POPA NEWS
Patent Office Professional Association
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USPTO Declares War on Employee Professionalism and Patent System Integrity

In an aggressive action, the USPTO demanded that POPA negotiate its term contract and submitted to the union contract proposals that slap down the professionalism of patent examiners, cut employee monetary awards and benefits, and endanger the integrity of the patent system.

The USPTO on March 3 presented POPA with proposals for a new collective bargaining agreement, despite an arbitrator's 2004 order of a bargaining hiatus. The agency proposed contract terms that severely devalue patent examination, including an awards-pay cut, the abolishment of credit hours, and a quality award system for only the favored few.

While boosting fees to the patent-user community, the USPTO hopes to slash examiner award pay and workplace benefits. If it succeeds, the agency's next step likely could be upping the already-high examiner work goals. The USPTO proposals undervalue the examiners' job, reduce quality by increasing speed-at-all-costs, and impede the government's ability to attract top-notch recruits to the USPTO ranks.

Same Work + Less Pay = Pay Cut

USPTO Director Jon Dudas in his March 7 *USPTO Weekly* message to employees stated, "I asked that this [contract] proposal be drafted in a way that improves the patent process and demonstrates the value of your professional contributions." Yet the USPTO's proposals prove this statement false and insincere.

The USPTO proposals attack employee take-home pay by chopping production awards. The majority of examiners now earn a 5 percent award for 110 percent production for 1,400 hours of examining and examining-related work. For the same percent achievement of goal within the same time period, the USPTO's contract proposals would cut award pay to 2.6 percent of salary. To earn a 5 percent award, employees would have to work at 120 percent of goal for 1,600 hours.

Director Dudas boasted in his message about "a new awards structure that provides opportunity for patent examiners to earn in excess of 16 percent of their annual salary in bonuses." He neglected to mention that this was for producing 140 percent of goal for 1,600 hours of examining and examining related time to earn a 13 percent production award, plus either working an almost impossible 600 additional hours training others or being lucky enough to get a 3 percent quality award.

The training function currently is an examining-related activity that's included in the production award formula, but under the new proposal the USPTO would separate those hours and not count them toward the production award. If a supervisor doesn't assign an employee the training time, the employee cannot earn the full award. To earn the 3 percent award an employee would need to conduct substantial training equaling close to a third of all of his or her available work time, which almost no employee currently does—most primary examiners who train do so for only 10-12 hours per pay period, which would not qualify under the proposed standards for even a minimum award. Supervisors try to minimize training time allotted to examiners to maximize art unit production time.

The USPTO would allow only examiners who are GS-12 and above for the full fiscal year to qualify for a quality award. Therefore, the year in which an examiner is promoted

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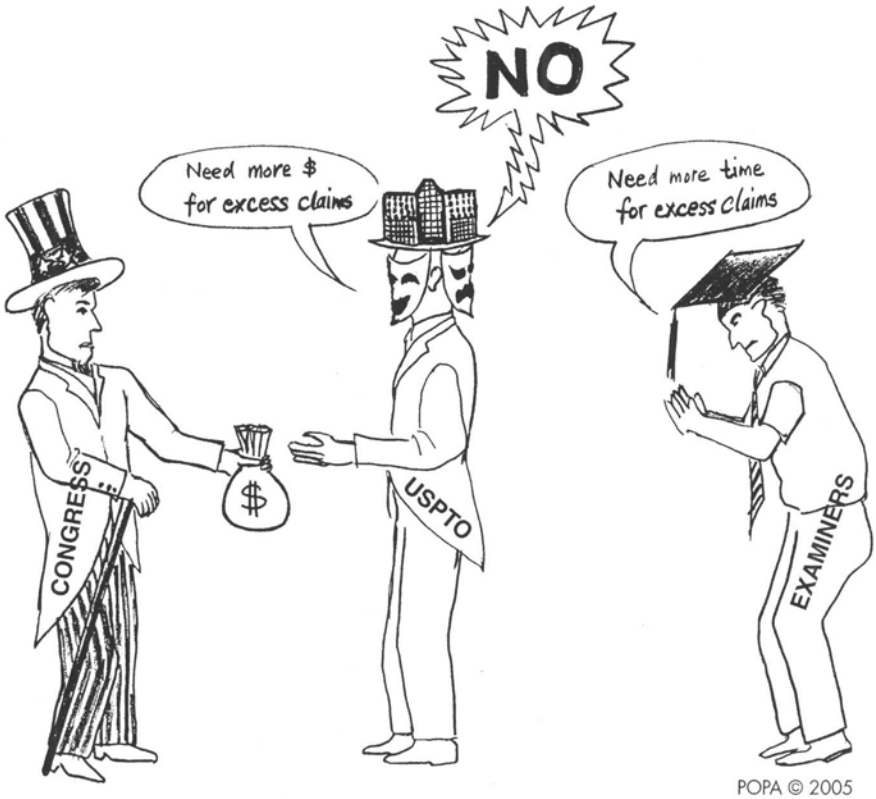

