POPA NEWS
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USPTO "Quality" Initiatives Mean Slower Production or Unfair Enforcement

The USPTO has proposed a set of quality initiatives that, if implemented, will change the current balance between patent quality and patent quantity through increased quality reviews and testing, and by strict enforcement of unrealistic standards.

Increasing patent examination accuracy will force examiners to slow down their production. Because the USPTO cannot afford any large-scale reduction in productivity, it's likely to strictly enforce its quality standards against only a relatively few employee scapegoats. To avoid such selective enforcement, POPA has proposed alternatives to ensure a fair application of the new quality framework and protect employees from potential management abuses.

POPA's proposals and the USPTO's alternatives for implementation are being considered by the Federal Services Impasses Panel (FSIP), which will decide the final plan based on the agency's and union's last best offers. The members of the FSIP were hand-picked by the Bush Administration, which – in an unprecedented move – fired the entire previous panel. The FSIP is chaired by a vice president of the conservative Heritage Foundation.

The FSIP may consider only those proposals that deal with the impact and implementation of the USPTO quality programs. Under federal labor law, the agency holds the sole right to determine the actual substance of any quality initiatives. Employees and their union cannot prevent or control testing or performance standards.

POPA has two main goals for its implementation proposals: 1) to provide procedures for protecting employees from allegations of error through an appeals process; 2) to treat the USPTO initiatives as a pilot in order to gather data to assess its actual impact on quality and on employees.

Instead of implementing a fair and timely appeals process, the agency wants to use the existing, cumbersome grievance procedure, which the USPTO notoriously neglects, often not responding to employee grievances for months, sometimes years. The USPTO also rejects the notion of gathering useful data, for example, on the correlation between test results and work product reviews. Without adequate data the agency will never know if its quality program has an illegal disparate impact on certain employees. It also will never know if the process is actually increasing quality and, if it isn't, how to fix it. *(continued on page 2)*

POPA Wins Job and Back Pay for Unfairly Dismissed Examiner

An arbitrator ordered the USPTO to reinstate with nearly three years of full back pay and benefits a GS 11 patent examiner that the agency had improperly removed, in a case that POPA recently won on behalf of the examiner.

The USPTO had based its removal of the employee, an examiner in Technology Center 1600, on deficient performance in the critical element of patent examining functions. The agency charged that the examiner had made 17 errors during the performance improvement period (PIP) that follows a written warning. POPA systematically refuted each allegation of error.

The arbitrator set aside many of the alleged errors because the agency did not show it made reasonable efforts to assist the examiner. The arbitrator described as "imperative" that the supervisor provide the employee "with affirmative assistance" during the PIP "when he knew or should have known [the examiner] was in increasing danger of being removed."

Under the 1981 Performance Appraisal Plan (PAP), the agency cannot charge a clear error where there is an "honest and legitimate difference of opinion" on the employee's finding. In this case, POPA presented an expert witness who disagreed with several of what the agency purported to be "clear errors" and corroborated the dismissed examiner's findings as legitimate and not deficient. The arbitrator agreed that the "clear errors" did not exist.

Relative to several other agency allegations of error involving legal functions, the GS 11 PAP states that the examiner was expected to perform only "after receiving preliminary instruction." The examiner's supervisor said he'd fulfilled that obligation, testifying during the arbitration, "As always, my door is always open to assist my examiners who are coming in to talk with me and discuss cases. I didn't change any policy or anything at this time." Deputy Director of Patent Operations Esther Kepplinger testified that the generalized Patent Academy training that the examiner had received qualified as sufficient preliminary instruction.

The arbitrator rejected those USPTO positions, stating that, during a PIP, "it becomes imperative that the SPE provide clear, written, dated, case-by-case 'preliminary instruction'"and that the examiner "was entitled to express instructions" from the supervisor. *(continued on page 4)*

USPTO "Quality" Initiatives

(continued from page 1)

A Cultural Revolution

As part of its 21st Century Strategic Plan, the USPTO decided to institute new quality procedures:

1. Dramatically increasing the number of work products to be reviewed for compliance with quality standards;
2. Instituting tests after training courses;
3. Requiring examiners to pass a legal competency certification test to be promoted to GS 13;
4. Requiring periodic recertification of the competency of senior employees; and
5. Requiring examiners to create additional records to enhance patent file histories.

