POPA NEWS
Patent Office Professional Association
April-May 2005 Vol. 05 No. 3

Negotiations on USPTO Proposals Deferred

The existing USPTO-POPA contract and its employee protections will stand until at least 2006, negating for a time the agency's recent harsh workplace proposals. An April ruling from the Federal Labor Relations Authority (FLRA) resulted after the union asked the authority to uphold a 2004 arbitrator's decision that supported the validity of the current contract.

The contract is to continue until at least the next open period for notification of intent to terminate the agreement, which is January-February 2006. Negotiations need not occur unless the USPTO reasserts its desire to terminate the current agreement next year.

This decision most immediately will impact the USPTO-POPA negotiated grievance procedure. The agency had been giving short shrift to grievances filed on employees' behalf and not following contractually mandated procedures, claiming that it could because no valid negotiated contract between the union and agency existed. The FLRA has upheld the contract, including the grievance procedure, and the agency must now respond to employees' concerns.

With 2006 the earliest window for negotiations, the USPTO has time to rethink its proposals in light of the significant negative reaction from employees to the initial proposals. The February-March issue of the *POPA News* included a sample of employee input to management. Additional employee letters between now and the next negotiations opportunity in response to the agency's proposals may help USPTO officials to better understand patent employees' positions and the agency may listen and change its proposals.

To understand the negotiated benefits available to you in the basic contract, go to *www.popa.org*, click on "Useful Info," scroll to the bottom and click on "Collective Bargaining Agreement."

USPTO's Broken Promise on Pay

The USPTO does not need to offer patent professionals a pay-raise alternative to a special-rate increase despite the agency having signed an agreement to do so, according to an April decision by the Federal Labor Relations Authority (FLRA).

The agency had promised in the 2000 USPTO-POPA Agreement on Initiatives for a New Millennium, "If OPM refuses the [special-rate increase] request, the Agency shall enter into discussions with POPA in order to provide substantially equivalent alternatives." When the USPTO later refused, POPA filed a grievance and the issue went before an arbitrator.

Initially in its arguments during the arbitration, the agency alleged that it had complied with the contract clause, but that POPA was not offering anything in return for the additional pay. POPA argued before the arbitrator that it had already provided a *quid pro quo* in the Millennium Agreement when the union agreed to the removal of the paper files and to the new customer service performance element. The arbitrator agreed with POPA and ruled that the agency was bound by the agreement.

In 2004 the USPTO appealed the arbitrator's decision to the FLRA and argued that it didn't have to keep its promise because "the award requires the Agency to adopt a specific practice or policy to encourage employees to remain employed by the Agency" and that the Millennium Agreement clause was not "an appropriate arrangement because rather than alleviating the adverse effects of the exercise of a management right, it provides a benefit to employees," according to the FLRA decision.

The FLRA chose an extremely broad analysis of the statute's definition of management's rights. The decision stated:

> "The right to retain employees under [the statute] is 'the right to establish policies or practices that encourage or discourage employees from remaining employed by an agency.' ...Further, 'management's rights...include the right to refrain from acting as well as the right to act.' Thus, management's right to retain employees includes, as relevant here, the right to refrain from establishing policies that encourage employees to remain employed by the Agency."

While the FLRA ruling gave the USPTO the right to withhold benefits that encourage employees to remain with the agency, it doesn't *obligate* the agency to withhold benefits. The USPTO is fully responsible for affirmatively choosing to withhold patent professionals' pay. In addition, the agency was so determined to renege on its promise that it chose to spend time and money to create a long-shot argument to contest the arbitrator's decision. Agency officials at the highest levels gave the go-ahead to fight tooth and nail to pay employees less.

Consider also for a moment how really broad this FLRA

(continued on page 2)

USPTO's Broken Promise

(continued from page 1)

ruling is. What union proposal is not designed to be a benefit for employees? What union proposal is not designed to make it more attractive for employees to stay with their employer? The FLRA's pronouncement is of such dramatic scope that it could be used to overturn virtually every prior ruling that found a particular matter substantively negotiable.

The ruling has opened the field for many negotiated programs to be shot down and placed in the management-rights trophy case. Federal statutes say that certain things can be substantively negotiated by unions and others are solely within management's rights. Pay issues in which the agency has discretion have until now fallen into the substantively negotiable area. Some discretionary federal-sector pay issues have been appealed as high as the Supreme Court, which has ruled in favor of unions' negotiating rights. But with this FLRA decision, those that had been substantively negotiable could now be placed under "management rights." This radical change may make agencies think that they can place all benefits within the realm of management rights.