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With a whopping 25% increase for USPTO, why don't examiners get more time?

USPTO Declares War *(continued from page 1)*

to GS-12 would not count. To apply this in practice, only examiners at GS-13 and above would qualify for quality awards. The current system allows up to a 1 percent award for commendable quality to junior examiners. The USPTO is proposing to reduce quality incentives for junior examiners to zero.

The USPTO recently enacted a peer review practice that will make its proposed quality awards even more illusory.

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Significant USPTO Contract Proposals

Equitable Treatment
- Eliminates current contractual obligation that "employees will be treated equitably and fairly by management."

Physical Facilities
- No guaranteed private office for anyone.
- No guarantee that your "office" will have full height walls or a door. Cubicles and bullpens would comply.

Work Schedules
- Abolishes nine and 10 hour compressed work schedules, thereby eliminating nine and 10 hour holiday pay.
- If automated systems fail to function properly, requires participants to leave work without administrative leave at the later of: after systems are down for an hour or participants run out of work that does not require automation.
- Limits hours of Increased Flex Program (IFP).
- Requires employees to submit IFP schedule prior to the beginning of each biweek.
- Increases core hours.
- Permits midday flex only with a detailed written request and advance supervisory approval.

Overtime
- Allows managers to require employees to work mandatory overtime.

Annual Leave
- Requires leave requests at least three days in advance.
- Allows managers to cancel annual leave approvals without showing cause.

Sick Leave
- Requires medical certification after a three-day absence.

Compensatory Time
- Limits to 120 hours yearly (currently 480 hours).
- Full-time employees only.
- Disqualifies employees who have received proposed disciplinary or adverse actions.
- Limits maternity/paternity compensatory time to 80 hours per year (currently unlimited).
- For religious compensatory time, requires written explanation of religious belief that necessitates absence from work.

Maternity/Paternity Leave
- Allows only for non-probationary employees.
- Operational needs of the agency would determine length of leave.

Part Time
- No longer guarantees slots to employees with preschool-age children
- Requires fully-successful rating for employees to participate in childcare/elder-care component.
- Cuts retention slots from 20 to 15.
- Requires retention participants to be at least GS-13 rather than current GS –11.

Credit Hours
- Abolishes credit hours.

Performance
- Abolishes oral warnings - performance-based actions would begin at written warning stage. Places employees only one step away from removal instead of two.
- Allows almost no employee defense against allegations of error.

Performance Awards
- Enables agency to change/abolish all awards virtually at will at the end of each fiscal quarter.
- Abolishes existing Gainsharing and Special Achievement Awards (SAAs).
- Employees currently earning 5 percent award for 110 percent production would earn up to 3 percent.
- To earn a 5 percent yearly production award would require 120 percent production.
- Requires zero errors for Quality Award.
- Quality Award only available to examiners GS-12 or above for the full fiscal year.
- Gives production and training awards on a two-quarter basis (currently quarterly).
- Requires for full award an increase from 1,400 to 1,600 hours.

Training
- Funds non-duty technical and legal training at agency's complete discretion.
- Requires three years at USPTO to participate in legal studies program (increased from current two years).
- Requires two years of continued service after training to participate in legal studies program, no matter if one credit or 88 credits taken.
- Eliminates paid time for reading technical and legal literature.
- Requires that learning the legal aspects of the job will be done on own time or at lunchtime courses.
- Eliminates paid training time under the 16/40 program.

Outsourcing
- Allows no recourse for employees when parts of employees' responsibilities are outsourced. Agency is planning to outsource classification and search functions.

Promotion and Details
- No longer enables examiners to move up through the GS scale even though they meet all of the objective requirements for promotions.
- Promotion requires recommendation of immediate supervisor.
- No guarantee of openness in the selection process for details or promotions.

