POPA NEWS
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New Public Transit Subsidy: Estimate on the High Side, Return Excess

USPTO officials have recommended that participants in the upcoming expanded public transit subsidy program estimate their transit benefit on the high side on their applications, including extra trips to the office for voluntary overtime.

Union and USPTO negotiators witnessed the signing of the Public Transportation Subsidy Program in May. Seated L to R: POPA President Ronald Stern, USPTO Office of Finance Director Michelle Picard, NTEU Chapter 245 President Howard Friedman, NTEU Chapter 243 President Melvin White. Standing L to R: Kim Walton, Michael Briskin, Tom Hellmer, Dave Dalke, Mitchell Front, Steven Berk, Howard Locker, Vinh Luong. Not Pictured: Kathleen Duda.

The new Public Transportation Subsidy Program—resulting from an agreement signed May 13 by POPA, the USPTO, and National Treasury Employees Union Chapters 243 and 245—will allow up to $100 for public transit expenses only, and cannot pay more than actual commuting costs. In estimating actual costs, the agency expects employees to factor in upcoming vacation days, extra trips due to voluntary work days or varying schedules, and extra mid-day trips to care for family members. For example, if an employee comes to work voluntary overtime on a non-scheduled work day, the public transit cost is considered a legitimate commuting expense.

Because of the unforeseen possibility of added commuting expenses, USPTO Financial Accounting Division Manager Tom Hellmer recommended in an early May meeting that employees "should estimate on the high side and the obligation is to return the excess" to the agency at the end of each quarter. In agreeing to participate in the program, employees agree, and are obligated, to refund all excess funds at the end of each quarter or face disciplinary action.

How to Apply for the Subsidy

In addition to offering up to $100 potential subsidy, the

(continued on page 2)

Examiners Call Office Overcrowding an "Outrage"

Earlier this year POPA asked bargaining unit members to recount their experiences with office overcrowding because the USPTO claims that no evidence exists that doubling employees disrupts work. Therefore, the agency says, no productivity adjustment is justified.

The response from examiners was loud and clear. One examiner summed up the responses to such agency thinking by stating succinctly, "It is an outrage!"

Following are excerpts from a few of the many letters received from impacted examiners, all attesting to the disruption.

* * *

Overcrowding is not a morale booster under any circumstance. It seems to be a foundation here at the PTO that high morale is not valued or necessary. The real problem is not only being doubled-up, but being doubled-up in a 10 x 15 ft. office. When you add two people to a room that's meant for one, it's worse than prison. Most prisoners get at least a 8 x10 ft. cell, according to Amnesty International. So maybe we're being punished. I believe that if you double up management at the top and go downward there will be no need for the examining corps to complain. Morale is what brings people through the worst of times. Management has the right to either improve the situation or sink the ship.

* * *

Doubling up employees at GS-13 has negative effects on our work performance and productivity: 1) The office mate is usually someone at a lower GS level, needs helps, and asks a lot of questions. It would be very unfair to turn our backs on our fellow examiners and not help them; 2) They have

(continued on page 2)

New Public Transit Subsidy

(continued from page 1)

new program significantly changes the procedures for applying and receiving the benefit. The new procedure requires participants to submit a Public Transportation Subsidy (PTS) application form at least one month in advance of every benefit quarter that certifies an estimation of monthly public transit commuting costs. The application is to be sent via e-mail to the program coordinator with a copy forwarded to the employee's supervisor. This is an improvement over the agency's original plan to require supervisory certification of each employee's estimation. It relieves the burden on supervisors, eliminates the ability of supervisors to hold up the subsidies for non-relevant reasons, and speeds the payment process.

The Office of Finance will provide an automated response to each PTS application form submitted. If the PTS application form is submitted late, the employee loses the first month of the quarterly benefit.

Also new to the program is the USPTO requirement for a new estimate and PTS application form every quarter. The ability to save the electronic version of the form and resubmit it with changes via e-mail eases that process.

The new benefit kicks in at the beginning of the next quarter, July 1. Participants must submit the new application form no later than June 3 (first business day of the month as June 1 falls on a Saturday). The new PTS application form is available as a link in the e-mail "What's New at the USPTO."

