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USPTO "Fighting" for Better Pay is More Like Shadowboxing

During a Sept. 12 online chat with employees, USPTO Director James Rogan stated that the agency has been, and will continue, fighting for greater pay for employees. That very afternoon, USPTO representatives said the agency would not consider granting even the 1.17 percent increase required by the Millennium Agreement unless employees agree to do more in return.

The following exchange was included in Rogan's online chat that day:

> *Good Examiner:* How about the idea of giving the examiners a raise so that retention of good examiners increases? ...Will you fight for us so that our hard work and dedication are compensated?
> *Jim Rogan:* Last year we requested and got approval from OPM for a 10 percent across-the-board special pay raise for patent professionals. This has, in fact, helped us to reduce our attrition rate. We requested an increase to cover approximately the locality pay, but because attrition has decreased, OPM denied this request. We have been fighting to obtain higher levels of compensation for our dedicated employees, and will keep doing so.

However, that afternoon USPTO representatives told POPA that Nick Godici and Esther Kepplinger had said that the USPTO's only obligation was to meet with POPA and discuss alternatives, but any alternative would require an additional quid pro quo. In other words, the POPA bargaining unit would have to "do something extra" in exchange for the 1.17 percent differential, over and above POPA's com-

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Work at Home: From Bad to Worse

The most recent USPTO proposal for a Work at Home program is substantially worse than the one offered when the agency shut down the negotiated ongoing program in July.

The proposal, delivered to POPA Sept. 4, withdraws all employee home-based technology assistance, including all agency-supplied hardware and software. It also severely restricts the participants' work schedules, dictating that participants work at their USPTO office during specified hours and prohibiting the use of comp time during those hours. Moreover, it allows the agency to terminate the program unilaterally at will.

The agency's previous, first offer outlined three levels of participation: Level 1 participants, who already have agency-supplied hardware that the USPTO now wants to take back claiming too-costly maintenance; Level 2 participants, who had agency software only; Level 3 participants, who received no additional assistance. The current, second offer effectively knocks all participants down to Level 3.

For Level 1, the USPTO says that the agency hardware and software is too expensive to support at home and plans to remove it. For Level 2, the agency won't agree to return the software programs that

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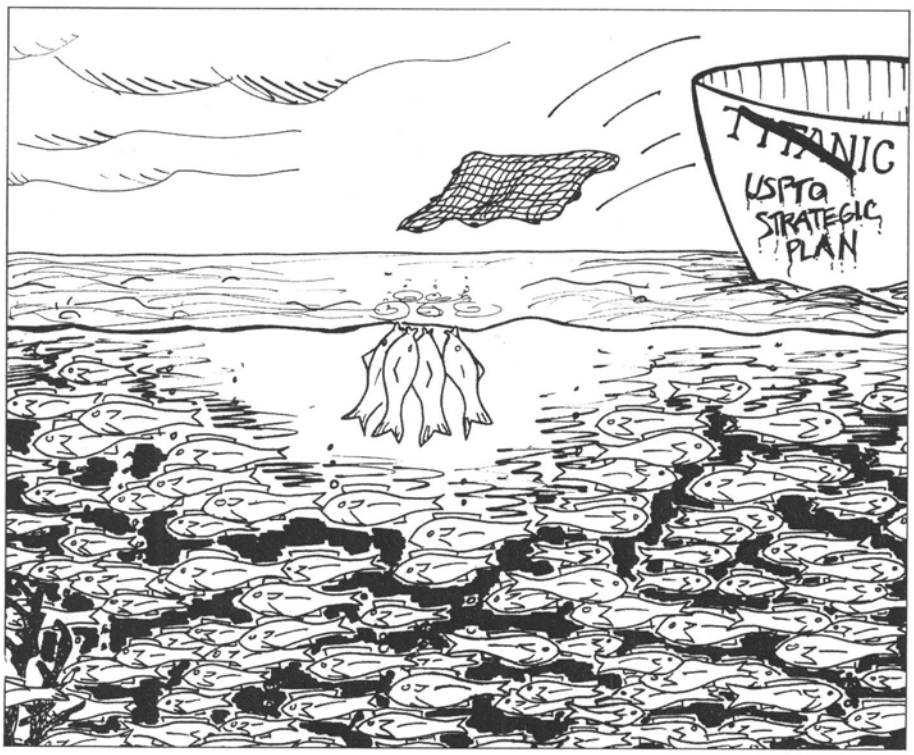

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The USPTO casting a "wide net" to capture employee input.

