POPA NEWS
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FSIP Enacts Entire USPTO "Quality Initiatives" Program

Examiners Should Prepare for Start of Testing in 2004

The Federal Services Impasses Panel (FSIP) in a Nov. 4 decision ordered the adoption of all of the USPTO's "Quality Initiatives" proposals.

While stating that it shared POPA's belief that the program's implementation "is likely to have an enormous impact on employees' conditions of employment," it added that the union's proposals "would result in administrative burdens and expense that outweigh their purported benefits."

For example, POPA had proposed a procedure to enable employees to defend themselves against allegations of error to be charged against the employee under the Performance Appraisal Plan. The process would include notice of the error, time to review the facts, and an opportunity to rebut. The FSIP decided to enact the USPTO proposal, which doesn't provide time for employees to defend themselves. The result in many circumstances is that employees must defend themselves on their own time.

The FSIP stated that the union proposal would provide a procedure "encouraging [employees] to challenge any allegation of error both orally and in writing, which in certain circumstances would involve an independent review, regardless of whether the allegation adversely affects employees' performance evaluations or awards."

Under the usual current practice employees are granted official time to defend themselves against errors alleged by quality reviewers specifically. The FSIP ruling does not explicitly change that practice.

POPA had sought an "independent review" for full signatory authority examiners who challenged error allegations based on differences in professional judgment. Full signatory authority examiners have achieved a level of professional recognition that until now had been accorded respect equal to that of the supervisor. The FSIP accorded no deference to the opinions of these most senior employees and relegated all employees' challenges of allegations of error to the established, already overburdened, grievance procedure.

Agency Quality Program in Perpetuity

The FSIP wholly misinterpreted the POPA proposal to reopen the "Quality Initiatives" program to union-agency review after two years. Adopting this proposal "would

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Overtime Rate Rises for Senior Patent Professionals

Overtime rates for all higher graded, overtime-eligible federal employees have been raised by recently enacted legislation, setting the new overtime cap at the greater of 1.5 times the GS-10, step 1 pay rate or the hourly rate of basic pay of the employee. This new overtime rate affects many senior patent professionals.

The provision was included in the fiscal year 2004 Defense Authorization Act, H.R. 1588, which was signed into law and became effective immediately on Nov. 25.

POPA has been working with members of Congress for years to receive at least regular hourly pay for overtime. Before this law, employees above GS-12, step 6 actually earned less on overtime than they did for work performed during the regular work week. Many thanks go to Rep. Duncan Hunter (R-Calif.), chairman of the House Armed Services Committee, for this provision. Hunter has received POPA's Guardian of the Patent System Award.

The overall pay cap for any one pay period is still the pay for a GS-15, step 10, which is limited by statute at the Executive Level V.

H.R. 1588 also raised the amount of a student loan repayment that agencies are authorized to pay each year in addition to basic salaries. The USPTO has declined to use this authority so far. The bill also raises Senior Executive Service pay.

The overtime cap was established in 1954 and last raised in 1966; it had not been adjusted since.

Officials from the Staff Union of the European Patent Office (SUEPO) met with POPA officials in Crystal City in October to discuss common interests and issues. See page 3 for story. SUEPO leaders (left to right): Central Secretary Jesus Areso; The Hague Chairman Ansger Wansing; Berlin Chairman Peter Kempen; Munich Chairman Hannes Stenftl.

FSIP Enacts "Quality Initiatives"

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permit the union to engage in unrestricted bargaining every two years over the same subject," stated the FSIP decision. In practice, POPA's proposal provided for only one reopener that could occur after two years, but if not exercised could occur at two year intervals until applied. When exercised, the USPTO and POPA could agree on a program that would last for whatever term the parties may decide. In fact, the USPTO agreed with precisely the same language regarding a two-year reopening of discussions when it signed the USPTO-POPA telework agreement.

In effect, the USPTO sought and won the ability to take an untried, untested and unproven program and make it permanent and not subject to change for an indefinite period.

Given the USPTO's current unwillingness to consider any employee input on its programs, these "Quality Initiatives" are here for the indeterminate future.