Examiners: Overcrowding an 'Outrage'

(continued from page 1)

friends, supervisors and mentors (primary examiner from their art unit often assigned to help them) who stop to talk. The above happen often at the time the other examiner is in full concentration and then loses track of ideas from the disturbance. It's definitely a distraction.

* * *

I was doubled up the same day I started the full signatory program. My new roommate is a new examiner and I don't mind answering any of his questions, but it takes my time. [This] unavoidably affects my concentration and therefore productivity while I have to have at least 10 counts every biweek just for 100 percent. Productivity adjustment would certainly help in the situation as a temporary measure, but resolving the problem of overcrowding by having every examiner in a private office is the only real solution.

* * *

We have two GS-12s in inside offices that cannot be doubled. No effort was made to allow those senior to these examiners the opportunity to switch offices. I have seniority over both of these examiners in the inside offices. At the time that one office was empty, my SPE knew of a plan in the works to double me in an outside office. He refused to even give me notice of such a plan so I could request the office switch. I have now been doubled for about 18 months. And I can testify that even at a GS-12 level there is an impact on the workload and amount of disturbance a new examiner contributes. Especially when [SPEs] expect you to answer questions posed by the new examiner but refuse to allow you to take any "training" time to compensate for it. It is funny, I'm allowed to take "training" time if anyone else stops and asks me a question, but not if my officemate does.

* * *

I have been GS-13 for more than a year and am doubled up. My desk chair cannot be moved close enough to my desk to sit at it. My phone does not reach my desk. It is difficult to open a case and discuss it with an attorney. I had to throw out years of notes, class material and reference material. Extra furniture was trashed even though I used it to store cases. This, despite the fact that many rooms are available that could be built out.

* * *

Disruption:

- Cannot perform personal interviews in office. Have to look for an available conference room or borrow SPE's or co-worker's office.
- Disrupted by roommate who is usually new examiner in other art unit with questions regarding [automation tools] problems, how to get office supplies, fax, printer location, etc.
- Disrupted by roommate being trained in the same office by his/her primary examiner or SPE.

(continued on page 4)

2001 POPA Cash Flow and 2002 Budget

	2001 Actual	2002 Budget
Income		
Dues	$193,985.00	$194,000
Other income, including interest$	$ 7,247.79	$ 6,500
Total Income	$201,232.79	$200,500
Expenses		
Litigation and lobbying	$103,405.90	$105,000
Newsletter	$ 22,384.74	$ 30,000
National Activities	$ 10,478.50	$ 13,000
Books & Periodicals	$ 9,263.44	$ 10,000
Elections	0	$ 3,000
Administrative	$ 8,743.17	$ 11,000
Membership	$ 11,538.79	$ 12,000
Membership Meetings	$ 9,029.58	$ 8,000
Capital Expenditures	$ 1,703.53	$ 6,000
Total Expenses	$176,547.65	$198,000
Net Addition to Reserves	$ 24,685.19	$ 2,500

Notes

National Activities: Membership dues and conference fees for national organizations such as Public Employees Roundtable and the Society of Federal Labor Relations Professionals

Administrative: Includes expenses for accounting, secretarial, postage, office supplies, insurance, equipment and software, service charges and miscellaneous

Membership: Membership incentives, including purchase of *The Federal Personnel Guide* for current and anticipated new members

USPTO Slow to Fulfill Congressional Mandate

One provision of the 1999 American Inventors Protection Act (AIPA) calls for the USPTO to propose a training program to help retain retirement-eligible employees. Staff of the House Judiciary Subcommittee for Courts, Intellectual Property and the Internet reported earlier this month that no suggested program has yet been submitted by the agency.

The AIPA specifies that section 3, title 35 of the U.S. Code has been amended to read:

> "TRAINING OF EXAMINERS.—The Office shall submit to the Congress a proposal to provide an incentive program to retain as employees patent and trademark examiners of the primary examiner grade or higher who are eligible for retirement, for the sole purpose of training patent and trademark examiners."

The law doesn't specify a deadline by which the USPTO must submit such a proposal to Congress. More than two years, however, have passed since the law's enactment.

In the next five years almost half the federal workforce could be eligible to retire, according to a 2001 report by the General Accounting Office. While that figure likely is not as high at the USPTO due to increased recruiting in recent years, the loss of experienced senior examiners to retirement could be significant.

