POPA NEWS
Patent Office Professional Association
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Arbitrator Rebukes USPTO for Poor Handling of Employee Discipline

In a recent arbitration victory—POPA's fourth out of its five most recent removal arbitrations—the arbitrator reprimanded the USPTO for playing "hide and seek" with mitigating information and warned, "the Agency simply must stop ignoring the fact that the POPA has a Labor Agreement with it and that, by golly, it's bound by that Agreement and every facet of due process which it and the laws import."

Despite the USPTO's trying, as Arbitrator Robert T. Moore stated, "to play games with the union," the arbitrator reinstated the terminated employee—who had consistently fully successful performance ratings and no prior discipline.

The USPTO fired the examiner for alleged conflict of interest and misrepresentation in reserving Department of Commerce meeting space for an outside, non-governmental organization. The agency claimed that the employee had used a government position to imply agency endorsement of a personal activity and for personal gain. Arbitrator Moore overturned the misrepresentation charge, agreeing that after reserving the space, others within the non-governmental organization—not the examiner—had distributed advertisements falsely stating that the event was cosponsored by the Commerce Department. Though upon discovering the error the ads were withdrawn, the meeting was pulled from the Commerce space and no lasting damage resulted from the mishap, the arbitrator mitigated the employee's termination to a 30-day suspension without pay. Moore held the employee responsible for failing to control the actions of others within the outside organization.

However, during the course of the hearing, it became evident that the USPTO had improperly given the deciding official information about the employee that the official should not have considered. "It was a denial of the grievant's due process right to confront him with two charges of misconduct occurring during a specific period, and then to have extraneous representations about the grievant … be the determining force in sentencing," wrote Arbitrator Moore. That the USPTO appeared to purposely provide the deciding official with inappropriate information "jinxed the agency's case," he added.

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USPTO Breaks Agreement, Crowds New Examiners in Tiny Cubicles

The USPTO is denying suitable office space to new examiners by crowding groups into 5′ x 6′ cubicles for months, in direct opposition to its office space agreement negotiated with POPA in 1999.

A group of examiners hired in June this year were trained for three months in open classrooms. Examiners have traditionally met in open classrooms for only two to three weeks. The agency then moved the employees into 5′ x 6′ cubicles hurriedly installed within conference rooms. The 1999 USPTO-POPA agreement states that examiners shall have offices of 150 square feet whenever possible and only when not possible shall two junior examiners share offices of 150 square feet. The USPTO has no date set for moving the patent professionals into semi-private office space.

While the cubicles are a step up from the total lack of privacy in the classroom,

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Confusion Cubed: Classroom or Workspace?

Proposed Petitions PAP Threatens Employee Jobs

The USPTO intends to introduce a new performance appraisal plan (PAP) that could endanger the jobs of examiners and attorneys in the Office of Petitions and Patent Cooperation Treaty (PCT) Legal Administration.

An analysis of 2005 production data for Petitions and PCT attorneys and examiners has shown that if the agency's proposed production standards were applied to fiscal year 2005 production, 76 percent of the employees (71 percent in Petitions, 82 percent in PCT) would fall below 90 percent production, which is low enough to justify termination. All of these employees received outstanding ratings in 2003 and 2004. Because of the impact of proposed changes in time allotments for different kinds of cases, some employees would have to produce at a level of 150 percent of their 2005 production to keep their jobs.

The USPTO has stated that all of these employees will be able to meet their productivity goals if they track their "other" time more carefully. The agency also implied that examiners can meet their goals if they just work harder. The agency plans to offer no additional tools, work methods or training to help employees meet the new standards. The USPTO in FY 2005 pressured examiners to meet higher standards, which they did. It appears that their reward for hard work is more hard work with no greater compensation.

The agency has also proposed highly stringent error standards requiring employees to be downgraded from outstanding to commendable if more than 1 percent of cases have an error without defining what could or could not count as an error and with no procedure to dispute a finding of error. The USPTO will not specify what is an error, which would enable examiners to distinguish between a chargeable error and an inconsequential error. It's giving no examples and no guidelines that would make the system uniform so it may be applied equally and protect employees against selective enforcement. The judgment of the supervisor—rational or irrational, fair or prejudiced—would reign. Under this lack of guidelines, a typo can be found as an error and an employee would have no recourse to have it changed.

