POPA NEWS
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Production Stress Causes High Examiner Attrition, GAO Finds

Calls for Comprehensive Evaluation of Production Goals

The root cause of U.S. patent examiners' high job attrition "appears to be the stress resulting from the agency's outdated production goals," concluded a Government Accountability Office study released Oct. 4, which supports POPA's call for an overhaul of the U.S. Patent and Trademark Office patent examiners' production system, including a direct allocation of adequate time for quality examination.

The report (GAO-07-1102) on the effects of USPTO hiring efforts on the patent application backlog detailed GAO survey responses from approximately 22 percent of all USPTO examiners, in which 67 percent of patent examiners identified the agency's unrealistic production goals as one of the primary reasons examiners may choose to leave the agency. The survey also found 70 percent of patent examiners work unpaid overtime to meet their production goals.

"Vacation time means catch up time," the GAO report quoted one surveyed examiner's response. Another examiner commented to the GAO, "I know that the production goals are set to keep us motivated in order to help get over the backlog, but if a majority of examiners cannot meet those goals without relying on unpaid overtime or annual leave then something is wrong with the system."

These findings are "an indication that the production goals do not accurately reflect the time patent examiners need to review applications and that these goals are undermining USPTO's hiring efforts," the GAO report concluded.

Occasional Unpaid Overtime?

The GAO noted, "This extensive amount of unpaid overtime does not appear to be a concern to USPTO management, even though the agency has not been able to meet its productivity goals for the last four years. The report

(continued on page 2)

POPA and USPTO Agree to Employee Protections in New Rules Implementation

Examiners negatively impacted by the new claims and continuations rules due to short dockets or increased examination "shall be fairly and equitably compensated," according to an agreement negotiated in October by POPA and the USPTO.

The agreement states, "examiners who feel that their ability to meet productivity or workflow requirements is negatively impacted must notify their supervisor in writing as soon as they are aware that they are so impacted. The notification must explain specifically the reasons for the impact." Therefore, examiners must keep accurate records to prove that they've been harmed by the new rules.

The agreement also protects employees from the effects

(*continued on page 3*)

Production Stress

(continued from page 1)

then quoted one USPTO official's response, "As with many professionals who occasionally remain at work longer to make up for time during the day spent chatting or because they were less productive than intended, examiners may stay at the office (or remote location) longer than their scheduled tour of duty to work."

As survey question Q6 indicates, 62 percent of examiners estimate working 1-10 hours unpaid overtime per biweek to meet their production goals; 23 percent use 11-20 unpaid hours per biweek. Most would find management's idea of using that much time to make up for "chatting" either laughable or insulting, but surely out of touch with the reality of examination.

The GAO study noted that from 2002 through 2006, one patent examiner left the USPTO for nearly every two hired. The pay and worklife incentives that the USPTO introduced during that time lacked a lasting impact on attrition.

To provide examiners with sufficient time, POPA has asked Congress to legislate a direct allocation of time for examination. The average time goal for examiners would equal the average total filing fee per application (Filing, Search, Examination and Excess Claim and Specification fees) divided by the average examiner hourly salary. The total filing fees represent only about 30 percent of the agency's patent fee income, leaving more than two-thirds of the agency's total patent fees for overhead expenses.

To be of lasting value, a comprehensive evaluation of the agency's assumptions behind examiners' production goals, as the GAO report recommended, requires direct input from the examiners and their union.

GAO Survey Question Responses

Q6. Over the past 12 months, on average, about how much voluntary/uncompensated overtime have you worked per biweek to meet your production goal?

Number of hours	*% of Examiners*
Less than 1 hour	5
1-10 hours	62
11-20 hours	23
21-30 hours	5
More than 30 hours	5

Q8. Over the past 12 months, on average, about how much annual leave have you used per quarter to meet your production goal?

Number of hours	*% of Examiners*
Less than 1 hour	2
1-10 hours	47
11-20 hours	29
21-30 hours	12
More than 30 hours	10

Q11. What are the top three reasons why you would choose to stay with USPTO?

Your current total pay (excluding benefits) 58%

The availability of the flexible workplace schedule program 49%

The availability of a hoteling program 38%

Q12. What are the top three reasons that would cause you to consider leaving USPTO?