USPTO "Fighting" for Better Pay

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promises in the Millennium Agreement. The agency representatives offered no concrete proposals of what they would find acceptable. They said they were not interested in just giving away the money for work done today.

The agency not only has the flexibility but the obligation under the Millennium Agreement to pay employees more, yet it has refused to do so.

POPA's standing proposal is for a 1.17 percent performance award to all employees who were rated fully successful or better. This action is legal under OPM regulations and within USPTO's full discretion. The agency even certified to OPM that it had the money available in the FY2002 budget.

The agency representatives said they would consider a quality award tied to the Strategic Plan for additional work done in FY '03, to be paid out in '04, but work now considered outstanding would not qualify for an award. More work would be required.

POPA said employees would be interested in a quality award, but not as meeting the obligation required in provision A2 of the Millennium Agreement.

Provision A2 states:

> "The USPTO shall request OPM approval for the next five years to increase the special pay schedule so as to maintain the 10 percent and 15 percent salary differentials relative to the updated GS rates, in a manner consistent with OPM regulations. If OPM refuses the request, the Agency shall enter into discussions with POPA in order to provide substantially equivalent alternatives."

OPM did not approve the USPTO's request for the salary increase to maintain the differential. Consequently, per the agreement, POPA and the agency were to meet and discuss ways to provide the 1.17 percent differential. POPA and the agency had a clear understanding at the Millennium Agreement negotiating table that the parties would find a way to give everyone in the bargaining unit an increase equivalent to the locality increase given to other federal employees each year. Some suggestions to explore included general retention bonuses, awards, etc.

POPA has filed a grievance to compel the USPTO to uphold the pay increase as mandated by the Millennium Agreement.

Leave Donations Needed

Primary Examiner Bob Budens (in Art Unit 1648) ran out of leave after extensive care for his ailing mother. He's now experiencing problems due to diabetes and is in need of leave.

For a leave donation form, please go to the USPTO employee Web site or call James Housel at 308-4027.

Speaking Out on Pay

The following is a letter shared with POPA from an employee to USPTO administrators:

Dear Sirs:

I am writing to express my discontent with the current situation.

....Provision A2 says, ". . . in order to provide substantially equivalent alternatives.". ... The discussions [with POPA} are just an explanation of HOW management will go about making such provisions. It would be one thing for management to try to weasel their way out of an obligation to follow the "spirit" of the agreement, but this is just a case of management acting in direct contradiction to the "letter" of the agreement.

...Management's excuse regarding many issues has been, "Congress won't approve it." However, in this case, all the power rests with management, and they cannot be rescued by the Congress excuse.

The aim of this agreement to promote employee retention will suffer greatly when employees see that within 5-7 years their "special pay scale" will have essentially been whittled down to nearly nothing over and above the regular government pay scale. I would have a hard time justifying staying at the PTO if my weighted pay were CUT by ~1.25 percent year after year....

In light of management's strategic plan to require agent testing to make GS-13 and recertification for primary examiners, it seems like the LEAST management could do is to adhere to the agreement already established and not allow it to diminish in value over a mere half-decade.

It is my sincere hope that management will enter more positive discussions with POPA, and that they will actually PROVIDE alternatives to the locality pay, as set forth in the agreement....

Lawsuit Challenges Paper File Destruction

The National Intellectual Property Researchers Association (NIPRA) filed suit in late August to block the planned USPTO elimination of the paper patent files.

"NIPRA members work every day on the cutting edge of technological change, so we fully understand and support the PTO's eventual goal of a paperless system," said NIPRA President James Cottone. "However, the abrupt elimination of the PTO's well-maintained and reliable paper collection makes no sense at this time, given the many bugs remaining in the database."

NIPRA filed a request in early September for a preliminary injunction to halt the planned file destruction. Attorneys for NIPRA and the USPTO have agreed to suspend the paper patent file elimination and further legal action pending the outcome of the first hearing on the case, scheduled for early December.