POPA is considering its legal options in response to this ruling. The full FLRA decision, *Dept. of Commerce PTO and POPA,* 60 FLRA No. 158, can be viewed at *www.flra.gov/decisions/v60/60-158.html*

Excused Absence for Bar Exam

For one time only, USPTO professionals may be granted up to three days (24 hours) of excused absence to take the bar examination, according to a long-standing USPTO memo concerning training and educational leave.

Excused absence may be authorized only for necessary travel time and for the days during which the examination is administered.

Additionally, up to two days (16 hours) of excused absence may also be authorized for any required interviews before admissions committees of the bar involved and the like, and the time so spent may include travel time.

However, wherever reasonably possible, travel time should be performed outside normal working hours. For instance, those being admitted to the bar in Maryland and Virginia would be expected to appear either early in the morning or on the evening before the day on which they are admitted where reasonable travel time permits. Similarly, those being admitted to the bar in other states would be expected to travel outside normal working hours, wherever possible.

No excused absence will be granted for studying for the bar or for taking preparatory courses.

New USPTO Standards for Trademark Attorneys Bodes Badly for Examiners

The USPTO recently imposed an effective 20 percent increase in trademark attorneys' production goals, which portends similar high-pressure production goals for patent examiners.

The Federal Service Impasses Panel (FSIP) rejected every single proposal by the National Treasury Employees Union Chapter 245 (Trademark Attorneys) to ameliorate the adverse impact of the USPTO's new performance appraisal plan (PAP) for the trademark attorneys' bargaining unit. The FSIP compelled NTEU to accept the USPTO's last negotiations offer after the union and the agency failed to reach agreement on the impact and implementation of the new PAP.

The new trademark PAP, for attorneys at the GS 13-14 levels, establishes a raw goal per quarter. The previous, long-standing trademark production structure was a "counts per hour" rate system, similar to the patent corps "hours per balanced disposal" system. In the raw goals system, computer system down time, equipment failures, even office moves become the employees' responsibility, forcing employees to make up for time lost for reasons beyond their control.

Currently the patent corps rating system accounts for "other" work necessary to perform the examiner's job. A raw-goals system would count only the number of first actions and disposals or whatever measures the agency decides to use.

The previous trademarks production goal was 1.2 or 1.3 counts per hour (depending on the employee's GS level) and included final actions as a count; the new PAP doesn't. It counts first actions and items similar to disposal counts in patents, but overall the new trademark PAP reduces the number of items counted, thereby increasing the production required to meet goals.

The new PAP also sets up new quality standards that one senior trademark examiner said, "will push you down to marginal for a 99.7 percent accuracy rate." The new trademark quality standards are a trial balloon for a program "really intended for patents," said the trademark examiner.

Impact of Raw Goals

The trademark raw goal system determines the number of counts expected every quarter by averaging "other" time in various categories, assuming how many hours employees will use for annual and sick leave, computer down time, etc. Although these averages are intended to apply to senior employees, the USPTO averages don't account for usage of all 26 days of annual leave—the averages only allow 160 hours of annual leave per year even though senior employees get 208 hours yearly. The USPTO also

(continued on page 3)

New USPTO Standards

(continued from page 2)

established the computer down time average before the files were 100 percent electronic, so that average in the USPTO's model for assumed "other" time is already inherently incorrect.

The corps-wide averages don't adequately reflect an individual employee's reality.

The new trademark raw goal production system doesn't allow employees to average from quarter to quarter and rates employees separately on each quarter's output. Employees can transfer extra counts, with supervisory approval, from the first quarter to the second quarter, or transfer counts not yet done from the second to the first quarter, effectively going into debt for the second quarter. But at the beginning of the third and fourth quarters, examiners can only transfer cases already done into that quarter, i.e., can move in "extra" cases presumably to cover expected leave time. Transferred counts can't be relied upon to qualify for within-grades or promotions.

This PAP means that employees will have to work consistently throughout the year. Extended absences, i.e., leave of more than one week, must be planned way in advance to enable employees to request goal waivers or adjustments from their supervisor. This makes taking longer than one-week vacations per quarter difficult without an accommodating supervisor. And all of the averages and anticipated leave can be upended by an employee or family member becoming ill for one more week than "planned."

