efficiency, I cannot totally discount Watson's view that adapting to the TEAS format was difficult for her. Nevertheless, I find Watson's claim that the different format presented difficulty for her implausible and probably not representative of the experience of many other employees in view of the fact that the format of the E-TEAS applications was not new to employees in the non-E-Commerce offices. This is because applications using the TEAS format were distributed to all employees during the period running from the introduction of TEAS in 1997 until the introduction of the pilot program in August 2000. Moreover, even after the pilot program commenced, Prin-TEAS applications, which used the TEAS format, continued to be distributed to all employees. Additionally, I find her claim that the traditional paper applications tended to have a uniform format unconvincing. In the absence of any requirement that a form be used, I find it hard to believe that the myriad applicants filing paper applications used the same format. Even if they did, the presence of a second uniform format does not strike me as particularly burdensome when applicants were held to the same substantive and procedural requirements regardless of the format used.

Regarding testimony that the use of a scanned copy of the specimen complicated matters, it appears that the reason for this was occasional difficulty reading the scanned copy and the possibility of confusing the two and treating one as the other. While these problems may have existed, I am not convinced that they were present in every E-TEAS application. Moreover, testimony shows that the absence of a "real" specimen was not unique to E-TEAS applications.

Even accepting Watson and Bell's estimate that E-TEAS applications, on average, took 5 minutes longer to process than traditional paper applications, there is no evidence that E-TEAS applications amounted to more than a small percentage of the work load of non-E-Commerce office examiners. Watson estimated that she processed 65-70 E-TEAS applications during the period June 2001 through September 2001. Computing this period as 30 percent of the year and her yearly production as 1600-2000 cases, the

E-TEAS applications would represent approximately 11-15 percent of the total applications she worked on.

The General Counsel asserts that if the 5 minute average increase in processing time is applied across those non-E-Commerce offices to which E-TEAS applications were transferred it is possible that the extra time spent on E-TEAS applications cost some employees the ability to earn more action points and by extension award money. The General Counsel's theory assumes that employees would have used the time to do work that would have earned them action points rather than do other work or activities. It also assumes that any action points earned would have been sufficient to make a difference in the amount of award money that they received. Significantly, there was no evidence submitted that Watson or any non-E-Commerce employee actually suffered a loss of award money because of being assigned E-TEAS applications.

The evidence as a whole shows that the E-TEAS cases transferred to the four non-E-Commerce law offices concerned the classes normally assigned to the receiving office. As shown in Cohn's e-mail of June 8, 2001, this was the expressed intention of the Respondent from the outset. I found both Watson's testimony that a substantial percentage of the E-TEAS applications assigned to her involved class 9, a class not assigned to her law office, and Shaw's testimony that he instructed the docket clerks to pull and transfer E-TEAS cases that matched the normal class assignments of the recipient offices credible. I do not find the apparent differences in their testimony necessarily irreconcilable. I think that it is possible that to some extent clerical errors occurred that may account for Watson receiving applications involving class 9. Also, Watson's testimony that everyone received training in class 9 because the tremendous number of class 9 filings produced the need to distribute them among the various law offices suggests that her receipt of the class 9 applications may have been the result of factors independent of the change cited in the complaint in this case.

On the whole, I find that the work that the employees in the four non-E-Commerce offices did with respect to the transferred E-TEAS applications was not significantly different from what they did with respect to non-E-TEAS applications. Additionally, the E-TEAS applications were not entirely new to them as that type of application had in the not too distant past been assigned to the four offices as well as the other law offices at PTO.

Another point that bears on assessing the impact of the change on employees is the duration of the practice of assigning E-TEAS applications to non-E-Commerce offices in lieu of E-Commerce offices. Given the indefinite nature of the pilot program, it cannot be said that the practice of transferring the E-TEAS cases to the non-E-Commerce from the E-Commerce offices was ever a permanent arrangement. In fact, it effectively ended in October 2002 when the pilot project ended and the Respondent resumed assigning E-TEAS applications to all of its law offices.

Having considered the nature and extent of the effect of the assignment of the E-TEAS applications to the four non-E-Commerce offices on bargaining unit employees, I find that the effect on their conditions of employment was *de minimis*. Compare *Social Security Administration, Malden District Office*,

Malden, Massachusetts, 54 FLRA 531, 536-37 (1998) (reassignment of duties was more than *de minimis* in circumstances where tasks involved would take employee approximately 10 minutes per case to perform, each employee would have 1-2 cases per day to process and the tasks had never before been performed by the employees) *with Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 408-09 (1986) (reassignment of employee was *de minimis* in circumstances where there was no change in pay or hours, the employee was reassigned to a position she previously held, the duties of the reassigned employee remained substantially similar, and there was minimal effect on other employees).

Because the effect of the change instituted in the October 2001 Directive was no more than *de minimis*, the Respondent had no obligation to afford the Union notice and an opportunity to bargain and, therefore, did not violate section 7116(a)(1) and (5) of the Statute.

Based on all of the above, it is recommended that the Authority adopt the following:

ORDER

It is hereby ordered that the Complaint in WA-CA-02-0145, be and it, hereby is, dismissed in its entirety.

Issued, Washington, DC, September 30, 2003.

NASH

Chief Administrative Law Judge

ELI

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, Chief Administrative Law Judge, in Case No. WA-CA-02-0145, were sent to the following parties in the manner indicated:

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Dated: September 30, 2003
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