Seeking Nominations for 2002 POPA Elections

Nominations open October 15 for the 2002 election of Executive Committee Officers and Delegates who will assume office during the POPA Annual Meeting in December. Completed nominating petitions will be accepted from October 15 up until **12 Noon** on October 28. The elections will be held November 20 and 21.

Pursuant to Articles VII and IX of the POPA Constitution, the following Officers will be elected from the membership at large: President, Vice President, Secretary, Assistant Secretary, and Treasurer.

In addition, the number of Area Delegates from the four designated office areas were reapportioned by vote of the POPA Executive Committee in September. The apportionment is designed to equalize the voting power of members in each office area, creating an almost uniform ratio of members to delegates for all areas.

All non-managerial patent professionals are members of POPA's bargaining unit. POPA delegate apportionment is based only on the number of dues-paying members in each office area, not on bargaining unit size.

One of the benefits of paying POPA dues is that you get a voice in POPA's organization and a vote in POPA's elections.

Delegates from the four office areas will be elected as follows:

- 9 Delegates from the Chemical Area
- 11 Delegates from the Electrical Area
- 6 Delegates from the Mechanical Area
- 2 Delegates from Designs, Business Methods, Computer Scientists and other areas combined

How to Nominate a Candidate

Nominations for an Officer shall be by petition stating the position sought, signifying the nominee's willingness to serve, and signed by at least 15 dues-paying POPA members.

Nominations for an Area Delegate shall be by petition stating the organization area to be represented, signifying the nominee's willingness to serve, and signed by at least 5 dues-paying members from that same organizational area.

For either type of nominating petition, nominees should obtain in excess of the minimum number of signatures in the event one or more signatures are disqualified for not belonging to dues-paying members.

If you wish to vote in the election and are not now a member, you may contact any POPA representative or the Election Committee Co-chairs listed below for a dues deduction form or download the form from www.popa.org. To vote, return completed dues deduction forms to one of the Election Committee members listed below prior to November 20. To nominate someone or to be nominated, return the dues deduction form prior to noon on October 28.

For nominating petitions contact:

Celia Murphy, co-chair, CM1-4A09, 305-3114
Joel Sincavage, co-chair, CM1-4B05, 305-3108
Runa Qaderi, CP2-4C12, 308-8155
Bruce Hess, CP3-11D31, 308-2402
Evelyn Lester, CP4-7D11, 308-4943
Diane Mizrahi, PK2-4D32, 305-3806
John Jillions, PK5-5D14, 308-2685

Latest Work at Home Proposal

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have worked well and without problems for employees at home. Requiring employees to return materials that work is not cost effective. The agency also hasn't provided any data on the actual costs of maintaining hardware and software to support its claims.

The agency now wants assurances that lots of bargaining unit employees will be at the office to answer customer questions. It's requiring Work at Home employees to be at the office at certain times, essentially forcing them off the maxiflex program and into the office three weekdays every week. The new proposal would also let employees use their comp time only during times they are not required to be on site.

The agency has presented no data to support its new-found focus on office coverage. The ability to answer external and internal customer questions has not been deemed important enough to offer non-examining time to employees to perform that duty. Supervisors and managers are not required to be available during those hours, and who is better to answer thorny customer concerns? In addition, demanding continued in-office time during core business hours defeats a large part of the congressional intent behind telecommuting, namely to reduce the traffic crush during peak hours.

In its most recent proposal the USPTO also intends to bar from Work at Home the 37 employees who had participated in the program and who the agency says did not return all Work at Home materials "timely," per the agency's narrow definition. Most of the "materials" were CD ROMs of installation programs that are not being reused by the agency. One employee reported that when he returned the CD it was tossed in the trash in front of him. This group of the most senior employees represents more than one-tenth of the previous Work at Home participants. Employees affected by this unnecessarily punitive measure may call Pam Schwartz at 308-2424 to discuss their situations.

The USPTO has since walked away from the Work at Home negotiating table. POPA hopes to continue discussions with the agency and a mediator from the Federal Mediation and Conciliation Service sometime in October.