This system requires nearly all employees to work extra hours. It transfers a larger burden of extra examining time to the employee.

The USPTO also imposed the new trademark production goals in the middle of the quarter, setting a precedent for the agency.

The trademark PAP sets maximum work levels per bi-week, so if attorneys want to complete more cases than the management-determined maximum they must get preapproval from their supervisor. If any work is done over the maximum limit, all of the examiner's work will be subject to extra scrutiny regarding quality.

To prevent employees from postponing work on more difficult cases, once a case is "pulled" or clicked "on" from the electronic docket, a trademark attorney has seven days within which to act on that case. This effectively stops employees from reviewing their dockets to balance their workload of easy cases with difficult cases or vice versa.

The NTEU Chapter 245 Web site (*www.nteu245.org*) cited statistics that showed that if the new raw goals were applied to the USPTO's 2003 production data, 39 percent of trademark examiners would have been rated marginal or below for failing to meet productivity requirements and 55 percent would've been rated marginal or below for failing to meet first action requirements.

More Pressure, More Voluntary Overtime

The impact on working at home and voluntary overtime will be significant. Sixty percent of trademark examiners participate in the work-at-home program. With the new PAP, if their production drops below 95 percent, they will lose their ability to work at home. The USPTO states that it will not allow voluntary overtime, but the raw number goals will pressure employees who work at home to do voluntary overtime at home to make the numbers.

The new trademarks PAP uses quarterly appraisals, in which each quarter is reviewed separately. This puts enormous pressure on employees to do voluntary overtime to make the numbers. The high pressure and impossible workload will force trademark examiners "to look elsewhere for work," said one senior trademark examiner.

The raw goals system makes employees shoulder a large share of the responsibility for computer system malfunctions or overloads. The agency allots only a small amount of down time for its computer problems in the new plan. If all of the employees working during allowed hours overloads the computer system and blocks access for some employees, they will be forced to work on weekends or at night when they can gain access. This means the USPTO can run deficient computer systems and abdicate responsibility for fixing or upgrading the system.

This FSIP decision further illustrates this panel's tendencies to decide in management's favor on the impact and implementation of agency decisions. The panel totally rejected all attempts by the union to ameliorate the adverse impacts of the USPTO's actions, and chided the union for attempting to undercut management's unilateral ability to set goals.

You Want *Me* to Help Contract-out My Job?

When one tech center "invited" employees to help devise a "search template," one employee responded below:

I assume that this meeting is to have the employees assist management in contracting out the first portion of our jobs, the search. Contracting out the search will result in management cutting our time per case. We may or may not be held responsible for the quality and completeness of the search (that we will no longer be performing ourselves).

I think that we should all wish management luck in developing the search template for our art unit, however, I believe that this process trivializes what I consider to be a professional aspect of the job. My search decisions cannot be simplified into a uniform protocol that everyone can follow with success in each of my cases. The method and length of my searches vary and depend on the claims of the case, the concepts and prior art presented, my initial search findings in the case and my overall knowledge of the art. This is not something that can be put into a template.

Do As I Say, Not As I Do

Quality Review Office Shows High Error Rate

Recent USPTO statistics indicate that findings of error by the Office of Patent Quality Review are only upheld approximately 61 percent of the time.

More than 30 percent of the Quality Review findings were reversed or dropped. Approximately another 9 percent were "modified" or determined not to be examiner error, but also not quality reviewers' error.

Compare this to the acceptable error rates imposed on patent examiners by the USPTO: 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 an examiner's termination.

The decisions are wholly subjective—the quality reviewers and the technology center staff who decide each case determine which cases are labeled as errors and which are not. Given the same case and the same facts, different reviewers can and do find opposite results.