At the most basic level, the agency in reality is proposing a USPTO cultural revolution. For most of the last 30 years, quality reviewers evaluated a random sample of 4 percent of all patent applications that resulted in the grant of a patent. Historically, about 5-7 percent of those cases have had patentability errors. Under the current performance appraisal plan, an error rate of 4.5 percent or greater results in a less than fully successful rating. An error rate of greater than 7 percent can lead to termination. Therefore, under the USPTO's proposal, to simply hold onto their jobs, all primary examiners will have to perform better than the current average.

The USPTO in practice has looked the other way on error rates in the course of sacrificing quality for quantity. Quality has suffered because of the lack of time per case given to examiners in the USPTO's pursuit of higher production. Now the agency says it wants to enforce high quality standards without giving examiners additional time to do so. This enforcement would make it impossible for the agency to function. For example, a recent in-process review of cases in Tech Center 2800 found a 38 percent error rate. (In-process reviews cover cases during any step of prosecution, as opposed to patentability reviews, which look only at allowed applications.) The agency couldn't afford to lose close to that number of employees annually. The natural result of strict enforcement will be a slowdown in production as employees strive to ensure accuracy.

The USPTO also plans punitive enforcement of performance standards. Whenever an employee twice fails a final 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. While this should only apply to a tiny number of employees who twice fail a training course, it triggers a wide-ranging review of the employee's work, enabling the agency to search for any reason to bring the employee down.

Certification and Recertification Failures Expected

The USPTO's proposals on testing employees for certification and recertification imply that it considers a test failure rate of up to 20 percent to be normal, acceptable and expected. It will only consider discussions about changing the testing system if after three years the failure rate exceeds 20 percent and only if the USPTO decides a change is needed.

The ramifications of this policy are that up to 20 percent of employees who fail will not be promoted or, in the case of primary examiners, will be demoted or fired. The USPTO implies that the loss of up to 20 percent of its examiners would be normal.

If these policies come to pass, the agency will be incriminating itself for abysmal human capital management. No conscientious employer, and certainly not Congress, would find such a failure rate acceptable.

Currently the agency urges employees to take short cuts to meet the USPTO's aggressive production quotas. If heretofore acceptable work products are now to be found unacceptable, the agency has a responsibility to establish clearly understood new standards that can be reasonably achieved in the time allotted.

Untested Testing

The USPTO has proposed certification testing based on questions from the patent bar exam. On a national level, the pass rate for applicants taking the patent bar exam is roughly 60 percent. The knowledge required for the patent bar exam can only rightly be expected of a full signatory authority examiner. Asking a relatively new examiner to be as expert as a full signatory authority examiner is unfair.

The patent bar exam contains some tricky questions that are presented in language that is difficult to follow. Under the proposed new system, certification may hinge more on language skills than on knowledge of patent law. And, because the agency does not plan to check the link between testing and work product quality, an examiner conceivably could ace the exam and still produce poor quality work.

To tout the reasonableness of its testing proposals, the USPTO had all of its supervisors complete a sample of a certification test composed of 50 questions selected from the patent bar exam.

The USPTO had hoped to use the sample test given to supervisors as a valid example of testing. However, the test's sample questions, and their answers, were all available online. It was a take-home test. Virtually everyone passed. No surprise.

If POPA's proposals are adopted and adequate data is gathered, the agency will 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.

Re-education Class

Recertification for signatory authority examiners doesn't require that they take the certification test again. Instead

(continued on page 3)

USPTO "Quality" Initiatives

(continued from page 2)

it will require "an enhanced review of the employee's work product once every three years," with approximately one-third of all GS 13-15 examiners undergoing the enhanced work review annually. The most senior examiners will be reviewed first. Continuing education classes and successfully passing the exams that follow would also be mandatory for recertification. The agency would have the discretion, on a case-by-case basis, to allow an employee to take the test prior to the training and thereby pass without taking the class.

All time preparing for the certification tests – except for a week-long course that the USPTO will give GS 12s preparing for the certification test – and all time for defending or appealing the results would occur on an employee's own time or on production time. Forcing employees to transfer activities – such as required training for required testing – from duty time to personal time constitutes a management abuse of employees.

Right to a Fair Defense

Employees deserve the right to defend themselves against allegations of error. They need notice of the error, time to review the facts, and an opportunity to rebut.

Quality Review examiners cannot be experts in all the technologies that they review. When signatory authority examiners contest an allegation of error, the dispute constitutes a disagreement between employees of essentially equal patentability-determining authority. Currently initial allegations of error are reversed in approximately 20 percent of cases. Primary examiners have already fully proven their competence by passing the signatory authority program.