The USPTO has responded that an employee may file a grievance, knowing very well that the current full grievance procedure can take years to conclude. The agency, employees and the taxpaying public would benefit from including error standards in its new PAP and creating an administrative procedure upfront to handle disputes simply, quickly and relatively cheaply.

POPA had recommended creating a procedure whereby managers give specific feedback and a rationale for ratings to enable employees to truly improve their performance. Instead the USPTO's PAP would increase supervisors' rating discretion without requiring them to give any response.

Specifically, the agency language read, "Supervisors will use discretion in determining whether to consider an examiner's failure to meet timeliness standards in an evaluation." After attempts at making the language more specific, POPA compromised with a counterproposal to insert "in a fair and equitable manner" after the word "discretion."

Upon hearing the union proposal, the USPTO's Acting Chief of Labor Relations David Dalke said that the agency would not accept such language because it would prevent two reasonable supervisors from taking different actions when faced with the same situation—which, in fact, is the very definition of unfair and inequitable selective enforcement by supervisors. Dalke then abruptly suspended negotiations and walked out of the meeting, startling the rest of the agency team who had planned to continue negotiating.

The USPTO's proposals for the Petitions and PCT employees reflect the tack it will likely take when it comes to negotiating the overall contract next year.

Arbitrator Rebukes USPTO

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"The picture the Agency seeks to paint of deception and misrepresentation by the grievant is seriously flawed," wrote Moore, "…it's a thudding dud and flat rejected."

"The Agency Must Mend Its Ways"

Arbitrator Moore used strong and unequivocal language to scold the USPTO about its "hard-line, defense-crippling approach" to labor relations.

Despite an arbitrator's order to produce documents and witnesses requested by POPA for the employee's defense, the agency stalled or refused. The USPTO even maintained that no collective bargaining agreement with POPA exists, to which the arbitrator responded that the agency "had absolutely no likelihood that it could persuade me" to agree. The agency also claimed repeatedly that it had no records of prior USPTO conflict of interest or misrepresentation cases, only to have POPA produce evidence of such cases, some of the cases quite recent, which caught the agency in "a transparent falsehood," wrote Arbitrator Moore.

Moore had only harsh words for the USPTO human resources staff that worked on this case. He said that unless the staff responsible was disciplined, "every arbitrator accepting a PTO case should be wary of accepting at face value any representation made by the PTO."

The arbitrator found that POPA overcame all of the USPTO's stumbling blocks and made its case. The employee has been reinstated with back pay, minus the 30-day suspension.

A Correction: Rep. Howard Berman, a Democratic congressman from California, is a forceful advocate for quality in the patent system. His political party membership was misidentified in the Sept.-Oct. *POPA News*.

POPA: The Next Chapter Begins

By Ron Stern, POPA President

Everyone who faces retirement looks back over their years of work and marvels at the changes in the workplace. Musing over my 41 years as a USPTO patent examiner, obviously much has changed. In 1964, examiners had no air conditioning, no photocopiers, no private offices, and no telephones (only supervisors rated phones). We worked at desks separated by dividers of green metal and translucent glass. We ordered copies, called photostats, from a central location, and they came printed in reverse, white on black. Smoking in offices was commonplace.

Much about the position of patent examiner has remained the same, however. The job demands well-trained scientists and engineers who want to work for their country. It requires today as it did 41 years ago the same intellectual skills to judge which inventions warrant a patent and which do not. And to continually maintain the integrity of patent examination, improve the USPTO workplace and keep the profession inspiring and attractive to future generations of examiners, it calls for men and women who look beyond the four corners of their offices and computer screens.

While I joined POPA shortly after beginning my career as an examiner in 1964 and I was elected as a delegate in 1967, I became truly active in 1970. At that time examiners faced intense production pressure by USPTO management. Professionals simply didn't have enough time for a quality search and examination. I decided to devote extra time and effort to fight to tame the out-of-control production system.

POPA embarked on a five-year crusade to determine reasonable production standards and gain more time per case for examination. Five years it took—all of the early 1970s—and POPA only succeeded after legally challenging and winning the right to negotiate on productivity, a precedent-setting case in the federal sector. (Then, in 1978, new statutes under the Civil Service Reform Act led to case law that changed the interpretation of the law to give management the sole right to set the content of performance standards and prohibit any direct negotiations of the standards with employees. But I'm getting ahead of myself.)