Grievances

No longer grievable:
- EEO matters
- Within-grade increases
- Removals
- Demotions
- Suspensions greater than 14 days
- Whistleblowing
- Reduction in force
- Written warnings for performance
- Denials of signatory authority

Grievance Procedure
- Severely cuts time for grievant's preparation.
- Reduces time for filing grievance from 20 to 14 days.
- Gives agency no obligation to respond to points raised by grievant or provide any pertinent information.
- Gives grievant no right to interview adverse witnesses before responding to a proposed action.
- No longer requires agency to have "just and sufficient cause" for taking a disciplinary or adverse action.

Union Activities
- Dramatically limits union's ability to represent employees.
- Cuts union time by more than half.
- No longer guarantees employee anonymity when seeking union representation.

USPTO Declares War *(continued from page 2)*

With peer review—added to the already existing quality review methods—employees will be more vulnerable to being charged with an error, which disqualifies them for any quality award. Supervisors will have the full power to decide if a peer-found error is actually an error and if it will count as an error against an examiner, and supervisors' decisions cannot be challenged by employees. The system has the built-in potential for favoritism and abuse.

The USPTO's proposed quality award structure would also absolve supervisors/managers from any obligation to give any written explanation if they deny a quality award. They would be able to withhold a quality award for any reason without rationale. Therefore an employee could have absolutely no errors, be rated outstanding, and could still be denied an award without explanation.

This 16 percent earning "opportunity" claimed by Director Dudas would therefore be available only to the agency's chosen favorites, if at all. As detailed in earlier *POPA News* articles, the USPTO's recent quality initiatives already are full of subjective determinations that can derail any employee. An outstanding rating wouldn't be enough; zero errors wouldn't be enough; the employee must stay on his or her supervisor's good side to receive a quality award.

Discouraging Quality, Encouraging Speed

If quality awards are blocked for junior examiners and are made impossibly difficult for primary examiners, the only way examiners can receive an award is through even higher speed.

The USPTO's proposals reward employees for spending the least amount of time per case. The USPTO's suggested production goal awards would offer significantly higher percentage payouts for a large quantity of work at minimally satisfactory quality. The USPTO scheme is to offer financial inducements to examiners to cut as many corners on quality as possible to produce, produce, produce.

This emphasis on speed over thorough examination runs counter to the intent of Congress, which supported increased fees for increased service. Congress listened to representatives of the patent community who said they'd willingly pay greater fees for excess claims in return for faster service that would not sacrifice quality. These proposals harm the integrity of the patent system.

Illusory Hoteling Guarantees

While the USPTO's one-day-per-week Patents Telework Program has a waiting list of over 80 applicants due to the USPTO's limits on senior employee participation, the agency is proposing a voluntary "hoteling" program, in which employees give up their workstation for "hotel work space" that is available for short periods of on-site use through a reservation system.

The hoteling proposal would save the agency office space and may sound like a good telework opportunity. But the agency-proposed hoteling arrangement would come with no promise that it would actually be implemented, and would give the USPTO jurisdiction to determine who and how many may participate. The agency would require employees to bear the financial burden of providing a broadband Internet cable connection and would reserve the right to require employees to foot the bill for hardware and

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Like Something Out of "Dilbert"

Employees Respond to Agency Contract Proposals

Since the USPTO announced its contract proposals in early March, POPA has received more than 70 letters detailing employees' concerns. Here are excerpts from just a few:

The [USPTO] proposals look like something out of a Dilbert cartoon. They really don't have any respect for us, do they?

The requirements for quality awards are so steep that they would be almost impossible to achieve. The zero error requirement alone would be an easy way to deny an award: patent examination is a very individualistic procedure, and two examiners' opinions could easily vary as to whether there was an error or not. Since the new quality review procedures were instituted, the error rate has gone up - if you are paying people to find errors, they will find them. Whether it truly is a legitimate error is another matter entirely!

The requirements to get approval in advance of flextime hours, to fill out a form for sick leave, and to require a doctor's certificate after three days simply drip with contempt for us. Also, since they can abolish or deny the flextime program at any time, they probably will.

