POPA NEWS
Patent Office Professional Association
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USPTO Lists One-Third of Patent Jobs as "Commercial"

Would Subject Jobs to Privatizing; POPA Challenges Designation

POPA has submitted a formal challenge to the USPTO's listing of approximately one-third of all engineering and technical full-time-equivalent positions (FTEs) within the patent corps as "commercial" jobs open to private-sector competition.

The agency's November 2002 Federal Activities Inventory Reform (FAIR) Act job inventory, posted on the USPTO Web site, listed 1,176 FTEs in the patent corps performing engineering and technical services as "commercial" and 2,481 FTEs performing such services as "inherently governmental." Because the jobs are listed only by OMB function codes and not the usual OPM occupational series, there is some ambiguity as to precisely which positions are being targeted. But, because the numbers of FTEs are so large, it is safe to assume that they apply largely to patent examiners. The listing of some jobs as "commercial," and others not, does not necessarily refer to jobs as they are structured today. Based upon the USPTO Strategic Plan, the agency is most likely referring to its intent to separate the prior art search function from the function of determining the legal consequences of the discovered prior art.

Contracting Out Judicial Functions

The job of a patent examiner has long been considered quasi-judicial becausee it requires examiners to make judgments of the metes and bounds of inventions and, thus, determine individuals' property rights. In this context, searching the prior art may be considered analogous to the judicial function of making findings of fact, while determining the legal consequences of the discovered prior art may be considered equivalent to reaching conclusions of law.

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Permanent Telework Agreement Doubles Work-at-Home Slots

The new Patents Telework Program, recently negotiated by POPA and the USPTO and scheduled to begin by April 30, more than doubles the number of employees that the USPTO had planned to allow to telecommute and makes work-at-home a permanent employee program.

Approximately 800 primary examiners and people in equivalent positions will participate.

The agreement permits reopening negotiations at the request of either the union or the USPTO every two years, and during negotiations the program will continue with the status quo. POPA anticipates that the number of participants will increase as the program succeeds.

Patent Telework Program Highlights

■ A minimum of 60 percent of primary examiners and equivalent positions will be permitted to telework one day a week. Selection priority will be given to those in the prior program and then by seniority.

■ The program is permanent. During any renegotiation, the program will continue with the status quo.

■ Participants may work any full-time schedule, subject to these restrictions:

- Participants must work 6 hours on at least three days Monday-Friday at the USPTO site, between 6:30 a.m. and 6 p.m.
- Regular compensatory time may not be used to fulfill these requirements unless for absences of one week or longer.
- On the telework day, if participants work more than six hours, six of those hours must be worked between 6:30 a.m. and 7 p.m.
- If the participant works fewer than six hours, all work must be completed between 6:30 a.m. and 7 p.m.
- All forms of approved leave, including compensatory time, may be used to fulfill work requirements on a telework day.

■ The agency did not commit to provide any hardware or software support, but if it chooses to do so, participant use will be voluntary.

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POPA and USPTO representatives at the signing of the Patents Telework Program Agreement. Back row: John Cabeca, Pamela Schwartz, Kathy Matecki, Michael Ball, William Way, David Dalke. Seated: POPA President Ron Stern and Deputy Commissioner for Patent Operations Esther M. Kepplinger. Not pictured are POPA team members Kathy Duda, Karen Hastings, Howard Locker and Melanie Tung.

PTO Lists One-Third of Patent Jobs as "Commercial" *(continued from page 1)*

Because making judicial conclusions of law depends on the findings of fact, neither function can be considered a commercial activity. Removing the job of making findings of fact from a judge would transfer much of the judge's function to the person making the findings of fact. Similarly, considering a prior art search a commercial activity would transfer control of the admittedly inherently governmental function of patent examination to the commercial entity.

The Office of Federal Procurement Policy's Policy Letter 92-1 defines "an inherently governmental function" as:

> "...those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the government. ...An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to: ... (c) significantly affect the life, liberty, or property of private persons."

Patentability determinations unquestionably affect the property rights of individuals. Therefore patentability determinations—and the findings of fact upon which they are based, i.e., the prior art search—constitute an inherently governmental function. Search is inextricably entwined with determinations of patentability and therefore must also be inherently governmental.

Bad Math, Inadequate Notice

The USPTO is wrong if it believes that one-third of all patent FTEs would be devoted to the prior art search if the search and patentability determination functions were separated. Examiners will need to duplicate functions performed during the search, such as reading and understanding the patent application and the references cited. The job remaining after the search is privatized would be 90 percent or more of the previous job.

The USPTO claimed that it has listed the patent corps jobs as "commercial" since its FAIR Act inventory of 2000 and that it has received no challenges to those claims. However, scrutiny of the "Patent Examination" FTEs listed in the USPTO FAIR inventories for 2000 found the only large number of patent jobs identified as commercial were 775 "administrative support" FTEs. In the 2001 patent examination inventory, 375 FTEs were listed as "administrative support" and 1,100 as "management support." Only the 2002 inventory for the first time listed "engineering and technical services" FTEs in the patent corps as commercial.