Talk of the Town Hall: Responses to Director Rogan's Speeches

USPTO Director James Rogan delivered his September "town hall" speeches on his 21st Century Strategic Plan to approximately 2,400 of the almost 7,000 USPTO employees. To try to reach the remaining majority of employees, a transcript of one of Rogan's speeches was placed on the USPTO intranet site. However, the agency left off of its site all employee questions and the statements by employee organization representatives, which contained vivid criticisms. And while Rogan's transcript noted "[Laughter]" by the audience, it notably excluded the audience boos.

During the speeches, Rogan attempted to justify the strategic plan as the result of "input" from examiners and a "mandate" from Congress. He avoided explaining the need for examiner recertification.

Selective "Input" on Plan

Rogan claimed that he sought "wide" input from employees on developing the strategic plan. Of the strategic plan work group he said, "It started with a half a dozen, and it expanded to a couple of dozen, and I told them cast your net as wide as possible."

Strangely, the net missed any union representatives.

Rogan often mentioned during his speeches that he is a former elected representative of the U.S. Congress. POPA is the current official elected representative of USPTO patent professionals. Just as Rogan was expected, and respected, by the administration and Congress to represent the views of his constituents, so does POPA deserve the same expectation and respect from the Rogan administration.

But Rogan said he *did* hear from examiners. "Examiners started sending input to me," said Rogan in his speech. Examiners did not have any opportunity to give the hand-picked work group input. They did not get to comment on any of the proposals before they were presented as a done deal. And to the best of employees' knowledge, the strategic plan has not been changed at all as a result of subsequent employee input.

While Rogan touted the wide examiner input to the plan, the manager in charge of the strategic plan development said otherwise. Brad Huther, characterized by Rogan at the town hall meeting as someone who "could separate truth from fiction," in writing to POPA stated that there were about "ten e-mails from employees to Jim Rogan" in reaction to the new plan. *(continued on page 5)*

Town Hall Questions & Comments

The following are excerpts from letters shared with POPA.

Director Rogan:

Why not try a pilot program for outsourcing the patent searches before changing it for the entire office? Wouldn't a small size study be better than realizing 5 years later that outsourcing has reduced quality?

Once outsourcing begins, what are you going to do when the examiners find that they consistently get poor searches with wrong art being applied to the claims? What level of quality of outsourced searches is good enough for the office?

What is the total number of people who worked in the strategic plan work group, the number of current examiners included in the work group, and when was the last time a person in the work group examined a patent application?

You noted in the town hall meeting that management had to "quickly" produce the strategic plan to meet the deadline for the budget. Why is management willing to risk/erase over 200 years of quality examination at the patent office by outsourcing searches on a "quickly" produced plan?

Why does management have a "town hall" meeting and only give examiners a 24 hour notice and allow examiners only 5 minutes for questions? If management truly wants input from the employees, please be more open and allow more time for public discussion about matters that affect the employees, the public and the patent system.

* * *

After you've done this job for sometimes as long as 30 years, having to prove that you're competent isn't just a hassle, it's insulting.

Depending on just how "rigorous" the competency certification program is, a significant number of these examiners could decide that it's time to turn in their last yellow folder and retire. That number may be as high as 10 percent of the examiner workforce.

I wonder if Director Rogan realizes that the immediate effect of [outsourcing] will be to create a vibrant and profitable community of private commercial entities competing directly with the USPTO for examiners.

Three hundred fifty thousand searches a year at approximately $500 per search comes out to a cool $175 million per year of inventor money, gushing into the private sector like oil into Jed Clampet's backyard. Who [but a patent examiner] is really competent to train non-examiners to do searches? Who else really understands how the searches will be used well enough to manage the process? How much money is that kind of experience worth in the private sector?

Okay, so how many more people are we talking about now? Another 5 or 10 percent? 20 percent total? And how does the USPTO intend to replace these senior people? There is an incredibly long learning curve involved in bringing a new examiner up to even a minimal qualification level. There's a lot of "infant mortality" among new examiners because nearly every one is being hired to do a job that they've never done.

So what happens? The pendency rate spikes up because you've just lost 20 percent of your most experienced people who may be doing as much as 40 percent of the total production, and at the same time the quality rate spikes down because a big chunk of your institutional knowledge just moved to Florida.