* * * *

Dear Mr. Dudas:

I have been at the PTO over 13 years. [Recently] I became a part-timer, working 80 percent time. I do this because I have a child with special needs. Since I went part time, my production has increased over 20 percent, and my use of sick days has decreased. I have also been able to adapt my schedule to allow me to continue mentoring six examiners and to teach [examining] classes.

According to the proposal, credit hours would be eliminated, and comp time would not be available to part-timers. [Those flexibilities have] saved me having to use over 30 hours of sick leave in the past year to take care of my children.

The [USPTO] proposal as it stands would force me to work less than I can at present, lowering the [number] of cases I could act on in a year.

Rather than eliminating comp and credit time for part-timers, it would be beneficial to increase [them], including the ability to work such on weekends… .

(more letters on page 4)

USPTO Declares War *(continued from page 3)*

software that the agency determines is needed. The agency also puts the burden on employees for any slow Internet connection response time or disruption in service. Once employees give up their offices at the USPTO, if they leave the hoteling program, the agency gives no assurance that they will regain any office space.

The USPTO argued before the Federal Service Impasses Panel that it had to limit its current telework program to ensure an adequate number of on-site senior employees to assist in training and answering questions. As recently as January 2005 the USPTO refused to raise the telework limit claiming that "coverage" was still an issue. In addition to "coverage" as an excuse to limit telework, the agency's proposals include "coverage" as a valid basis to deny leave requests.

As long as the agency is using "coverage" to deny one day per week of telework and leave use, a hoteling arrangement is inappropriate because it provides a benefit to a few at the expense of all others. Employees should not be denied use of their leave and the right to telework a day per week so that a few others may be away from the office most of the time.

Punitive Negotiations Demands

By claiming a power to negotiate, the USPTO is ignoring its own appeal of an arbitrator's February 2004 decision. Arbitrator John C. Truesdale ruled that the USPTO-POPA contract was to stand for another year without additional bargaining. When the USPTO appealed that decision, the arbitrator's ruling was placed on hold pending a ruling by the Federal Labor Relations Authority (FLRA), which has not yet occurred. If the FLRA supports the arbitrator's ruling, as POPA anticipates, the earliest that the agency can demand to negotiate a new contract is one year from the FLRA decision. Until then, the current contract and employee workplace procedures stand. The USPTO filed the appeal, but is trying to wriggle away from the consequences of its action.

While Director Dudas in his March 7 message said, "These proposals are not set in stone; they are the subjects of negotiation," such extreme and punitive negotiating positions at the outset make reaching an amicable compromise very difficult, if not impossible. Director Dudas continued in his message, "We hope to expeditiously reach agreement with POPA," knowing full well that if the USPTO chooses not to reach agreement, the Federal Service Impasses Panel is stacked in his favor, having overwhelmingly decided cases in federal management's favor on every significant issue.

USPTO to Repel the "Best and Brightest"

At a time when the Office of Personnel Management (OPM) and federal management think tanks are talking about how to make the federal government an "employer of choice," the USPTO is moving in the opposite direction by proposing oppressive workplace standards.

For example, when the USPTO's computerized examination tools fail to function, the agency's proposals would require all of the employee users to go home without pay after the systems are down for an hour or participants run out of work that does not require the computerized tools. This literally forces employees to pay for the agency's management failures and transfers the cost of doing business to the employees.

At a time when the Bush administration is encouraging agencies to pay off employees' student loans and to pay for training, the USPTO proposals head in the opposite

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Letters to POPA

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In the last few years we examiners have had to absorb so many changes. Just when you thought that you could come up for a little air, management clamps down some more restrictions called "proposals."

Who could guess that this is the same office that will grapple with a backlog of about 500,000 cases by year's end? No employer can get work done in any office by scrutinizing workers right down to the dress code, micromanaging even their leave that they are lawfully due, and implementing more rules that take the wind out of them.

On the one hand, we purportedly have a quality issue, so much so that allowance rates are low, production numbers cannot be met, and every final action has to be thrashed over. We do more now than ever before. We print out our own references, take care of the draftsman's job, attend to classification problems...the list is endless. We have managed to absorb all this besides attempting to write near-perfect final actions...all on our OWN TIME, in the same production requirements that were stipulated 30-40 years ago.

And all they can come up with is how to make the already demoralized examiner more miserable? I would have liked to see at least an hour allotted to us to write final actions, especially when attorneys have the liberty to amend claims beyond recognition.