Former USPTO Commissioner C. Marshall Dann Dies

C. Marshall Dann, 87, the U.S. commissioner of patents and trademarks from 1974 to 1977, died April 24 after hip replacement surgery, according to *The Washington Post.* He lived in Wilmington, Del.

In July 1976, Dann distinguished himself by being the first and only USPTO commissioner to enhance patent quality by granting examiners more time per case. Many examiners were, and are, grateful to Dann for allowing them time to do a better job. (See following box.)

Dann also institutionalized, by means of Rule 56, an applicant's duty to disclose all known prior art. Unfortunately, those amendments wound up being used to harass patent owners during litigation. The rule has since been reformed to reduce the burden on patentees by relaxing the time by which the known prior art must be submitted to avoid a charge of fraud. The Dann amendments worked; applicants today routinely make known prior art available to examiners.

Dann was a past president of the American Patent Law Association and the American Intellectual Property Law Association. The *Post* wrote that Dann, a 1949 Georgetown University law school graduate, worked for DuPont Co. as a chemist and chief patent counsel from 1935 to 1974. Since leaving the USPTO in 1977, he had practiced law.

C. Marshall Dann was a man of great integrity and dignity. Many commissioners have talked about bettering patent quality; he actually did something about it.

Dann's Legacy: Improved Quality

In 1975, patent examination faced a crisis.

Examiners were dealing with an extraordinary increase in the amount of art, in the complexity of prosecution, and in the competitiveness of patent attorneys. Examiners also were handling a steep rise in the size and number of patent applications, and a correlating jump in pressure to crank out the work.

Examiners today can empathize with what their predecessors were facing in 1975.

That year, USPTO Deputy Commissioner Luttrell Parker held a series of hearings to gather evidence about the patent examination process. In 1976, USPTO Commissioner C. Marshall Dann presided over a quality improvement initiative and labor negotiations that marked the last time patent examiners experienced an increase in the time allotted for examination.

This was done at a time when it was easier to write actions than it is today. Then, examiners hand-wrote actions that required only short explanations regarding combining references. Office actions today require much more detailed explanations of how references are applied to claims, including explanations of the motivation for the combination of references.

Commissioner Dann took seriously the evidence presented by the Parker Commission and supported tangible steps to improve quality. Current leaders would do well to follow Dann's direction and respect the evidence of need presented from all quarters of the patent community. Twenty-six years after C. Marshall Dann's legacy, it's time to improve quality by granting examiners more time per case.

Helen Bentley to Run for House Seat

Helen Delich Bentley, who now represents POPA on Capitol Hill, will be running for the Maryland congressional seat that she held for the 10 years prior to 1994 when she ran for governor, according to *The Washington Post.*

She is seeking the district currently represented by Rep. Robert L. Ehrlich Jr., who is giving up the post to run as the Republican candidate for governor later this year.

The *Post* reported that House Speaker J. Dennis Hastert assured Bentley that she will be reappointed to her former committees and retain her seniority if she wins the election (and if the Republicans retain control of the House).

Her Democratic opponent is expected to be the current Baltimore County executive, though that nomination is yet undecided.

EAST-WEST Implementation Agreement Signed

POPA and the USPTO agreed in early May to several provisions regarding use of the Examiner Automated Search Tool (EAST) and the Web-based Examiner Search Tool (WEST). Though most of the implementation issues were covered in the 2000 Millennium Agreement, several items were negotiated separately.

Most significantly the new agreement includes a provision that permanently continues the expanded limit of 400 hours of compensatory time, which had been temporarily increased from 140 hours.

The agreement also outlines what happens to those examiners disciplined for doing poorly when the EAST and WEST systems were launched without adequate examiner training. The provisions overturn performance-based disciplinary actions related to EAST or WEST problems.

One term of the agreement also continues examiner access to the U.S. patents and Derwent databases using commercial databases, which allows searching using Messenger software and accesses Chemical Abstract Service registry numbers for compounds. These services are more efficient for some arts than EAST or WEST.

Examiners: Overcrowding an 'Outrage'

(continued from page 2)

• As a result, have to work voluntary overtime to maintain high production.

* * *

I am a GS-14 and was told I would be doubled up because I was on part-time status in December. That convinced me to come back to full time but I was told that I was the last person in our tech center on part time that would have been doubled. It sounded as if other 14's were doubled from the way it was presented to me. I didn't like the fact that being part time became a punishment. I thought it was supposed to be a benefit of being a government employee.