Error Statistic Report - Allowed
10/1/04 - 3/19/05

TC	Total Reviewed	Total Returned	Total Cases Where TC Agrees To Error	Total Dropped: OPQR Agrees There Is No Error	Total Cases: Agreed to modify	Total Open: TC And OPQR Not Yet In Agreement	Current Error Rate: Closed / Reviewed	OPQA Finding Reversed: Total dropped / Total Returned	Worst Case Error Rate: (Total Closed+Total Opened)/ Total Reviewed
1600	213	19	8	9	2	0	3.76%	47.37%	3.76%
1700	303	38	20	14	4	0	6.60%	36.84%	6.60%
2100	224	15	12	2	1	0	5.36%	13.33%	5.36%
2600	219	5	2	3	0	0	0.91%	60.00%	0.91%
2800	440	23	17	5	1	0	3.86%	21.74%	3.86%
2900	33	3	2	0	1	0	6.06%	0.00%	6.06%
3600	165	16	12	3	1	0	7.27%	18.75%	7.27%
3700	221	20	12	6	2	0	5.43%	30.00%	5.43%
Totals	1818	139	85	42	12	0	4.68%	30.22%	4.68%

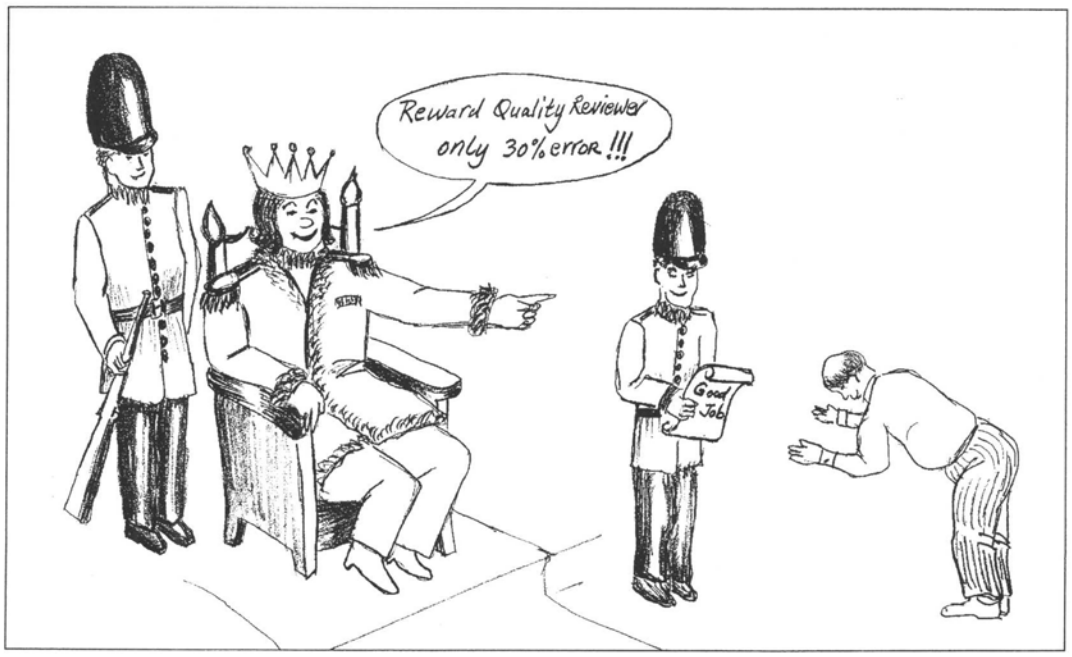
Discouraging Careers with USPTO

In 2005, for a disappointing second year in a row, the USPTO did not organize a Take Our Daughters and Sons to Work event in April, though several other Commerce Department agencies participated. The USPTO instead sent out the following notice the week of April 25, just prior to the nationally recognized family event:

It is the longstanding, written policy of the USPTO to restrict children from the workplace during all hours of work. Employees are responsible for devoting their full attention and best effort to their work responsibilities when in a pay status, including overtime. Children in the workplace can and do distract employees and disrupt work processes.

Supervisors are expected to enforce this policy. Employees may not bring children to or keep them at the worksite for more than a brief period of time. Of course, this policy does not apply to official office events, such as "Bring Your Children to Work" day.

The USPTO pointedly did not allow employees to participate in "Bring Your Children to Work" day in any way because it distributed the above memo "to restrict children from the workplace" while refusing to hold an "official office event." In other words, the agency told employees, "Your children can only participate in our official event, but we're not having one."



An Opinion

Too Much Patent Reform, Too Few Real Fixes

The American Inventor Protection Act passed in 1999 tried to resolve several patent system problems by ending "submarine" patents and by publishing patent applications after 18 months. But rather than improve, the patent system defiantly went into crisis. The race to pass the USPTO Fee Modernization Act shifted into gear. That legislation sought to improve the system by raising fees and outsourcing the classification and search functions. Since that legislation went into effect, we've learned that the patent system has suffered another meltdown requiring new legislative reforms to save it. Enter the proposals for a Patent Act of 2005.