When the dust settled, the USPTO increased the average time per case for a GS-12 examiner from 18.2 hours to 19.5 hours. A bit more than one hour more per case may seem like a little thing, but that hour has made an overwhelming difference to the quality of patent examination and to examiners' work lives.

That accomplishment happened in 1976. Your overall time-per-case has not increased since. Though examiners have had a few small breaks with additional other time, they've had no fundamental recognition for the substantial rise in actual examining time needed per case. Thirty years is too long when you look at the exponential growth in the complexity of applications and the amount of prior art. It's time again for patent professionals to stand with POPA to fight for more time per case.

Working for your professional association provides both tangible and personal rewards. Most USPTO employees who volunteer with POPA report that they believe strongly in the work they do to improve their lives on the job, from better electronic search tools to better pay and awards. They devote their skills and energies not just to their dockets, but to their profession and to their government by improving the job for themselves and their fellow professionals.

I'm now passing the mantle to the next generation of Association leadership and I'm confident they will guide POPA well. But they need POPA members to stand behind them, to demonstrate with a large percentage of the patent corps as bonafide POPA members that patent professionals are united in support of examination integrity and workplace quality. The USPTO, Congress and the patent community will listen to you when you join with your fellow employees to speak with one strong, clear voice.

This reminds me of a story of a father and son. They were walking in the woods when they spied a mountain lion. "Quick, Dad, run!" shouted the boy.

"No, son, don't be afraid," said the father. "He won't hurt us." And they kept walking.

When the boy then saw a bear among the trees, he pulled his father's arm in the opposite direction shouting, "A bear!"

The father smiled and patted his son's arm reassuringly saying, "Don't worry, we can handle the bear," as he strolled on.

Even farther into the woods, as they climbed over a fallen tree, a swarm off bees emerged. The father shouted, "Watch out, son! Run!"

When they were a safe distance away, the puzzled boy said, "You weren't afraid of the lion and you weren't afraid of the bear. Why were you afraid of a bunch of little bees?"

The father replied, "Because there were a lot of them and they were organized."

When you as patent professionals organize behind your association—showing your strength and speaking with one voice—you enhance your effectiveness and gain more respect from the administration.

I've worked my whole career to enable examiners to do the search and examination properly, with professionalism and integrity, and to gain you the resources to do so. But I didn't do it alone. As I leave, my thanks go to the hundreds of people who have helped maintain POPA as the voice and conscience of patent professionals. Your work has been, and will be, vital to the American economy and to the individual lives of thousands of USPTO employees.

ATTEND THE POPA ANNUAL MEETING

Wednesday, Dec. 21, 2005
Madison Building Auditorium

12–1 p.m.
- President's State of the Union Report
- Treasurer's Report
- Grievance Director's Report
- Address by Commissioner of Patents John Doll

1–3 p.m.
Reception for retiring POPA President Ron Stern—All employees and managers invited to wish Ron farewell.

Refreshments Provided

USPTO Breaks Agreement *(cont. from page 1)*

it's far less than what every examiner needs and deserves and was promised by the USPTO.

For comparison purposes, USPTO technical support employees receive 10′ x 10′ of space each. The public search rooms provide 6′ x 6′ of space for each searcher.

In addition, the agency in the Millennium Agreement guaranteed an individual high-speed printer to every examiner. Every bullpenned examiner will be sharing a group printer.

This examiner overcrowding is the result that POPA warned of years ago when the USPTO pushed ahead with Carlyle construction even though officials knew at the time that Carlyle couldn't hold the anticipated increase in employees. Agency officials also refused to rent additional needed space despite the availability of Crystal City office space that was fully wired for the USPTO computer system.

POPA filed a grievance opposing the overcrowding in October, which has gone unanswered by the USPTO for weeks.

Why I Joined POPA

"I have been a POPA member since my first biweek…"

Back in my high school history class, I learned that unions were instrumental in shaping the American work week. In the early days, unions were involved in reducing the work day from 12 to 10 hours. Just picture having to put in a 12-hour work day six days a week! Unions later lobbied Congress to pass the eight-hour workday for federal workers. Things I take for granted today, such as a 40-hour work week and paid overtime, are the direct result of past union efforts.