Your production goals 67%

The amount of voluntary/uncompensated overtime that you must work to meet production goals 59%

The amount of paid leave that you must use to meet production goals 37%

Production Evaluation Timeline Needed

When the GAO report was released, the USPTO issued a press statement that "as part of its quality initiatives, [the USPTO] will review assumptions the agency uses to establish production goals for patent examiners… In its review, the USPTO will work with its examiners and user communities."

However, in its comments to the GAO about the study's findings, Deputy Secretary of Commerce David Sampson responded for the USPTO that current initiatives such as the applicant quality submissions, the new claims and continuations rules changes, and information disclosure statements "will result in a more efficient and focused examination on the part of the patent examiner. It is anticipated that there will be efficiencies gained from these initiatives. *Once the USPTO determines the effect of these initiatives on examiner productivity,* we will reevaluate the assumptions that we use to establish examiner production goals." [emphasis added]

In other words, the USPTO press statement said that it would work with examiners to reevaluate the production goals—but it didn't say when.

Congress needs to hold the USPTO accountable for following through on the GAO recommendations within the next year.

The GAO report is available at www.gao.gov/new.items/d071102.pdf

Employee Protections

(continued from page 1)

of a potential increase in requests for continued examination(RCEs) prior to the rules change implementation. It states, "in any pay period where an examiner has more amendments on his/her docket than can be acted on in the amount of examining time available, the [supervisor] will, upon the employee's request, provide written confirmation of the cases that should be acted on within the pay period in order to avoid negative workflow points." Again, the examiner is responsible for precisely recording all harmful incidents.

The agreement also covers ground rules for future negotiations on the impacts of the rules changes. As POPA reported in the October *POPA News,* the uncertainties surrounding these rules changes have made predicting their impacts on employees almost impossible. If the union were to negotiate now and incorrectly identify the real impacts on employees, it would be precluded from negotiating later over the same topics when the real impacts became clear.

With post-implementation negotiations, POPA can identify the rules changes' impacts and the employees affected by them. POPA and the USPTO have agreed to the terms of future negotiations and, most importantly, have agreed to apply all future remedies retroactively, to the time the rules changes became effective.

An agreement provision states that any of the agreement's time periods will be extended by the amount of time that the new rules implementation is enjoined. Because a court has ordered that the rules be enjoined [see the adjacent box], the three-year time limit on the agreement has net yet begun—nothing will happen while under the injunction because the rules are not yet in effect.

See the full agreement reprinted in this newsletter for comprehensive information on your negotiated rights.

Company Sues to Block New USPTO Rules

A federal judge granted a preliminary injunction halting the implementation of the USPTO's new rules that would limit the number of claims contained in a patent application and the number of continuations. Pharmaceutical company GlaxoSmithKline (GSK) sought the injunction and filed suit against the USPTO to overturn the new rules.

Judge James C. Cacheris of the U.S. District Court for the Eastern District of Virginia issued the injunction on Oct. 31; the rules were to take effect Nov. 1. The lawsuit is the first major corporate challenge to the new rules. The GSK lawsuit calls the rules "vague, arbitrary, and capricious" and claims the new rules will damage the company's ability to obtain new patents. GSK cites about 130 pending patent applications for which it has requested two or more continuations and/or continued examinations. Hundreds of thousands of patent applications may be similarly affected. The injunction is effective pending a decision on the merits of the GSK case, which is not expected until 2008. The USPTO may appeal the district court's injunction.

—From news reports, Oct. 16 and Nov. 1, 2007

Employee Rights in "Risk Designation" Background Checks Set by POPA and USPTO

"Other" time and union counsel are some of the procedures, rights and safeguards that POPA and the USPTO agreed to for employees during the designated risk level investigations—commonly referred to as background checks—mandated to begin for current employees in January 2008.

Employees generally will have a two-week window in which to complete the forms and will be granted a minimum of one hour of "other" time for the process. If the initial screening results in a further investigatory interview, employees have the right to union counsel and "other" time for the interview. The agreement also covers the order of background investigations, with the most senior employees completing the requirements last.

For more complete information, see the agreement reprinted in this newsletter.

POPA Files Grievance Seeking Time for WebTA Timesheet System

After the USPTO implemented an electronic timesheet system with only four days' notice to employees – causing headaches and lost examination time as employees tried to decipher the new codes and system – POPA filed a grievance seeking additional time for examiners to complete timesheets and for time lost.