As most examiners know, the application backlog is huge and the claims per application are increasing. The scope and complexity of the prior art grows daily. Patent classification is out the window and automation solves old problems by creating new ones. The Board of Patent Appeals and Interferences (BPAI) wants everything on a silver platter. The agency is erasing "other" time and piling tons of little tasks onto the patent examination process, and the quality of applications is declining.

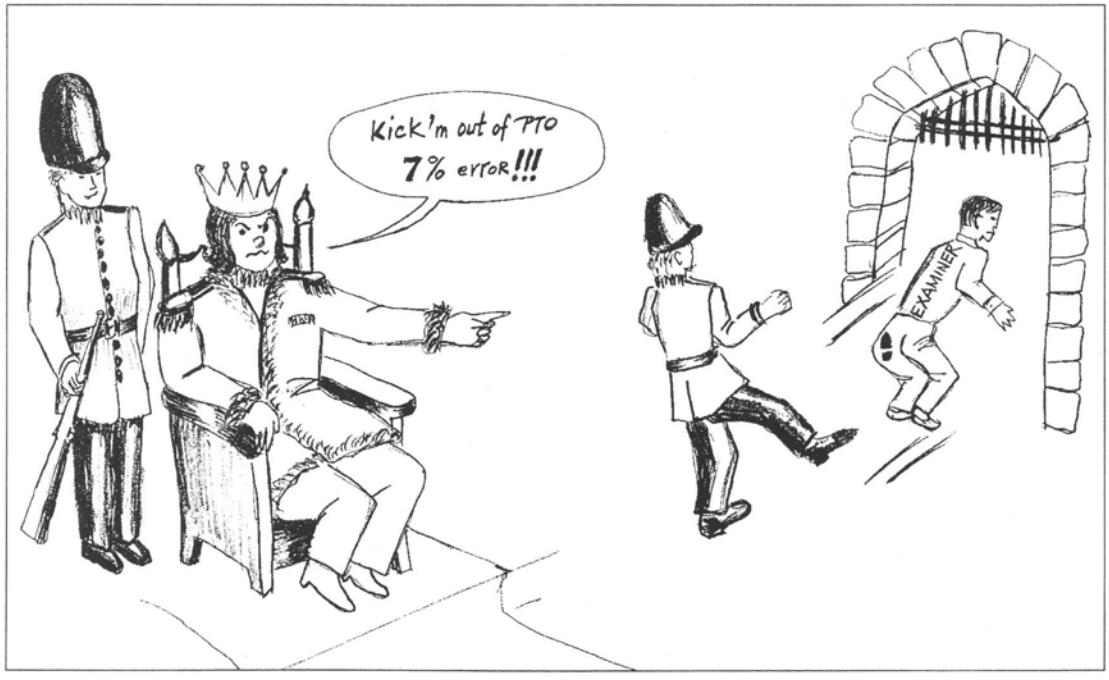
In response to these challenges, the USPTO is now telling examiners to hurry up and be extra careful. It disrespects basic agreements with its employees. Just as the agency embarks on a huge recruiting effort, it refuses to maintain the value of our special pay rate, which was designed to help recruitment and retention. The agency collects excess claim fees because it takes excess time to examine excess claims, but it gives no extra time to examiners to examine the excess claims.

Of course this leads to less than ideal results in the 170,637 utility patents the agency issued last year. Officially, the USPTO shoots for just a few percent in error. Math whizzes will note that for each percent, 1,706 erroneous patents are granted. The public, academia, and Congress have been up in arms about a few patents they think were issued in error. They really have very little idea of the extent of the problems. Unfortunately, those that have a clue appear to be too caught up in their own self-interest to actually address the challenges of the USPTO.

The proposed Patent Act of 2005 addresses none of these underlying problems. Instead, the bill provides a smorgasbord of goodies as requested by vested interests. The main effects of the bill would:

- create a post-grant opposition system;
- raise the standards for a patent holder to obtain injunctive relief in an infringement verdict;
- make "informed good faith belief" of invalidity a defense to treble damage demands;
- require pre-grant publication after 18 months even for inventors who don't plan to file in foreign countries;
- transfer responsibility from the courts to the USPTO for issues regarding applicants' failures to disclose prior art, increase the standard by requiring proof of an *intent* to deceive or mislead, require that the courts find invalidity of at least one claim independent of the alleged misconduct, and insulate current patent owners from any inequitable conduct by a prior owner;
- eliminate the 112 first paragraph "best mode" requirement; and
- migrate the United States to a first-inventor-to-file system to harmonize U.S. laws with the rest of the world's laws.