No amount of dangling money before us is going to help the overworked examiner this time. In the end, it is not about money. It is about time.

* * * *

This [quality] award isn't dependent on how well I do my job, but how much effort my supervisor wants to spend reviewing my cases. With all my cases being reviewed, one alleged error will eliminate any chance of an award. You can't even really control the outcome since it depends on the opinion of another.

What I am sure of is that we really are not white-collar professionals, but well-paid factory workers—as if patent examining is as simple and mindless as screwing two parts together. Management's proposal only confirms that.

(more letters on page 5)

USPTO Declares War *(continued from page 4)*

direction, forcing employees to train themselves and do it on their own time. The agency-required certification testing compels employees to study on their own or risk failure. (And no, the USPTO does not pay even a portion of its employees' student loans, nor does it propose to.)

Many private and public employers now offer generous part-time work accommodations to employees who are parents of preschool children. Not the USPTO. It is proposing to take away some of the current part-time positions available to parents of young children.

If the USPTO makes these new workplace proposals a reality, it will surely earn itself a top spot on the list of the ten worst places to work in the U.S. government.

USPTO: An Agency Out of Step

Leaders inside and outside of government have moved toward creating a federal workplace that is attractive and respectful of employees' talents and professionalism. With these contract proposals, the USPTO demonstrates how far out of step it is with the mainstream.

"If people are government's greatest asset, then government leaders need to make them a strategic priority," stated Marcia Marsh, vice president for agency partnerships at the Partnership for Public Service, at a congressional hearing last year.

Also in a speech last year, OPM Acting Director Dan Blair (then the OPM deputy director) told federal human resources professionals, "You have the authority and the flexibility to bring to federal service the best and brightest America has to offer. Now, you must have the desire and dedication to get that job done."

The USPTO's contract proposals clearly fail to fulfill that mission.

Leave Donation for Newborns' Illness

On Jan. 18, healthy twin sons were born to Bethany and Shane Bergin, both examiners in workgroup 3640. Eight days later, both boys were rushed to the emergency room and have been in the pediatric ICU ever since. The exact cause of the illness has yet to be diagnosed; however, the effects of the illness are profound. While both boys have come off life support, they have suffered significant brain damage.

Bethany and Shane have exhausted both their annual and sick leave during these past weeks. Because doctors can't ascertain the lasting effects of this illness, no one knows the extent of time the parents will need to remain away from work to care for the boys.

The Bergins would appreciate your generosity in donating any annual leave to help them through this most difficult time. If you have any questions regarding the current condition of the boys, their parents or leave donation, please contact Kim Smith at 703-308-8515.

More Letters to POPA

(continued from page 4)

Dear Mr. Dudas,

The TC2800 meeting held Dec. 1, 2004, was very encouraging. You actually listened to examiner concerns! To me, it seemed like the office was finally going to move ahead in making positive changes to the patent process, to improve the quality and efficiency of patent examining functions.

However, when I reviewed an official copy of the [USPTO] proposal I was outraged and completely saddened.

Management's proposal is a regression to the draconian times of the early '90s! Everything that improves our morale and fosters our creativity is now at risk!

So why is management backtracking on the former agreements that have made the USPTO a fabulous place to work? The current proposal should focus on improving the patent process instead of inhibiting our lives.

* * * *

I cannot enough express how disturbing the current proposal is. And for the record, my hallway has been aflame with disgruntled discussions regarding the proposal. I hope everyone will effectively speak up because we need our rights protected!

* * * *

As a primary examiner who has a child in preschool and [is in the military reserves], such proposals will make the patent office a difficult place to work.

Some of the [USPTO proposals] are not clearly defined and give the agency room to change as they see fit; and others come just short of violating our civil rights and privacy. Does the agency realize that many of us, including myself, already work many voluntary overtime hours in order to meet production goals and the bonus? Cut the bonus and the sacrifices we make right now will not be worth a penny. If this is what would happen I can see myself doing the bare minimum just to make it. The agency can definitely lose on this more than gain, since many examiners will not make it.

* * * *

I don't understand how limiting employees' flexibility helps employees or the office. If there is a backlog of cases and employees move them, why does it matter if someone works on Saturday, Sunday, early in the morning or later in the evening to do it? Additionally, there are so many benefits with respect to flexibility in terms of dealing with metro area traffic, weather, etc. The whole community benefits from flexibility.