The agency implemented the new WebTA system after refusing to negotiate with POPA. The new system changed and renamed cost codes, did not provide easy-to-use tools for locating the codes, and gave no time to examiners to learn the new system. The result is an electronic "tool" that is more difficult and time-consuming than using pen and paper.

To aid with the grievance and to ensure employees are properly compensated for lost time, examiners should log the time they use to get WebTA working.

USPTO Opts to Deny Pay for Comp Time

The USPTO chose to use its "sole and exclusive" discretion to deny payment for basic compensatory time earned by GS-9 and above employees, despite POPA's appeal for reconsideration.

After the Bush administration issued new compensatory time regulations, the USPTO wrote its own rules stating that compensatory time earned by GS-9 and above employees after May 14, 2007, must be used within one year after the pay period in which it was earned or forfeited without pay. In its draft notice to all employees about its rules, the agency placed all the responsibility for its decision on the Office of Personnel Management, when in fact the OPM regs state that the agency can decide whether employees must:

a. "Receive payment for the unused compensatory time in an amount equal to the amount of overtime pay the employee would otherwise have received for hours of the pay period during which compensatory time off was earned by performing overtime work; OR
b. Forfeit the unused compensatory time off."

The USPTO selected b.

Upon learning of the agency's intended action, POPA President Robert Budens wrote to the USPTO:

> "The agency's actions are shouting so loud that employees won't be able to hear management say how 'employees are the agency's most important asset.'
>
> "The agency needs to seriously rethink its position on this issue. Comp time is not the equivalent of annual leave or sick leave. While annual and sick leave are rights of employees, they represent benefits of government employment, not a substitute for paid overtime… Comp time, on the other hand, represents actual work that an employee has already provided to the agency. For the agency to now consider comp time to be essentially the same as use-or-lose annual leave is to effectively steal the employee's already-performed work back from them.
>
> "On behalf of all our bargaining unit members, POPA requests that the USPTO reconsider this decision on comp time and agree to pay employees for any unused comp time they may have accrued and not used within the specified time limits."

When examiners work comp time hours, they have to produce additional counts to meet the USPTO's required production goals. Forcing employees to forfeit the time or the pay for additional production is obliging them to work for nothing. This is both insulting and demoralizing.

The agency also failed to tell employees that the new regulations state, "If failure to use compensatory time off is due to an exigency of the service beyond the employee's control, the employee must receive payment for the unused compensatory time off." Such an exigency hasn't occurred for a long time, but POPA believes employees need to know of this right, while the USPTO told POPA, "Since the 'exigency of the service' provision will rarely apply to employees, there is no need to include it in the Weekly article and provide employees a false sense that they will be able to save the time and/or be paid for the time."

Even if it's a little thing, do something for others—something for which you get no pay but the privilege of doing it.

—Albert Schweitzer, Nobel Peace Prize winner

CFC: A Privilege, Whatever Your Beliefs

Whoever you are, whatever your values, you'll find a charity to support and believe in when you look through the Combined Federal Campaign catalog this year.

Donating to the charities of your choice through the CFC is easy and cost effective. You pick who gets your contribution; only the charities you designate will receive your money. You may spread the tax-deductible payments over the year through payroll deduction or contribute a one-time check. And workplace giving through the CFC cuts fundraising costs for participating charities, enabling more of your donation to go to those you wish to help instead of to direct mail and advertising.

Giving through the CFC is your personal decision. POPA and the USPTO have negotiated safeguards to your confidentiality. In the collective bargaining agreement, Article 4, Section 14 (F) states:

> "…Solicitors shall not divulge information regarding an individual's contribution or allotment to anyone other than a person designated by, and acting on behalf of, the Personnel Processing Division, other charitable campaigns or the U.S. Bond Drive."

Please review the 2007 Catalog of Caring to find out about charities that you can support, and take advantage of the CFC's opportunity to help others.

Survey Shows Benefits of Extending Hoteling to Part-timers

A large percentage of part-time examiners would work appreciably more hours per biweek if the USPTO enabled them to participate in the telework or hoteling programs, a recent POPA survey found.

When POPA polled its bargaining unit in October, 43 of 47 part-time respondents said they'd work between 5 and 32 additional hours per biweek on the telework or hoteling programs. The respondents represent almost half of all current part-time examiners.

The finding supports POPA's proposal to extend hoteling and telework to part-time employees, which will be discussed in contract negotiations with the USPTO.