This last provision requires a complete rewrite of 35 USC 102, eliminates 35 USC 103 paragraphs (b) and (c), and changes the nature of interference practice. Nothing in the bill appears to address the backlog of cases or the quality of issued patents. In fact, the post-grant opposition system appears likely to have deleterious effects on both quality and timeliness.



What is worse, this legislative effort keeps the agency busy dealing with the shape and passage of the new legislation, and instituting the changes if the bill passes. It diverts the USPTO's attention from the task of making the patent system better as to all of the existing, unchanged parts of the patent system. Agency officials have compounded this problem

(continued on page 6)

"We must all hang together or most assuredly we shall all hang separately."

—Benjamin Franklin, at the signing of the Declaration of Independence

Join POPA

An Opinion

(continued from page 5)

for themselves by attempting to change the basic labor agreements they have with examiners.

Unchanged is the examiners' need to acquire and maintain an intimate knowledge of a particular technology area, and the need to properly apply prior knowledge in that technology to new inventions to reject or allow patent claims. Optimizing this core duty requires focused attention and coherent practices, not a succession of legislative reforms, rule changes, and contract disputes. In short, the USPTO needs the attention of a chief executive at the helm, not a crew of legislative assistants.

As it stands, legislative reform is on the agenda. For patent examiners, the biggest changes would result from the first-to-file system and the post-grant opposition system. The first-to-file system requires a rewrite of 35 USC 102, because who is first to invent is no longer an issue. Thus, the value of documents as "prior" art changes. Normally, a complete rewrite of 35 USC 102 would generate a lot of debate about the words chosen to convey the intent of Congress. The proposed statute contains the language "or otherwise known," which looks like it could generate even more controversy than the language "in public use or on sale" (which the proposed legislation writes out). In any case, a new raft of training will be required to migrate practice to the new 35 USC 102.

Defending Examiners to *USA Today*

An article in the May 2 issue of *USA Today* with the headline, "Pressure Mounts for Reform of Patent System," included the following second paragraph:

> *"The long-underfunded patent office takes years to review some applications and many patents are improperly granted because examiners lack technical expertise, according to testimony to Congress last week from tech firms, universities and other inventors."*

On May 3, POPA President Ronald J. Stern submitted the following letter to the editor of *USA Today*:

> "During the two days of congressional hearings on patent reform legislation last week, which I attended, none of the respected expert witnesses or the distinguished lawmakers on the panel mentioned anything negative about the technical competency—or diligence—of U.S. patent examiners.
>
> To the contrary, the more than 4,000 patent examiners—most of whom have advanced degrees, many of them doctorates—are specialized scientists, engineers and designers with focused knowledge in their area of expertise.
>
> Yet your article states upfront that the congressional witnesses testified that "many patents are improperly granted because examiners lack technical expertise." The writer gave no substantiation or attribution in the article that followed to these insulting—and false—claims.
>
> I've been a U.S. patent examiner for more than 40 years. The quality of the workforce has only improved.
>
> Unfortunately, the amount of time that is allowed per patent application has not increased since 1976.
>
> If the business and inventor community finds fault with the quality of patents issued, they should blame the churn-'em-out, quota-culture encouraged by the management officials at the U.S. patent office. Until examiners receive more time to do a proper examination, pressure to speed through patent applications will cause patent quality to suffer."

Patent Office Professional Association

Letters from readers are welcome. Address to:
The Editor, Patent Office Professional Association,
P.O. Box 2745, Arlington, VA 22202 • (571) 272-7161

Officers

Ronald J. Stern, *President,* (571) 272-2322

Lawrence J. Oresky
Vice President/Director of Grievances, (571) 272-6930

Howard Locker, *Secretary/*
Director of Adverse Action Challenges, (571) 272-0980

Pamela R. Schwartz, *Assistant Secretary/*
Director of Unfair Labor Practices, (571) 272-1528

Randy Myers, *Treasurer,* (571) 272-7526

Visit us on the Web at http://www.popa.org

© 2005 Patent Office Professional Association