* * *

Before I was hired, my recollection is that I asked the interviewer about people having their own offices and the SPE told me that GS-13s get their own office and many GS-12s have their own offices. This was in fact a consideration in my accepting the job and moving to the area. This is just another issue (one of many) that has taught me that there is a big difference between what management says and what management does.

* * *

I am a doubled up GS-13 who is interrupted constantly for training, socializing, "sounding out cases," etc. I was definitively told when I was hired nearly 3 years ago (as a GS-11) that when I become a GS-13, I get my "own office." I have been told once "just 'til January 2002," and then "just 'til April 2002," and most recently "wait for the new buildings." Why don't we create temporary satellite offices? Why haven't we gotten the productivity adjustment? If the economy picks up, we will see an exodus as far as I'm concerned.

Persistence Pays

When a GS-12 patent examiner received notice of his proposed job removal for alleged misconduct, he exercised his right to respond to the proposed firing. He and POPA asked to see documents and to talk to people believed to be relevant in order to counter the proposed termination.

The USPTO did not provide the documents or the interviews and the examiner was fired in August 1999.

That's just the beginning of the story.

The union moved the issue to binding arbitration, which means an independently appointed, impartial arbitrator would decide the issue and both the USPTO and POPA agreed to abide.

In May 2000 an arbitrator was appointed.

In Feb. 2001 the arbitration hearing was held.

In May 2001 the USPTO challenged the authority of the arbitrator to resolve the information request dispute and was denied.

In Oct. 2001 both parties submitted their final written arguments on the information request.

In Jan. 2002 the arbitrator decided the dispute.

And they haven't even touched on the issues of the employee's firing. The wheels of justice sometimes grind slowly.

The arbitrator ruled that POPA, on the behalf of the fired examiner, has the right "to have access to witnesses prior to a decision on conduct matters...or as in the instant case, prior to an arbitration hearing...."

He also ruled that POPA may have access to requested documents.

While the arbitrator's ruling did not require the USPTO to provide all of the documents or all of the witnesses requested by POPA, the decision has given the union needed evidence to mount an effective case to regain the examiner's job. That case would've been made back in 1999 if the agency had then provided the requested information.

The moral of the story: Persistence pays.

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Memorandum of Understanding for the Public Transportation Subsidy Program

(Revised May 13, 2002)

This agreement is entered into by the United States Patent and Trademark Office (USPTO), the Patent Office Professional Association (POPA), the National Treasury Employees Union, Chapter 243, (NTEU, Chapter 243), and the National Treasury Employees Union, Chapter 245 (NTEU, Chapter 245) to address the Public Transportation Subsidy (PTS) Program.

1. **Authority and Purpose.** This agreement is established pursuant to 5 U.S.C. § 7905 which provides for "programs to encourage commuting by means other than single-occupancy motor vehicles."

2. **Basic Benefit.** Starting with the first full quarter beginning after the signing of this agreement by all parties, the USPTO agrees to provide to any bargaining unit member who elects to participate and qualifies for the PTS Program payments limited to a maximum of $100.00 per month, per employee. The amount cannot exceed the actual public transportation expenses of the eligible employee. Current payments are made via MetroChek, but the USPTO may choose to offer any other form of payment at its discretion. For the purposes of this agreement, MetroChek will cover any and all forms of payment. Use of this benefit is limited solely to the costs of commuting to and/or from work via public transportation systems, which are participating in the MetroChek Program or any successor or alternate program approved by the Agency.

3. **Eligibility.** All members of each bargaining unit are eligible to participate in the PTS program, provided that the employee:

   a. Commutes or will commute to and/or from work on those systems participating in the MetroChek program;

   b. Does not use a monthly parking space at or near the workplace during regular working hours, except for vehicles used in the WMATA MetroChek program; and

   c. Does not have a parking permit for a currently assigned USPTO parking space during regular work hours, except for vehicles used in the WMATA MetroChek program. This does not include weekend/evening parking permits.