For a union to be most effective, it needs to represent a majority of the workforce. The more members the union represents the greater the union's bargaining power in contract negotiations and the protection of employee rights and benefits. It does not require mental gymnastics to understand that it is a good idea to join the union.

I have been a POPA member since my first biweek on the job. I would recommend that every eligible PTO employee join our union.

—Ulrike Winkler, Patent Examiner, Art Unit 1648

"…you can be sure the union will be on your side."

I joined POPA within my first month of working here. I decided that in this huge work structure, where checks and balances on the managers don't seem to exist, I wanted someone to go to when something goes wrong. You don't go into a workplace looking for a problem, but the bigger the work structure the more likely you'll need someone to stick up for you.

When I was expecting my second child, I didn't understand the government's maternity leave system. I asked my supervisor for help, but she claimed she knew nothing and gave me no help at all. My POPA rep was the only one to answer my questions directly, giving me lots of family and medical leave information that was accurate. When I came back to work, POPA found out that I was the only examiner who had been denied adequate advanced sick leave for maternity and helped me file a grievance. I won, and my reward was a transfer to my current unit, which is so much better for me.

Union dues? The five dollars a paycheck isn't going to kill you. And no one else here is going to look out for you—you can be sure the union will be on your side. POPA's fighting for things like better pay and other benefits to make this a better place to work—that's POPA's job. You just have to support the union so it can work for you.

—8-year veteran examiner in TC2800

JOIN POPA

Patent Office Professional Association

Letters from readers are welcome. Address to:
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POPA NEWS EXTRA
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PRESIDENT RONALD J. STERN RETIRES

POPA President Ron Stern's Final Badge-Out

POPA President Ronald Stern announced recently that he will retire at the end of December 2005, finishing an era of gains in labor rights and employee benefits rarely equaled by larger national federal labor unions.

The number of federal government unions that have negotiated increases in wages for their bargaining unit members in recent years can likely be counted on one hand, yet Ron spearheaded the POPA effort to secure a special pay rate that provided a 10 percent to 15 percent pay increase for patent professionals in 2000.

Ron Survives 41 Years of Service to USPTO, 38 Years of Labor Relations

Ron reported to work as a junior examiner at the U.S. Patent Office (no one mentioned trademarks at that time) in June 1964. Life was good, with no electronic time gates and many low-cost cafeterias and restaurants within easy walking distance for lunch. Supervisors measured the amount of work you did by counting the number of letters you mailed.

Ron Stern, circa 1986

Ron was first elected POPA president in November 1982, before many current examiners were even born. Before that, Ron was active in POPA as an Executive Committee member starting in 1967 and then serving as vice president. He worked face to face on labor relations and employee benefits with USPTO Commissioners Brenner, Gottschalk, Banner, Parker, Dann, Mossinghoff, Manbeck, Quigg, Comer, Lehman and Dickinson, and Directors Rogan and Dudas.

New York City to Pittsburgh to Washington, D.C.

Ron was born, raised and educated in New York City, earning a B.S. degree in physics from City College of New York. Higher education took him to Carnegie Mellon University in Pittsburgh, but higher priority (love and marriage to his wife, Jane) brought Ron to Washington, D.C., to work at the U.S. Patent Office in 1964. He earned his law degree from George Washington University in 1969.

Ron actually started his career when the U.S. Patent Office was located in the Herbert Hoover Building, which also housed the entire Department of Commerce. Ron rode the bus to work from Silver Spring (before transit subsidies) while Jane headed in the other direction to her career with the Montgomery County school system and the Maryland State Teachers Association.

Pride in Workmanship

From the very earliest stages of his career in POPA, Ron wanted to improve quality. He pushed for printed U.S. patents to carry on the first page the name of the examiner who allowed the patent so that all would know exactly who had issued the particular patent. Ron believed that pride of workmanship and pride of ownership in allowing a patent would make each examiner's work transparent to the examining corps and to the general public. Through Ron's efforts some 40 years ago, the examining corps, managers and the general public can see the work performed by each and every examiner.