The commercial listings for 2000 and 2001 clearly can't be describing the patent examination function. The agency gave no indication that these FTEs refer to professional jobs and they cannot be construed as such. The USPTO therefore had not given fair and adequate notice to employees that their jobs may be subject to contracting out.

Huge Contracting Growth

In the cover letter to the Office of Management and Budget regarding the USPTO FAIR Act inventory, the agency stated:

> "During FY 2002 alone, the USPTO increased the number of contract personnel onboard by over 1,000.... Currently, the USPTO has over 3,900 contract personnel working either onsite at our facilities or offsite at contractor facilities.... If the USPTO were given credit for its current contracting efforts, approximately 39% of our total workforce has already been contracted out."

Telework Agreement *(continued from page 1)*

■ Employees with short-term medical conditions may be permitted to telework for up to four months with supporting documentation. Employees may reapply as necessary. Employees must meet all the eligibility requirements, except for seniority. Participants qualifying as medical-exception participants will not count towards the 60 percent minimum.

Previous Work at Home program participants will be grandfathered into the program as long as they meet the requirements. Vacancies will be filled at the end of the first, second and third quarters. Application for the program will be ongoing.

Each week participants may choose one day to telework Monday to Friday. Supervisors cannot arbitrarily deny the choice of telework day and cannot use their own personal schedules as a basis for denying a participant's chosen telework day.

Unlike the prior program, the agency will not be required to fund any hardware or software. However, POPA urges that the USPTO return the existing successful software and equipment from the previous program to the participants. The USPTO would incur no additional costs and would gain productivity from the software-facilitated work at home. Without the proven software, participants will waste time using workarounds. If the agency provides equipment, participant use will be voluntary.

Telework participants may take "other" time while on their day at home, including but not limited to time for training others, transfers and written restrictions. The USPTO made it abundantly clear that it expected employees to provide the same training and consulting services that they would provide if they were on site. Basically, all activities listed on a patent examiner's 690e, except for union time, are appropriate activities that may be done at home.

If a participant has received a disciplinary or adverse action, he or she may be removed from the program. The USPTO committed at the table that a disciplinary action for these purposes is, at a minimum, a written letter of reprimand and does not include oral actions.

Participants may also be removed from the program for abuse of the program guidelines. The agency had at first proposed removal for significant or repetitive rules

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Telework Agreement *(continued from page 2)*

violations. To overcome POPA's objection that this could apply to unintentional repetitive violations of technical rules, the language was strengthened to require abuse.

POPA succeeded in eliminating the agency proposal to exclude employees who returned materials late from the previous program. All prior program participants will receive priority for placement in the program.

Regarding production requirements for the telework program, participants must "have and maintain a fully successful rating of record." Rating of record is a personnel term of art that means the written rating in the Official Personnel File (OPF). If in the last fiscal year an employee received a fully successful rating or better, the employee qualifies until the next fiscal year unless he or she is placed on a performance improvement plan or if the employee is given a new written rating during the year. (This usually happens only when the agency wants to deny an employee a within-grade increase.)

While the number of participants is more than twice the number in the prior program, the union's proposal was to allow thousands of employees to telework instead of hundreds. POPA based its proposal firmly on published guidance from the Office of Personnel Management and Congress, which provided for the eligibility of all satisfactorily performing employees whose job can be performed via telework. However, during a hearing on the stalled negotiations before the Federal Services Impasses Panel, the FSIP adjudicator clearly stated his agreement with the USPTO that the program should be limited to only, in the agency's words, the "most trusted and experienced" patents employees.

The Patents Telework Program represents a compromise that quickly establishes a permanent program to assist a significant number of employees. POPA thanks Rep Frank Wolf (R-Va.) for his efforts in nurturing and promoting telecommuting, a program that benefits the USPTO, its employees, and the community.

Correction to Table in November 2002 *POPA News*

The November 2002 *POPA News* incorrectly stated the correct data supplied by National Intellectual Property Researchers Association (NIPRA). With apologies to NIPRA, the correct data follows:

USPTO Subclasses with Over 1,000 Patents

	1995	2002	Change
Subclasses with >1,000 patents	415	769	185%
Subclasses with >2,000 patents	27	60	222%
Subclasses with >3,000 patents	5	23	460%
Patents in largest subclass	3,812	10,830	284%
Patents in largest 20 subclasses	51,871	105,419	203%

Compiled by PATENTEC for NIPRA

Patent examiners in "bullpen" office.

No Training Benefits in Bullpenning

A USPTO experiment in housing 6 to 9 junior examiners in one large, open office has failed to improve examiner training as planned, according to agency managers.

The experiment, known as "bullpenning," began in October 2002 in what the USPTO admitted was a violation of Article 16 of the basic USPTO-POPA agreement, which the USPTO reaffirmed in 1999. Explaining the situation to POPA in November 2002, the USPTO said that each bullpen office would include a desk for a trainer. The trainer could then be more easily on-call and instruct the examiners as a group in spur-of-the-moment training.