Talk of the Town Hall

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Non-governmental Searching

Of the inherently governmental nature of searching, Rogan told employees at the meetings, "The examination process here in the PTO is making that quasi judicial determination of whether something is or is not patentable. That is a sovereign function, and so that is not something that we think is outsourceable. The search is different."

This sounds reasonable. But these quasi judicial determinations are wholly based upon the prior art produced by a search. The computer programming acronym, "GIGO," applies here; it stands for, "Garbage in, garbage out." With inadequate search results, an examiner will not be able to make the high-quality determination that this sovereign function requires.

What About Recertification?

Rogan's strategic plan proposals to improve quality include: recertification of primary examiners; requiring employees to pass examining-related questions from the Patent Bar Exam for promotion to GS-13; quadrupling the number of work product reviews for primary examiners; and expanding the "second pair of eyes" review. The obvious pattern emerging scapegoats employees for quality problems and ignores the inadequate time allowed for examination.

Historically, about 5-7 percent of the sample cases examined by Quality Review have patentability errors. Under the proposed performance appraisal plan, an error rate of 5.5 percent will result in an employee's termination. That means an error rate that is equal to the average for the whole USPTO can get employees fired. All primary examiners will have to be better than the current average primary examiner to keep their jobs, a clearly illogical result.

The agency also plans to provide at least 12 hours of training in two-hour courses, with a test at the end of each course. That's six tests a year, or one every two months, on average. Not even surgeons or pilots, for whom competence can be a life or death matter, get tested that often. Repeated testing is not the accepted way of maintaining professional standards in the private sector and it should not be at the USPTO. What did examiners do to deserve this treatment?

This testing and review, if done reasonably and fairly, will likely be prohibitively expensive. It will be cheaper if the intent is something other than a system that applies equally to all. It's cheap and easy to have a witch-hunt system in which strict adherence to the rules is required of only a few targeted employees. USPTO has stated that it plans to use an expanded staff of reviewers to target those who do poorly on tests. This ability to concentrate resources on a few selected people is likely to produce unfair results.

Rather than increasing the number of managers necessary to review one patent examiner, the agency should provide adequate opportunities for examiners to keep current with changes in patent laws and in their respective technologies. Improved search tools and increased time per case, training, and reclassification, more than anything else, will directly result in significant improvements in patent examination quality.

Congressional "Mandate"

Rogan quoted extensively from congressional appropriations reports to rationalize his plan. He left out of the FY 2003 Senate Report 107-218 the sentence that supports hiring examiners, which states, "In the interim, the Committee recommendation supports efforts to shift PTO resources to high priority areas and a more gradual increase in staffing to ensure that examiners have expertise, tools, and training necessary to produce quality patents on a timely basis."

From last year's Senate report regarding the FY2002 appropriation, Rogan also quoted, "...the PTO has chosen to remain wedded to an archaic patent process and attempted to hire its way out of its problems....A substantial amount of funds have been expended on information technology projects over the last decade, but no significant increase in examiner productivity has been noted."

A sentence from that same paragraph also read, "In addition, PTO management has moved at a glacial pace to address the attrition problem among its patent examiners."

For more than a decade the USPTO has told Congress that it needed millions each year to invest in computerization to make employees more productive. After spending in the billions on automation, the Senate report stated that it finds "no significant increase" in efficiency.

The House Appropriations Committee reported on the FY2002 budget request, "The Committee is concerned that, with the increased funding the Office has received in the past, there is no measurable increase in performance....PTO has been unsuccessful in proving that increased funding will decrease the amount of time it takes an applicant to receive a patent....Therefore, the Committee directs the USPTO, in consultation with the Department of Commerce, to develop a requirements-based budget structure."

In other words, the House asked the agency to explain how much money it needs to increase productivity and improve examination. Improving computer tools is not equivalent to improving productivity and examination quality.

Employee productivity has remained constant; examiners spend approximately the same average number of hours per case now as they did ten years ago. Rather than demanding fewer examiners, Congress was expressing frustration over billions spent on automation tools that it believed would enhance productivity but failed.