Arbitrator Rules No Retroactive Law School Reimbursement

An arbitrator gave the USPTO total control over whether or not to fund the Non-duty Hours Legal Studies Program, virtually negating an entire section of an agreement negotiated and signed by the agency and POPA in December 1998. The decision denies retroactive reimbursement to employees who'd been forced to pay full tuition when the USPTO abruptly shut down the program in fall 2002.

Arbitrator Garvin Lee Oliver misunderstood the case, believing that the union's testimony and the agency's testimony conflicted during the hearing, when in fact there was no conflict. Oliver ultimately decided that POPA had agreed to a provision that offered much less than what the head of the agency was willing to give.

POPA's Intent Negated

During the hearing, the USPTO official, John Love, testified that the agency should yearly decide and control law school funding, and stated that he told the union as much. Arbitrator Oliver recognized that POPA had sent an e-mail to the USPTO that objected to the wording of the USPTO's proposal. The first language proposed by USPTO would have given the agency full authority to unilaterally decide the fate of the program each year. POPA's counter proposal clearly changed the meaning and checked the agency's authority. The USPTO didn't change the POPA language, tacitly agreeing to its meaning, which POPA detailed in the e-mail, and the agency signed the document. The final clause reads:

> Management may reduce, suspend, or terminate funding for this program when such an action is necessary for the proper functioning of the Agency. In making this determination, management will consider similar cutbacks in other non-duty training programs in an effort to equitably distribute reductions among all employees. Such determination will take into account the nature and purpose of the training and the adverse affect on the employees and the Agency.

The second phrase of the first sentence places a condition upon the agency that the ability to "reduce, suspend or terminate" the program be subject to proof in any enforcement proceeding. The USPTO agreed to this wording as explained in POPA's e-mail. The USPTO never testified that subsequently it protested the meaning of the e-mail, but Arbitrator Oliver apparently thought that the agency had, which was a mistake. He thought that the USPTO claimed no difference in the meanings of the original and the amended clauses and that POPA agreed. Oliver then credited the USPTO's non-existent claim.

POPA testified during the arbitration that prior to the union-agency negotiations, the union had met with then-Director Q. Todd Dickinson, who agreed that continued funding was critical to the running of the law school program. Dickinson and POPA agreed to create a standard by which the USPTO would decide to cease funding only under serious circumstances. Oliver assumed otherwise, that POPA had agreed to an interpretation that was less than the head of the agency was willing to give. This arbitrator's mistake in the findings of fact is not appealable.

Oliver did note that POPA's intent was to safeguard the program from arbitrary cuts by the agency. "It is apparent from the bargaining history that the Union sought an agreement [that] would prevent the Agency from acting arbitrarily or cutting funding on a whim," he wrote in his decision. "The Union noted that the agreed standard would be an 'objective' standard by which an arbitrator can judge management's actions…"

Current Law School Program Unaffected

USPTO Director Jon Dudas reinstated the legal studies program in December 2004. This arbitrator's decision does not affect its continuation. It does mean that the agency can cancel it at any time, and employees literally banking on the reimbursement need to consider alternate funding sources if the USPTO does so.

2004 POPA Treasurer's Report

The following report includes 2004 income to the Association and 2004 expenditures of the Association.

POPA 2004 Income

Dues thru 12/31	$195,825.00
Interest thru 12/31	$ 2,203.82
Total Income	$198,028.82

POPA 2004 Expenditures

	2004 Actual	2004 Budget
Litigation & Lobbying	$153,642.97	$120,000.00
Newsletter	$ 28,549.16	$ 30,000.00
National Activities	$ 8,264 .00	$ 11,000.00
Legal Info. Resources	$ 11,270.65	$ 8,000.00
Elections*	$ 3,247.84	$ 6,000.00
Administrative	$ 10,527.04	$ 11,500.00
Membership Services	$ 9,065.75	$ 12,000.00
Membership Meetings	$ 1,080.79	$ 5,000.00
Capital Expenditures	$ 5,469.58	$ 6,000.00
Total Expenditures	$230,888.78	$209,500.00
Net to Reserve	($ 32,859.96)	

* Election budget revised at 9-9-2004 Executive Committee meeting to fund two voting locations.

Notes

National Activities: Membership dues and conference fees for national organizations such as Public Employees Roundtable, Fund to Insure an Independent Retirement and Society of Federal and Employee Labor Relations Professionals.