In reality, the trainers don't even have desks in the bullpens, according to two groups of bullpenned junior examiners surveyed by POPA this month. Individual examiners in these groups must go to the trainer's office to report on a case. One bullpen group reported never having had a group training meeting. The other group said that two such meetings occurred since the experiment began in October.

The bullpen experiment has succeeded in saving office space for the agency, eliminating employee privacy, and increasing possible distractions.

Examiners who were moved from single or double offices reported greater problems from noise and distraction than those who had only experienced the group office at the USPTO. All the employees appeared to be high-performers who were enthusiastic about the agency and their jobs. All reported that they were told by their managers that the bullpenning was a one-year experiment and that they would return to single or double offices at its conclusion.

POPA is seeking a remedy via the negotiated grievance procedure.

Rogan Backpedals on Paper File Removal in Public Search Room

In a December 2002 letter to Congress, USPTO Director James Rogan retracted his earlier official certification that the destruction of the public paper search files and the total reliance on electronic searching would not negatively impact the public. *(continued on page 4)*

POPA Executive Committee

As a result of the November 2002 POPA election, the representatives on the POPA Executive Committee are:

President	Ronald Stern
Vice President	Lawrence Oresky
Secretary	Karen Hastings
Assistant Secretary	Pamela Schwartz
Treasurer	Randy Myers

Delegates – Electrical
Mark Tremblay
Gene Munson
Margaret Wambach
Stephen Meier
Michael Shingleton
Sheila Clark
Bill Luther
Ella Colbert
David Robertson
Albert Gagliardi
Raquel Gordon*

Delegates – Mechanical
Vinh Luong
Raymond Johnson
Edward Miller
Irene Cuda Rosenbaum
Mike O'Neill
David Reip

Delegates – Chemical
Howard Locker
Kathleen Duda
Robert Budens
Patricia Duffy
Jennifer Graser
Patricia Morris
Larry Tarazano
Dina Letscher
Adrienne Johnstone

Delegates – Designs, Business Methods & Others
Melanie Tung
Caron Veynar

* Candidates Raquel Gordon and Charlene Dickens both received an equal percentage of the votes cast in the Electrical Area. After learning of the tie, Charlene Dickens officially withdrew her name from the candidacy.

POPA Service Awarded

POPA presented awards for service and dedication to four members at the December annual meeting.

Outstanding Service Award

Howard Locker: Howard is a jack of all trades for POPA. Recently he worked on the negotiating teams for Work at Home, Public Transit Subsidy, Quality Initiatives and the Performance Appraisal Plan. Howard has also been active in several grievances, disciplinary action and removal cases and effectively saved the jobs of two people last year. His actions earned him the appointment as POPA director of adverse actions.

Distinguished Service Award

Robert Budens: Robert heads all POPA Automation negotiations, which makes him very active because many negotiations are entering the litigation stage. He also led all the paper removal determinations and the corresponding flat screen monitor distribution to the examining corps. Robert serves on the POPA Legislative Committee and the Quality Initiatives negotiating committee.

Grievance Director's Award

William Luther: Bill has helped POPA tremendously in the grievance arena. He attended sessions of one arbitration on his own time just to learn the process. On his own he defended four employees against proposed disciplinary actions. He created a tracking database for grievances and unfair labor practice actions. Bill routinely handles information requests to the USPTO regarding grievances, proposed actions, Freedom of Information Act requests and appeals of FOIA denials.

Volunteer Service Award

Celia Murphy and Joel Sincavage: Celia and Joel devoted their time and efforts to last year's POPA Election, which seems to increase in difficulty each time. For the first time, they created inexpensive privacy screens to ensure secret balloting. They used their own time and leave to make sure that the election ran smoothly and fairly.

Paper File Removal *(continued from page 3)*

Rogan's retreat resulted from "some supplemental issues" that arose from an August 2002 lawsuit challenging his certification and the public paper file removal, he stated in his letter to Rep. James Sensenbrenner, chairman of the House Judiciary Committee.

The lawsuit, filed by the National Intellectual Property Researchers Association (NIPRA), seeks to maintain the public paper files "only until such time as the electronic search systems provide an equivalent result to a combined search of the existent paper and electronic systems," NIPRA wrote in its Nov. 2002 newsletter. The NIPRA lawsuit cited USPTO and private studies that demonstrated error rates from 36 percent to 71 percent in the classification of certain trademark registrations.

The USPTO publicly disputed these findings, even though some were from its own research. "If the error rate were actually that high, we would have heard about it," said Deputy Commissioner for Trademark Operations Robert Anderson in the *Patent, Trademark & Copyright Journal.*

However, NIPRA obtained a copy of a May 2002 letter from the USPTO to the data entry contractor who was largely responsible for the high error rates. NIPRA reported in its newsletter that the USPTO stated in its letter:

"The potential impact [of the high error rates] to the USPTO in terms of eliminating paper records is significant and detrimental."

These "supplemental issues" cited by Rogan in his letter to Congress prompted him to state to Rep. Sensenbrenner, "The USPTO will resume maintenance of its paper public search collections while it revises the plan."

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