4. **Misuse and Availability of Benefits.**

   a. The MetroChek transit passes are not transferable and are to be used only for the commute to and/or from work. Giving, selling, trading, or transferring the MetroChek transit pass to other individuals, or purchasing the same from another individual is prohibited, even if the other individual is eligible to receive the subsidy. Any portion of the subsidy unused at the end of the quarter should be returned to the PTS Coordinator in the Office of Finance. Misuse of the subsidy or failure to timely return unused subsidies may result in disciplinary action.

   b. Should the Office decide to investigate any employee's eligibility for participation in the program or for the amount of benefits claimed, the employee will continue to receive benefits pending the Office's determination concerning eligibility. The Office may, however, reduce or stop benefits once it makes a determination of ineligibility or reduced eligibility. Employees may be required to repay benefits improperly claimed, and may be subject to disciplinary action.

5. **Employee Obligation to Report to Work.** Receipt or non-receipt of the subsidy does not alter an employee's responsibility to report to work.

6. **Procedures.**

   a. Bargaining unit employees who want to participate in the PTS program should do so by filing a "PTS Application Form" with the PTS Coordinator located in the Office of Finance via the USPTO's e-mail system, on or before the first day of the month preceding the month in which the employee wishes to begin receiving the subsidy. Applicants must copy their supervisor when submitting the form to the Office of Finance. Each applicant will be required to specify on the application form the mailing address to which the subsidy is to be delivered, and provide a detailed description of commuting costs to be covered by this program. This form must be completed each quarter (three months), on or before the 1st day of the month preceding the month in which the employee wishes to continue receiving the subsidy. E-mail applications must originate from the employee's official agency mailbox (or equivalent) and shall be the equivalent of the employee's signature. The Office of Finance will provide an automated response to each application submitted.

   b. Paper copies of PTS Application Form may be submitted to the Office of Finance when:

      - The employee has been newly hired (during the last 30 days). These applicants need not provide a copy to their supervisor;
      - The employee is reporting an address change or correction;
      - The employee lacks access to a USPTO provided workstation; or
      - The employee's workstation or the network is malfunctioning on the date the form is due, or on the last date the employee expects to be present in the office prior to that date.

      Application forms may be obtained from the Office of Finance or from the USPTO's intranet site.

      Upon request the Office of Finance will provide a time stamped copy of an application submitted.

   c. Paper copies of PTS Application Form must be submitted to the Office of Finance when eligibility is based upon the applicants request to cancel a PTO assigned parking space at a future date.

   d. Newly hired bargaining unit employees will be provided PTS program information and an application form during the new employee orientation process. In addition, a copy of this agreement and all forms used in the PTS program shall be maintained on the USPTO Intranet site in a folder entitled transit subsidy under the OHR web page.

   e. Employees will be notified each quarter (during the three weeks before the PTS Application form is due) by announcements in all "What's News" or successor means. These messages will provide electronic access to the application form and include the availability and specific location of information concerning this program on the USPTO Intranet site.

   f. Any employee who wishes to discontinue his/her participation in the PTS program must notify the PTS Coordinator in writing, must return all unused MetroCheks, and must not complete another PTS application form until they wish to resume participation. At that point, the employee should fill out a PTS application form on or before the 1st day of the month preceding the month in which the employee wishes to begin receiving the subsidy again.

   g. Address corrections/changes may be made in the Office of Finance by filling out a new PTS application form and showing USPTO identification. Alternatively, address corrections/changes may be made via the USPTO's e-mail system

by filling out a new PTS application form and E-mailing same to the Office of Finance from the employee's official agency mailbox (or equivalent).

7. **Delivery of MetroCheks.**

   a. The MetroChek transit passes will be mailed to each participant using the U.S. Postal Service, except as provided in Section 7(d) below. When an employee is late in submitting the PTS application form, the employee will not receive the full transit subsidy for the current time period. The employee will receive the portion of the subsidy for those months for which the PTS Application form has been received by the 1st of the preceding month.

   b. Due to the negotiable nature of the MetroChek transit passes, lost subsidies will be replaced only in rare circumstances and under no circumstances will more than one lost subsidy be replaced per employee within a two-year period. In instances of lost subsidies, an employee must, in writing, provide the following information:

      1. Certify that the subsidy was not received at the most recent address provided by the employee;
      2. provide the employee's name, position and organization;
      3. state whether the employee is representing himself/herself, or is represented by a union representative;
      4. provide a specific account of the employee's belief as to why the subsidy was not received at the address provided by the employee; and
      5. list and certify all prior subsidies that were replaced for the employee during the last five (5) years.