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

Membership Services: Membership incentives, including purchase of Federal Personnel Guide for current and new members and participation in Community Day.

POPA Proposes USPTO Workplace Solutions

Well before the agency presented its recent contract proposals, POPA outlined some of its concerns about the agency and suggested solutions to USPTO Director Jon Dudas after he invited the association's input during a meeting last year. POPA's suggestions included:

■ **More time for examiners to do their job.** The USPTO-POPA Millennium Agreement, Subsection I, requires the agency and the union jointly to develop a proposal to Congress to benefit patent quality by increasing funding, most of which shall be used for increasing time for examination. Such a joint initiative can only benefit the USPTO and its employees.

■ **Improve the labor-management relationship.** A key component in any good relationship is open communication. A vital part of the USPTO-POPA relationship for nearly 20 years had been a labor-management committee composed of POPA representatives, non-union employees, and top Patent management. In recent years USPTO officials have refused to schedule any meetings of this committee. This group had been considered a useful conduit, bringing the concerns and frustrations of ordinary employees to the attention of top agency management. Most of the items discussed were the smaller impediments to getting work done, such as insufficient supplies or a lack of coordination between administrative operations and examining operations.

Renewing these committee meetings can only improve USPTO labor-management relations.

■ **Work together to reduce errors and improve quality.** No one likes to make mistakes, but if examiners do, the agency needs to inform them as soon as the errors are found to prevent future ones. The USPTO must clarify its changing standards so that employees can conform to the agency's new expectations.

Conversely, no one likes to be accused of a mistake falsely. When employees have been, they have discovered no established procedures for contesting an error. They must use their own time to review the allegations and present a defense. Approximately 20 percent of the alleged errors are improper allegations and the USPTO reversed them. The USPTO needs a procedure to allow employees to defend themselves against allegations of error.

Employees also resent that they receive an unsatisfactory rating when they have a 7 percent error rate while management reviewers may be considered fully successful with a 20 percent reversal rate.

■ **Involve employees in automated tools development.** The USPTO-POPA Millennium Agreement established mechanisms for early employee involvement in the design of automated systems. The agency has never honored this agreement, shutting out union input.

Gaining employee feedback early makes business and economic sense. By informing the Office of Search and Information Resources Administration of day-to-day employee needs, the computer experts can respond more accurately and productively, preventing the problems before they occur.

■ **Expand GS-15 Promotions Opportunities.** In the early 1990s, the USPTO employed about 125 GS-15 nonsupervisory examiners in the approximately 1,800-examiner patent corps, equaling about 7 percent. In today's almost 4,000-examiner patent corps, 7 percent would represent approximately 280 employees, yet the patent corps has only about 100 GS-15s, or 2.5 percent.

Some agency officials believe a policy deliberately restricting access to GS-15 positions is necessary to enhance the desirability of supervisory jobs. However, management positions attract people-oriented individuals while the GS-15 examiner job interests those who prefer the independent, technical nature of examination.

GS-15 positions provide a reward, and thus an incentive, for employees to do high-quality work and act as resources for other examiners. The policy of making GS-15 non-supervisory positions so difficult to get has effectively removed them as incentives, encouraging employees who reach the top of their GS-14 ladders to leave government. (Many of these top employees likely would jump the government ship for higher pay if outsourced searches were to become permanent.) The policy also discourages other employees; they look ahead, see their limited future at the USPTO and therefore leave.

■ **Create a procedure for employee transfers.** The USPTO has neither a procedure nor clear-cut criteria for transferring an employee from one supervisor or technology area to another. The current system lacks uniformity and fairness in determining who is allowed or encouraged to transfer.

The USPTO's policy is to refuse to transfer employees who have performance issues and oblige the current supervisors to document poor performance. The organization needs to establish criteria to measure the cost of forcing out an examiner and the resultant cost of recruiting and training a new employee, and compare this to the cost of transferring the examiner to a more appropriate art unit or supervisor. The USPTO now is forcing bright, capable employees who are valuable agency resources to choose between remaining in an undesirable situation and seeking employment elsewhere.

The agency has a substantial history of individual employees excelling after being allowed to transfer out of a

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Taken for a Ride

The City of Alexandria recently kicked off its free DASH About Lunch Shuttle Bus service in Old Town. The lunch shuttle will provide all lunchtime passengers free travel every ten minutes from the Alexandria Patent and Trademark Office to Old Town and back. The service runs from 11:30 a.m. to 2 p.m. on weekdays.