Landmark Goals Agreement

One of Ron's first major efforts was referred to in the *POPA News* as the "Taming of the Goals." Ron was working with fellow POPA volunteer Ed Bauer to negotiate a goals agreement that would provide patent examiners with a predictable promotion ladder and performance appraisal standard rather than relying on totally subjective standards applied inequitably across the patent corps. They hoped this would eliminate waiting for a more senior examiner to be promoted, retire or die before an examiner could be promoted. This system has endured for more than 30 years and has enabled examiners to succeed, be promoted and earn cash awards based on objective, defined standards rather than subjective evaluations and cronyism.

The only problem was that Ed, Ron and POPA were so successful in defining an objective standard that the government in 1978 enacted laws that ended up prohibiting unions from negotiating over future production standards. This has enabled the USPTO to set ever more difficult production goals without providing employees with badly needed additional time.

The Signatory Authority Program

Ron had another project—to enable an experienced patent examiner to act independently to determine the patentability of an application by becoming a primary examiner with Full Signatory Authority. Such a program

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existed at that time, but the selection was based more on favoritism than on merit. Ron sought to make every examiner eligible to become a primary examiner by competing against known objective and subjective standards. Ron led the negotiations to set up a permanent Signatory Authority Program, open to all who qualify, which remains today.

A Favorite Activity: Ron Stern signing a POPA-negotiated agreement with USPTO officials, circa 1990s.

Ramrod Behind the Newsletter

Ron has long promoted distributing information to our bargaining unit members. It was one of his 1982 campaign promises. The chief communications vehicle has been the *POPA News*, for which Ron has served as editor for many years. When the Internet came along, Ron got onboard and pushed to get POPA members their own Web site. The National Academy of Public Administration has noted that POPA does a much better job of communicating USPTO programs, policies, and pay information to employees than the agency.

Litigator Extraordinaire – A Multimillion-Dollar Man

Ron always had his eye on the bottom line for examiners—pay. He spearheaded the efforts for special pay rates, SAA awards, gainsharing awards, an overtime pay increase, and the Millennium Agreement pay raise of 2000, as well as numerous other cash settlements of grievances that put money in examiners' pockets. The amount of case law established by POPA, a small upstart union with a small fraction of the members held by larger national unions, shows how successful Ron has been as POPA's chief counsel.

Lobbying as Union Strategy

Ron led POPA into the realm of lobbying to help prevent Congress from making decisions with adverse effects for bargaining unit members. Under his leadership, the union membership voted to increase their dues to pay for a lobbyist. POPA for the first time hired a lobbyist, former Maryland Congresswoman Helen Delich Bentley, to represent our interests to Congress and the administration. On many occasions, Ron has taken on the difficult task of putting together POPA's testimony to Congress and then presenting that testimony in person.

Ron has testified for many years to provide more time, money and tools for patent professionals to better enable them to do their jobs. Ron also has testified for greater numbers of patent examiners to be hired to take care of the backlog while continually predicting that technology and computers alone would not suffice. Many examiners today may have their job thanks to the persistence of Ron before congressional committees.

A Family Friendly Type of Guy

Ron has always been a strong advocate of family friendly benefits. His skill as an advocate for employees has led to programs including flexible and compressed work schedules, maternity and paternity leave, part-time schedules, increased flextime program, compensatory time, transit subsidies, leave sharing and credit hours—programs that many employees now take for granted or believe that management willingly provided them out of its benevolence.

Worldwide Patent Affiliations

Ron established an information-sharing affiliation with the Staff Union of the European Patent Office (SUEPO). In 2002 he led a delegation of POPA officials, at their own expense, to visit SUEPO in The Hague, Netherlands, to discuss working conditions, benefits, classification and automated search tools such as e-Phoenix. This continuing dialogue and information exchange with our European counterparts prompted POPA and SUEPO at a meeting in May 2005 to plan to expand their outreach to the Japanese Patent Office.

We, the officers of POPA, could probably fill a couple of newsletters with Ron's accomplishments on behalf of his fellow examiners because most examiners' benefits have been negotiated or litigated by POPA and they carry the stamp of Ron's leadership.

Ron, Thanks for Everything You Have Done for Patent Professionals, POPA and the U.S. Patent System

Passing the Torch: Incoming POPA President Larry Oresky with Ron Stern

Good Luck and Good Health in Retirement

From Your Fellow POPA Officers