To become a signatory authority examiner, work products are reviewed by multiple supervisors to lessen the impact of reviewer subjectivity. POPA has proposed a similar second independent review whenever a first reviewer identifies an error disputed by a full signatory authority examiner.

The USPTO has proposed requiring employees to defend themselves on their own time or, perhaps even worse for the public, by taking time away from the examination of other patent applications.

For testing after training courses (not for certification testing) and only after an employee has failed a training test a second time, the agency proposes, "If the employee is successful in persuading management to withdraw its determination that an error has been committed, all such time shall be treated and recorded as examining-related time for purposes of the employee's performance appraisal and awards." This should only occur for a minute fraction of all employees, which POPA estimates to be less than 1 percent. All time for appeals from allegations of error in the vast majority of cases, including errors found during the recertification process, would be production time, thereby taking time away from other patent applicants and harming them in the process.

Protection Against Selective Enforcement

POPA has proposed protections against selective enforcement by asking that the USPTO be required to review the same percentage of credited work for everybody. The agency has responded that it can review as much or as little as it likes for any examiner with no limit on how much it may harass a particular employee.

The USPTO complained in its brief that it's incapable of fulfilling POPA's suggestions that it review a pre-determined ratio of cases for each examiner. "This elaborate procedure requires management to calculate, and constantly recalculate, for each individual examiner, the number of cases that can be reviewed based on the number of cases completed by other examiners," the agency wrote.

This is a disingenuous and purposely misleading argument. The USPTO calculates production reports on each examiner every two weeks and supplies them to all managers. A policy that says that the agency would review 4 percent of the work could be easily determined from these production reports. These and other statistics that POPA is proposing are easily attainable and are reasonable requests for a new program.

To read the full POPA and USPTO proposals to the FSIP, go to the POPA Web site at www.popa.org.

Another POPA-proposed protection is that unless at least 80 percent of employees are meeting the agency standards, then the USPTO must bear the burden of proving that the standards are achievable in the time available.

More Job Duties, No More Time

The USPTO has proposed that examiners provide an enhanced file wrapper history including a full summary of the interview and the reasons for withdrawing a rejection. The agency has also proposed not allowing any extra time to perform these extra duties.

Under the USPTO's very strict production system, employees already put forth maximum effort, often working many hours of voluntary overtime. Employees cannot absorb significant extra duties. The agency maintains that the time needed for this additional work will be very small. No one, including agency managers, knows if this is true.

Because accurate data gathering would determine the facts, POPA has proposed that the time spent on the new file wrapper duties be accounted for separately under the agency's time and activity reporting system. Such a recourse does not change the USPTO's assignment of work, but would generate data to determine the true impact of these new duties on employees.

A Blank Check

The agency has asked the FSIP to set this process in stone for three years, with no ability for employees to

(continued on page 4)

USPTO "Quality" Initiatives

(continued from page 3)

provide meaningful feedback on the success or failure of the process. The specific impact of these processes will only be evident after they are implemented, if no pilot is performed. In essence, the USPTO is seeking a blank check to write the certification and recertification processes without any formal input from employee stakeholders.

After three years, if and only if the USPTO unilaterally decides that any change is needed, it will then consider POPA's suggestions on behalf of employees. If the agency sees no need to change, it won't necessarily consider any employee input. And, as stated earlier, the agency would consider changing the certification or recertification exams only if 20 percent or more of employees fail the exams.

Dissing Employees

The USPTO in its proposals demonstrates its disdain for its employees with its assumption that, if left to their own devices, employees will produce poor quality work.

To grant up to nine hours of examining-related time for employees to appeal a harmful agency finding "will reward poor performers," wrote the USPTO to the FSIP. "Examining-related time counts towards the minimum amount of time that employees must accrue to receive a full award, *yet the employee is not responsible for producing any work during that time.* Consequently, examining-related time is the most advantageous type of time for employees." [emphasis added]

This is a specious and contemptuous characterization of examining-related time. If employees are defending against allegations of error, they *are* doing USPTO work. They are protecting the integrity of the patent system. Examining-related time also covers classifying, assisting supervisors in training, attending meetings for or with a supervisor, and myriad other essential work-related duties.

The agency also wrote that granting examining-related time for an appeal "would provide an incentive to employees to spend time challenging each and every finding of error, regardless of whether a finding of error actually impacts their rating or their award."