No Extra Time for Extra Duties

Regarding examiners' added duties for the enhanced file wrapper record, POPA had proposed that the time spent on including a full summary of an interview with applicants and the reasons for withdrawing a rejection be tracked separately under the agency's time and activity reporting system. Such accounting would not change the USPTO's assignment of work, but would generate data to determine the true impact of these new duties on employees.

The FSIP rejected that reasoning, stating that "by considering such time as 'examining related,' however, [POPA's] final offer would do more than merely generate reliable data on the impact of the additional duties on employees" by causing "unnecessary conflicts between examiners and their supervisors." The agency expects examiners to absorb the extra work.

Similarly, POPA had advocated agency data gathering to better understand the difficulty of each exam, the distribution of grades, whether additional training is needed, and whether the tests are fair and accurate indicators of performance. Since any and all of the USPTO's quality initiatives could have an unintended negative impact on the efficacy of patent examination, POPA's goal is for the agency to collect statistically valid proof that all of the USPTO's quality initiatives have a positive impact on the quality of the work products and processes. Such data may also help indicate if the testing has a disparate impact on certain classes of employees.

The FSIP ruled that such a data gathering requirement is "excessive," stating that the union should have proposed "less obtrusive" ways of ensuring that the testing is administered fairly and equitably.

Broad Definition of "Problem Employees"

POPA had suggested that the USPTO be required to review the same percentage of credited work for everybody. However, the agency thought it would be fair to be able to review as much or as little as it likes for any examiner with no limit on how minutely it may investigate a particular employee's body of work until it can say, "Gotcha."The FSIP agreed. In this backhanded way, the FSIP supported the union's contention that the USPTO will be able to use its new procedures to target any employee it chooses.

The FSIP also accepted the agency proposition that whenever an employee twice fails a test in a mandatory training course, the agency would expand review of the employee's work – including all work beyond the subject of the course. This could trigger a wide-ranging review of the employee's work, enabling the agency to search for any reason to bring the employee down.

The FSIP wrote that the union's proposal "undermines one of the primary purposes of this part of the Quality Initiatives program: to use the results of competency testing as a trigger for identifying problem employees." Therefore, if any employee fails any test twice, he or she is a "problem" employee subject to intense scrutiny that is not applied to all other employees.

The FSIP based its findings on a report from panel member Joseph C. Whitaker. Whitaker, president and CEO of Whitaker Construction of Shreveport, La., was arrested in July by federal agents for failing to pay subcontractors, which is a criminal infraction in Louisiana, according to McGraw-Hill's *ENR.Construction.com* newsletter. He was released on bond. Whitaker's company filed for Chapter 11 bankruptcy protection last year.

The FSIP decision, and the briefs and proposals from both POPA and the USPTO, are posted on the POPA Web site at *popa.org.*

Contesting an Error or Negative Evaluation

If you believe the USPTO mistakenly charged you with an error or wrongly gave you a negative evaluation, you can contest the legitimacy of the agency's claims through the grievance procedure. You can challenge an individual accusation of error on a particular case or a negative performance appraisal. Each employee can use a reasonable amount of official time up, to eight hours, for the preparation of a grievance.

The first step to filing a grievance is to verbally notify your supervisor that you are grieving his or her action. The action must be taken within 20 calendars days after the matter prompting the grievance. Contact a POPA official for further information:

- Larry Oresky, POPA director of grievances, 308-2581
- Dave Robertson, 305-3825
- Bill Luther, 308-6609
- Ray Johnson, 308-2565

POPA Hosts EPO Union Officials

From operating with a paperless examination system to separating search from examination, POPA leaders learned much from their counterparts in the Staff Union of the European Patent Office (SUEPO) when they visited in October.

Six SUEPO officials from the union central office and its four regional sections met with POPA leaders to discuss their experiences with the rapidly changing patent examination environment.

The SUEPO described for POPA the EPO BEST program "Bringing Examination and Search to Together." In the years following World War II, the organizational precursor to the EPO, located in The Hague, Netherlands, dealt only with patent searches. In the 1970s, an examination bureau located in Munich, Germany, was added and the EPO was established.