   c. Any claim of non-receipt of a subsidy must be submitted by the participant to the PTS Coordinator within 10 business days of the first day of the month in which the employee was to receive the subsidy. Any claim not submitted within this period will not be considered. A meeting, during which the employee may be represented by a union representative, may be requested by either party within 5 business days of filing the claim. This meeting shall be scheduled by mutual agreement for a time between 9:30 a.m. and 3:00 p.m. during the next 6 business days. A written decision will be rendered 10 business days following the filing of the claim or 5 business days after the meeting, whichever is later. This decision will be considered the equivalent of a USPTO decision at the first or informal stage of the grievance procedure. The union and/or grievant may decide to continue with the grievance process if unsatisfied with the results. Only the union may appeal the final Agency decision to arbitration.

   d. In those instances where lost subsidies are replaced, the employee will be required to pick up, in person, the replacement subsidies from the PTS Coordinator. As determined by the PTS Coordinator, the employee may be required to pick up future subsidies for the following two years, in person, in the Office of Finance. The employee will be required to produce a USPTO identification card to receive the replacement subsidies and future subsidies.

8. **Grievances Concerning the PTS Program**. Any participant who is aggrieved over any aspect of the PTS Program other than the non-receipt of the MetroChek transit passes may appeal in writing to the PTS Coordinator within 15 business days after the matter or the date the employee becomes (or should have become) aware of the occurrence. The appeal must contain the following information:

   1. the employee's name, position, and organization;
   2. an indication of whether the employee is representing himself/herself or is represented by the Union;
   3. a specific account of the incident giving rise to the grievance;
   4. specific reference to the provisions of this agreement in dispute;
   5. an explanation of how the provisions of the program have been violated; and
   6. a detailed statement of the specific remedy sought.

   Any claim not submitted within this period will not be considered. A meeting, during which the employee may be represented by a union representative, may be requested by either party within 5 business days of filing the claim. This meeting shall be scheduled by mutual agreement for a time between 9:30 a.m. and 3:00 p.m. during the next 6 business days. A written decision will be rendered within 10 business days following the filing of the claim or 5 business days after the meeting, whichever is later. This decision will be considered the equivalent of a USPTO decision at the first or informal stage of the grievance procedure.

9. **Changes to the PTS Program Budget.** If management determines it to be necessary to reduce or terminate funding for the PTS Program, members of the bargaining units will not receive a greater reduction in their individual maximum subsidies than any other person in the USPTO. When the program funding is reduced or terminated, it will be reinstated when such action is no longer necessary.

10. **Meaning of Dates Provided in this Agreement.** Deadlines established in this agreement are automatically extended to the next business day when they fall on a Saturday, Sunday, or Federal holiday.

11. **Reinstatement of Parking**: Employees who forfeit a parking space controlled by the USPTO to participate in this program shall be eligible for reinstatement of their parking permit on a priority basis when:

    a. They end participation in the PTS program on or before December 31, 2002, and notify the PTS coordinator and the Office of Administrative Services by that date;
    b. New participants decide to terminate their participation before the end of the first full quarter they have participated in the program; or
    c. They suffer a ten percent or greater reduction in benefits resulting from funding cutbacks to the PTS program.

    Priority basis means that their names will be placed ahead of all other names on the applicable waiting list except those who also have priority status.

12. **Increases in Maximum Monthly Amounts for the Transit Subsidy Program.** If the maximum monthly transit subsidy amount increases in the future, the maximum amount paid under this agreement will also increase, with the other provisions set forth above remaining unchanged, unless the Agency or any of the unions requests to bargain before the effective date of the new amount. So long as there are no other changes to law, rule, or regulation (including Executive Orders) pertaining to the PTS program, IRS adjustments to the maximum benefit, as set out in 26 U.S.C. § 132 (f)(6), shall be automatically applied to this program.

Signatures

For the USPTO

Michelle Picard — 5/13/02
Michelle I. Picard, Director, Office of Finance — Date

For the Unions

M T White — 05-13-02
Melvin T. White, President, NTEU 243 — Date

5 13 02
Howard D. Friedman, President, NTEU, 245 — Date

5-13-02
Ronald J. Stern, President, POPA — Date