Alexandria sees this service as a way to boost lunchtime trips to Old Town, but few if any USPTO employees will take this shuttle under the current USPTO badge-in/badge-out policies. While employees can use mid-day flex, rarely do they use it just for lunch. Businesses in Old Town will not see the boost in patronage promised by USPTO before the Carlyle campus was built.

POPA's Workplace Solutions *(cont. from p. 7)*

situation where they were viewed as unsuccessful.

■ **Count final rejections in the production system.** A preferred way to counteract the common criticism that the agency gives employees more credit for issuing patents than for making rejections is to give employees "count" credit for writing a final rejection. While this may undo the concept that one can only get two counts per completed application, it will more accurately reflect the work necessary for quality examination.

■ **Support continuing legal and technical training.** To be a world-class organization, USPTO professionals must maintain their skills in all relevant areas. For examiners, that means continuing education in their art, in patent law, and in USPTO automation skills. The European Patent Office devotes approximately 5 percent to 6 percent of examiner resources to continuing education, a vastly higher amount than the USPTO's continuing training. At one time the USPTO paid examiners' travel and registration expenses for technical and legal conferences and for field trips to laboratories and production facilities in their relevant technologies.

■ **Reclassify overly large subclasses.** To facilitate patent searches, subclasses must contain no more than a few hundred patents. Because the agency has eliminated virtually all reclassification work, searches in some areas of technology have suffered. Good classification is essential for producing a quality search.

Reclassification will benefit the public at least as much as it will benefit examiners. On occasion, patentees are accused of using unusual terminology to complicate patent clearance searches for competitors. The USPTO needs reclassification to gather together all the items that use different terminology but represent the same methods, concepts or structures.

On Employee Monitoring

Regarding the August 2004 POPA News *article, "USPTO Coaches Supervisors to Dupe Employees into Admissions":*

I have been a supervisor at PTO for six years. I have never been coached by my management into "duping" my employees, officially or unofficially. I would not expect to be. And what's more, I have never heard any suggestions that any other managers are coached in this way either.

I wouldn't ever dupe my employees into admissions. I have built up an enviable supervisor-employee relationship based on trust, respect and plain speaking. I am very careful about what I communicate and how I do it, so that I do not endanger the trusting, two-way relationship I have built. "Duping" employees isn't my style, and I resent your publication suggesting that I do or would.

POPA responds:

We're gratified to learn that not all USPTO supervisors have received the instructions on how to trick employees into admissions. Sadly, however, the USPTO handed out these instructions, on paper, to hundreds of supervisors.

A USPTO supervisor-employee relationship that includes "trust, respect and plain speaking" is indeed rare and "enviable," as the writer states. POPA encourages all supervisors to follow the trust-engendering lead of this individual by rejecting any management directives to monitor employees through underhanded means.

Post-grant Opposition Won't Get It Right the First Time

The following is excerpted from a column in *Intellectual Property Today,* October 2004, by Joseph N. Hosteny, an intellectual property litigation attorney with the Chicago law firm of Niro, Scavone, Haller & Niro:

I eagerly read the 2004 American Intellectual Property Law Association testimony to see how it would recommend fitting this new PTO structure [a post-grant opposition procedure] into the PTO's already stressed budget, but there was nothing there.

A post-grant opposition would be a big change to our patent system. But other than estimating that a "substantial number" of people would have to be hired as administrative judges, the AIPLA's proposal does not estimate the cost of post-grant proceedings, whether to the PTO, the initiator or the patentee. ...There was no cautionary note that, for example, stopping PTO fee diversion would increase patent quality and decrease the number of post-grant proceedings that might be necessary. There was no mention of the PTO having the resources to "get it right the first time."

We have no hope of a better Patent Office until it has the funding it needs. What is more, every cosmetic, non-monetary change that is made, which does not address the underlying problems in the PTO, only makes the problem worse, not better. If a post-grant opposition procedure is adopted under these circumstances, there will be too many oppositions. And those oppositions, like reexaminations that do not comply with the statutory mandate, will take much longer than the promised 12 to 18 months. Nor will they eliminate, or even do much to simplify, litigation. They will, unfortunately, only complicate it further.

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