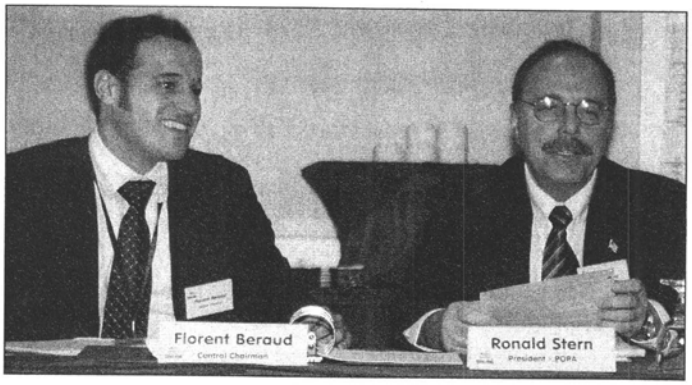
In recent years the EPO began moving the functions together in the patent examiner position through BEST. While improving efficiency, BEST has not provided as great an increase in efficiency as the EPO had expected. BEST gives individual examiners more varied duties, greater responsibilities, and hence the job is more interesting and rewarding. The EPO managers also appreciate BEST because it increases its flexibility to move work among its offices throughout Europe and adapt to workload fluctuation, examiners being able to perform either essentially search work or examination work. One example given about how combining search and examination improves the whole process: Employees in the EPO office in The Hague, Netherlands, previously only did search work. Now BEST enables examiners in The Hague, who are now searching and examining, to customize the search to an intended rejection. SUEPO has, however, expressed some concern that classification work is so demanding and paramount that examiners should be able to specialize and focus in their work on search and classification tasks.

Health Effects of E-filing and On-screen Searching

After the EPO had been working with an electronic application filing, or E-Phoenix, system for several years, and after the introduction of on-screen search, the SUEPO officials reported seeing a marked increase in repetitive motion injuries and vision problems among its examiners and its clerical and technical members, who began using the electronic system exclusively. In response, the EPO and SUEPO are jointly about to design a workplace health and safety system. The system includes having a doctor and nurse onsite in the offices in The Hague and Munich. SUEPO and EPO work together to educate employees, acknowledging that employee awareness is key to preventing further injuries.

The SUEPO/EPO experience will aid POPA when it negotiates the implementation of the USPTO e-filing system. POPA will work to protect employees from experiencing these same injuries on the job.

The leaders of the two unions discussed at length the issue of mutual recognition of search results. This practice would mean that the USPTO would accept the validity of EPO searches without additional U.S. searching, and vice versa. While both organizations and their unions respect each other's examination competence, the union leaders found that the laws under which patents are granted in each jurisdiction now vary too much to allow mutual recognition to happen. For example, the EPO does not conduct prior art searches based upon U.S. filing dates. And the USPTO does not necessarily cite the most relevant art based on publication date.



SUEPO Central Chairman Florent Beraud (left) met with POPA President Ronald Stern and others in October.

POPA looks forward to continuing its productive relationship with SUEPO and thanks its leaders:

- Central Chairman Florent Beraud
- Central Secretary Jesus Areso
- Munich Chairman Hannes Stenftl
- The Hague Chairman Ansger Wansing
- Berlin Chairman Peter Kempen
- Vienna Chairman Francois Basty

Clarifications to Increased Flexitime Policy

POPA and the USPTO have agreed on changes to the Increased Flexitime Policy (IFP) that clarify the procedures for core hours and Sunday hours while maintaining the IFP as an excellent employee benefit.

The agreement establishes:

1. A basic Monday through Saturday workweek. IFP participants can earn credit hours on any day including Sunday. Credit hours must be used during the same bi-week in which they're earned, unless an employee is eligible to carry over hours under the 1999 POPA-USPTO Credit Hour Agreement.

2. A weekly core hour, during which all employees must be on duty, of Thursday from 1-2 p.m. Employees will be eligible to use leave, compensatory time or credit hours to offset the work requirement during core hours.