Congress has said that the USPTO would do well to reorient its automation priorities towards internal, administrative systems versus examination. The FY2002 Senate report noted, "... the Committee observes that PTO administrative expenses may be rising unnecessarily. ...The Committee expects that the PTO will take appropriate steps to ensure its administrative resources are sufficient but not extravagant."

USPTO Strategic Plan Criticized at National Academy of Sciences Conference

Prominent members of the patent community, including POPA, gave point-by-point critiques of the USPTO 21st Century Strategic Plan at a National Academies of Sciences (NAS) intellectual property conference in August, following lead-off speaker USPTO Deputy Director Jon Dudas.

One speaker aptly reflected the general tone of the gathering when he asked late in the program, "Is there anyone in this room who prefers separating search and examination besides [one other panel member]?"

Not one of the 110 present responded. (Dudas had left without listening to other panelists' presentations. Several subsequent speakers commented on Dudas leaving early, with one independent inventor saying he was "insulted" by the departure.)

Much of Dudas' speech echoed USPTO Director James Rogan's explanations of the strategic plan. Dudas said that the "competitive model" of outsourcing the search should work at the USPTO, and compared it to the accepted practice of contracting outside legal counsel. A member of the NAS-IP committee studying the issue – New York University Law Professor Rochelle Dreyfuss – commented, "You are outsourcing a judicial function [in this plan]. You should not do it."

Dreyfuss added that the costs that the USPTO will save by having applicants outsource the search will simply be shifted to the applicants. In fact, POPA President Ronald Stern, invited as a conference panelist, noted in his presentation that he had been told by private-sector searchers that the cost of private searches now ranges between $500 to $1,000. The USPTO's most optimistic hope is to save by outsourcing an average of 20 percent of an examiner's time, which is about four hours. At an average cost of $40 per hour of examiner time, it costs the agency roughly $160 now for a quality search. Applicants would save money by paying fees for a few extra hours of examiner time and they'd simultaneously receive better quality.

More Post-grant Review, Less Upfront Quality

Of all the additional conference panelists, Nancy Linck, senior vice president of Guilford Pharmaceuticals, most supported the USPTO strategic plan. She advocated lengthening the time allowed for deferred examination and urged more emphasis on post-grant review rather than on quality examination.

The next speaker, however, spoke against outsourced searches and longer periods of deferred examination. Charles Van Horn, a partner in the firm of Finnegan, Henderson, Farabow, Garrett & Dunner, said that foreign searches won't meet the requirements for a U.S. examination. He said dryly that the USPTO will indeed need a better post-grant review process to weed out the increased number of bad patents if searches are outsourced.

Whither Quality?

Panelist Gary Griswold, president of 3M Innovative Properties Co., said each proposed change had to pass through three judgment filters: 1) Will it improve quality?; 2) Will it reduce pendency?; and the least and last concern, 3) Is it cost efficient? He stated the almost universal patent community opinion, which is repeatedly voiced to Congress, that ending user fee diversion would free funds to increase quality. He added that it's the responsibility of the USPTO and executive branch to take the lead on stopping that practice.

Ronald Myrick, chief intellectual property counsel of General Electric, later echoed Griswold's concerns but added the necessity for "e-government." He cautioned the agency that it is suggesting "massive change" and making "massive claims."

"Massive claims require massive proof" that the proposed procedures will succeed, said Myrick, who is a member of the Patent Public Advisory Committee. The audience responded with loud applause. He stressed that the plan needs more pilots and testing before being approved.

Quality Starts with People

Quality patent examination "starts with the people," said Lita Nelson of the Massachusetts Institute of Technology Office of Technology Licensing. "I am sad that we're saying we can't support a good patent system. I am shocked by [the strategic plan] proposals."

Nelson said that if the USPTO wants a high-quality system, then the agency should give examiners better working conditions, training, pay, reasonable goals and motivation and it will happen.

Independent inventor Raoul Drapeau warned that "if all of these changes go into effect, they'll put us [independent inventors] out of business."

The PTO has called the strategic plan a "train on the move," said Drapeau. "As far as I'm concerned the train has jumped the tracks and is wandering lost in the woods."

The NAS conference comments will be incorporated into a report on the USPTO from the NAS Board of Science, Technology and Economic Policy to be presented to Congress and the federal courts in December.

Patent Office Professional Association

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