Most examiners should find this statement insultingly absurd, because most have a great deal of professional integrity. They would not file frivolous challenges that would ultimately make them look foolish. Their professional reputation is at stake.

Tried and True Quality Enhancement

The only effective way to increase quality and maintain production is to improve examination tools and to increase the amount of examination time per case. Examiners come to work for the USPTO because they want to do a high-quality job. Increasing quality would necessitate the agency's hiring of more examiners and holding onto its good ones, something that the USPTO will be hard pressed to do if these proposals are implemented.

POPA Wins Job and Back Pay

(continued from page 1)

POPA also proved that several of the charges of error occurred in cases for which no credit was received by the examiner during the PIP, such resulting because the agency delayed crediting or "PALMing" the examiner's work until after the PIP had ended.

In overturning the allegation of clear error in these cases, the arbitrator wrote, "It was the agency's burden to see that 'credit was received' for said work during said PIP. If the agency failed to instruct [the supervisor] adequately in this regard – after having had no fewer than 28 weeks to foresee the possibility that the grievant might not pass [the] second PIP – it is not the grievant who should be made to bear the consequences."

The arbitrator reversed all 17 of the USPTO's charges of error and ordered the employee reinstated to the GS 11 position without loss of seniority or other benefits and with full back pay.

POPA Delegates Howard Locker and Raymond Johnson represented the employee before the arbitrator, assisted by POPA Vice President Larry Oresky, Assistant-Secretary Pamela Schwartz, and Delegate William Luther.

Quiz Wiz

Julie Anne Watko, an examiner in Art Unit 2652, had the top score in the patents trivia quiz offered by POPA at its USPTO Community Day table in August. She received a $50 check as a prize.

Increasing Examination Time Cuts Costs, Study Concludes

An increase in patent court cases is linked to decreased patent quality, and increasing time for examination would save the United States more money overall by spending less on high-cost litigation, according to a study published by the National Academy of Sciences.

The study, "Patent Examination Procedures and Patent Quality," by economist John King, assessed the effect of increasing application workloads on USPTO examination performance. The result: a negative effect.

"The data suggest that an increase in examination quality would reduce the number of patents that courts must review, decreasing the risk of litigation," the report states. This is in line with the USPTO rationale for its recently proposed quality initiatives. However, the method for successfully achieving quality that economist King statistically reviewed – increasing examiner time per disposal – is not one that the agency likes to acknowledge.

"Increasing the number of examiner hours by an hour for every patent disposal carries substantial costs, however," the study states. "A policy of increasing examiner effort across all examination groups by one hour per patent disposal would mean an increase in examination costs of roughly 5.5 percent."

"Although these costs are significant, they point to an interesting result," wrote King. "Assuming that the statistical relationship [established earlier] between increased examination hours and reduced litigation holds, the one-hour increase in examination would eliminate approximately 25 [court cases] ...an estimate of the reduction in litigation costs achieved by increasing patent examination intensity is equal to $17,045,000. This amount significantly exceeds the $11.3 million cost of increased examination effort, which is based on a $100,000 annual salary for examiners that is probably overstated to begin with."

Court Cases Involving Patents Issued Between 1989 and 1991

Examination Group	Approx. Annual Rate of Patents Involved in Court Cases Per Thousand Patents Issued
1100. Metallurgical, inorganic petroleum and electrical chemistry	1.5
1200. Organic chemistry	1.3
1300. Specialized chemical engineering	1.7
1500. Plastics, coating, photography stock	1.1
1800. Biotechnology	1.4
2100. Industrial electronics, physics	1.1
2300. Information processing, storage, and retrieval	0.5
2400. Packages, cleaning, textiles, and geometrical instruments	0.1
2500. Electronic and optical systems and devices	0.0
2600. Communications, measuring, writing, and lamp/discharge	1.9
3100. Handling and transportation media	3.1
3200. Material shaping, article manufacturing, and tools	3.7
3300. Mechanical technologies and husbandry information	4.8
3400. Solar, heat, power, and fluid engineering devices	4.5
3500. General construction, petroleum and mining engineering	4.4

SOURCE: Derwent *LitAlert*, USPTO Annual Reports. From *Patent Examination Procedures and Patent Quality,* by John King

LETTERS TO POPA

Law School "Suspended" Indefinitely, not "Cancelled"

The article on law school [*POPA News*, July-August 2003] describes the program as having been "cancelled." I would like to point out that the letter referred to did not cancel the program but rather stated that funding for the program was suspended. Suspension is provided for in Section I (5). I hope you will take action to correct this misinformation. Thanks.