3. The ability of employees to change the duty hours time designations each bi-week prior to timesheet finalization by their timekeepers. For example, during the bi-week, employees can redesignate regular hours as credit hours earned, or use credit hours for regular hours that were not worked.

Please visit *popa.org* and click on "Useful Info" to view a copy of the agreement.

Back-out Overtime to Qualify for an Award

At the end of each fiscal year, if you're a bargaining unit member who has worked overtime during that year, you should check your production to see if you qualify, or are close to qualifying, for a Gainsharing or Special Achievement Award (SAA) and then do an overtime "back out" calculation. Some supervisors forget to tell their examiners that this could pay off.

You can calculate your fiscal year production for the awards by "backing out" your overtime hours as provided for in the Gainsharing Award Agreement and the SAA negotiated for employees by POPA. The closer you are to the next level of either award or to qualifying for either award, and the more overtime hours you have, the more significant this calculation could be.

Say for example that you're an examiner who worked 1,700 hours of examining and examining-related time in the fiscal year, and 300 of those hours are overtime hours. If you have 20 hours per balanced disposal (BD), then the expected BDs for the year at 100 percent would be 85 BDs. If you produce 92 BDs for the fiscal year for 108 percent production (92/85), then you can "back out" up to 300 hours of overtime at 100 percent, which would be 300/20 = 15 BDs. Thus, the percentage expectancy for the fiscal year, with all the overtime "backed out," would be (92–15) / (85–15) = 110 percent. By "backing out" the overtime in this example, you would qualify for an award – you wouldn't qualify for an award with the overtime added into the total examining hours.

One other caveat in the POPA-USPTO Gainsharing Award Agreement is that, if your total examining hours used for your award is below 1,400 hours, then the award amount will be prorated by the ratio of the number of examining hours worked divided by 1,400 hours. By "backing out" overtime hours, this could drop you below the 1,400 hour cutoff and result in a prorated award. However, nothing prevents you from "backing out" any portion of your overtime hours that you wish.

To read about the SAA and the Gainsharing Award, refer to the POPA website at *popa.org*. Click on "Useful Info," and then click the last item under POPA Documents, "Collective Bargaining Agreement." Go to Appendix A, titled the Agreement on Awards, and Appendix C, titled the Gainsharing Award Agreement of 1988.

Note that examining-related time is included with examination time in this calculation to determine the percentage reward received. Examining-related time includes all items through line 17 on Form 690E, the examiners' time-reporting form.

Happy Holidays & Best Wishes for 2004 from Your Friends at POPA

No Overall Agency Bar to Late-Night Office Hours

Senior USPTO officials set the record straight on policies regarding employees in agency buildings during overnight hours and on speaking with members of the press.

The information was prompted after a supervisor reprimanded an examiner for being in his office overnight during Hurricane Isabel. The examiner later spoke with a *Washington Post* reporter about his experience, which appeared with quotes from workers for other employers in a story titled, "Isabel Caused Some Employees to Stay at Work."

The examiner told POPA, "My SPE told me that the office is closed every night between 11:30 p.m. and 4 a.m. and that you could be disciplined for being here during that time. ...Additionally that you can be disciplined for talking to a newspaper without first clearing it" with the Public Affairs Office.

In fact, a senior official confirmed that the USPTO has no rule against an employee being in an agency building overnight or during weather emergencies or closings. The employee was told by his supervisor that he could be charged with trespassing. That is false, said senior USPTO management.

The agency frowns upon employees using their offices "as a motel" or a second residence, the official said. But if an examiner wants to work overnight or during an official day of administrative leave, he or she is allowed to do so.

Regarding interviews with the news media, the agency acknowledged that USPTO employees can speak with reporters without obtaining clearance from Public Affairs as long as they do not purport to speak on behalf of the agency, comment on the content, status or validity of any patent application or patent, or discuss any other confidential agency information. Employees may comment on any issues regarding their worklife, for example, their commute, job stress, flexitime, etc., if they do not represent their opinions as those of the USPTO.

Patent Office Professional Association

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