– USPTO Chief Negotiator, Law School Program

POPA responds:

The newsletter is intended to explain situations in simple and plain language. It is not intended to convey the subtle distinction between cancellation and suspension in the context of an overview of the situation. What matters to employees is that the USPTO is not providing the funding that was expected and has no plans to provide that funding in the near future. We would be delighted to publish any firm plans by management to resume funding the program.

All OACS, All the Time

As of Dec. 1, 2003, the USPTO will be able to shut down the use of all action writing software other than the Office Action Correspondence Subsystem (OACS). Only those employees who were using typists to prepare office actions prior to July 1, 2002, may continue to have actions typed until the beginning of the fourth quarter of fiscal year 2005.

Employees who believe they need OACS training should promptly request training from their supervisor. As appropriate, two to four hours of additional training over and above already given mandatory training will be provided.

Software that the USPTO may shut down by Dec. 1 include Action Writer, Form Writer, PCT Writer and WordPerfect.

Your CFC, a Powerful Tool of Help and Hope

Dear Colleagues:

The Combined Federal Campaign gives us the power to express our own personal commitment to helping the less fortunate. Your donation will give you the good feeling that comes from knowing that you helped and gave hope to your neighbors, here and around the world.

For $1 per pay period, you've got the power to:

- Provide diapers for a orphaned baby for 5 months
- Provide food staples for a family for two weeks
- Remove 60 pounds of trash from shorelines and underwater areas
- Provide a month's worth of shelter and education for a child who has been orphaned by AIDS in Uganda
- Fund activities for visually impaired seniors for ten weeks

For $2 per pay period, you've got the opportunity to:

- Supply a health clinic with 50 pregnancy tests
- Provide 10 delivered meals for homebound seniors
- Plant 100 sapling trees
- Buy a month of lunches for a malnourished child
- Buy a chemotherapy patient a wig and a complete blood count
- Feed a shelter dog for a month

For $5 per period, you've got the ability to:

- Provide a lightweight wheelchair to a disabled person
- Provide a caring foster home to an abused child for a month
- Buy two hearing aids for hearing-impaired people

Employees may make their contributions confidentially. POPA has provided the agency with opaque envelopes so that supervisors and keyworkers won't be able to see to whom you are giving. The envelopes are available from your CFC keyworker and should be handed out with the pledge materials

As an organization committed to the ideal of helping people, POPA urges you to contribute as generously as you can to the CFC.

Sincerely,

Ronald Stern

Ronald Stern
POPA President

Advocating for Safety and Security Measures

For the last two years, many employees have been troubled by the deficiencies in the USPTO approach to emergency preparedness and security. POPA has been advocating for your safety, but you can also take action.

Following Sept. 11, 2001, POPA met with security and management representatives to request necessary security improvements and warn of deficiencies. In the ensuing years, POPA has been persistent but the union's words of caution have brought little result. For example, the USPTO has failed to implement:

- Repeated requests for drills specifically targeted to bomb threats and shelter-in-place scenarios.
- Emergency procedures including drills for disabling all building ventilators.
- Physical barriers for preventing unauthorized vehicles from approaching USPTO facilities.
- Egress routes to remote safe areas for every USPTO building in the event of a bomb threat
- Buzzing/vibrating pagers for our hearing and sight impaired employees and more evacuation wheelchairs for use in drills and actual emergencies.
- An option to occupy ground floor office space for non-ambulatory employees.
- Improved protections for the planned childcare facility at Carlyle.

Employees can address their additional safety concerns by contacting POPA reps Margaret Wambach or Sheila Clark, or by writing to the POPA newsletter.

JOIN POPA

Patent Office Professional Association

Letters from readers are welcome. Address to:
The Editor, Patent Office Professional Association,
P.O. Box 2745, Arlington, Va. 22202
(703) 305-3000

Officers

Ronald J. Stern, *President,* (703) 308-0818

Lawrence J. Oresky
Vice President/Director of Grievances, (703) 308-2581

Howard Locker, *Secretary/*
Director of Adverse Action Challenges, (703) 308-2924

Pamela R. Schwartz, *Assistant Secretary/*
Director of Unfair Labor Practices, (703) 308-2424

Randy Myers, *Treasurer,* (703) 305-4734

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