The third question in the survey asked full-time examiners if they would switch to part-time work if they could participate in hoteling and why. Approximately 1 percent of bargaining unit examiners responded that they would switch; of those, about half said they would go part-time for family reasons, to delay/enhance retirement, go to school or even stay at the agency.

The USPTO fears extending the telework or hoteling benefits to part-time examiners in case too many full-time employees elect to switch to part-time. The small number of respondents indicates that this likely would not happen. Instead, the results show that many of those who would become part time are those who might otherwise leave the agency. Instituting telework and hoteling for these employees would be a positive retention step for the USPTO.

A recent Government Accountability Office study showed that the USPTO's flexible workplace policies induce examiners to stay despite high production pressures. Expanding these benefits can only help the agency to keep its skilled examiners.

Part-Time Hoteling/ Telework Survey Results

Total Respondents = 102

Part-time respondents = 47 total

Number who would work more hours = 43
Number who would work same hours = 4
Number who would work fewer hours = 0
Range of additional hours respondents would work = 5 to 32

Full-time respondents who'd switch to part time = 55 total

Reason For Switching	*Number of respondents*
No Reason Given	24
Maternity/Paternity/Family	20
Delay/Enhance Retirement	7
School (including law school)	3
Retention (employee leaving)	1

House Telework Bill Offers Opportunity for Hoteling Changes

A mandatory opportunity to telework in every federal agency is the intent of a bill recently introduced in the House of Representatives. POPA plans to discuss with key congressional committee members the bill's potential impacts on the examiner workforce.

The prime goal of the Telework Improvements Act of 2007 (H.R. 4106) is "to improve teleworking in executive agencies by developing a telework program that allows employees to telework at least 20 percent of the hours worked in every two administrative workweeks."

The bill would require each agency to establish policies determining which employees may be authorized to telework and then mandating that the agency apply the minimum telework allowance of 20 percent of hours each biweek to those employees.

The bill's language gives plenty of leeway to federal agencies to determine which employees are eligible to telework. Agencies can exempt employees due to their need for access to classified information or their face-to-face public contact. Patent examiners who need "additional training" also may not qualify under the bill's provisions.

However, the bill does not address the number of hours each week an employee must work to be eligible, specifically mandating a minimum 20 percent of an employee's regular work hours. Therefore part-time USPTO examiners who meet the other criteria should qualify under this legislation.

Examiners Pay Hoteling Costs

POPA hopes to meet with members of Congress to discuss more detailed, practical applications of the telework legislation. For example, the USPTO now requires hoteling examiners to work one hour each week at the USPTO office. The only viable reason for this, by the USPTO's own admission, is to maintain the Alexandria office as every hoteler's "duty station."

Changing the hotelers' duty stations to their home offices would require the USPTO to pay for travel to Alexandria for employee training or any other occasional on-site business. Keeping employees' duty station in Alexandria enables the USPTO to shift the cost of doing business to employees. It creates an unreasonable and costly burden on examiners to travel to Virginia at least every two weeks, especially those 40 or so examiners who live outside of the D.C. metropolitan area.

Many hoteling employees currently living a long distance from the Carlyle campus routinely fly to D.C. on a Friday or Saturday to work the required one hour in one week, stay till Monday to work the one required hour in the next week, then fly home. These examiners foot the bill for travel, room and board. This is the bill that the USPTO wants to avoid paying.

(*continued on page 8*)

Agreement Between the Patent Office Professional Association and the United States Patent and Trademark Office on Post-Implementation Bargaining Over the Impact and Implementation of the Rules Changes on Claims and Continuation

1. The United States Patent and Trademark Office (USPTO or agency) may implement the rules changes on numbers of claims and continuations currently anticipated to be effective November 1, 2007, without completing negotiations on the impact and implementation of those rules changes.

2. (a) The USPTO agrees to enter into post-implementation mid-term bargaining on the impacts and implementation of the rules changes on numbers of claims and continuations upon request by POPA. Such requests shall be submitted in accordance with mid-term bargaining ground rules in effect between the parties at the time of the request.

   (b) If the Union requests bargaining under this agreement, the bargaining will commence with the Union submitting proposals at the time of the request. If the Union wishes to begin negotiations on a separate adverse impact, this bargaining may be combined with the first negotiations at the Union's discretion, unless the Federal Service Impasses Panel has accepted jurisdiction over the prior negotiations. If the FSIP has asserted jurisdiction, the subsequent request will proceed independently.

   (c) To reduce the number of teams needed by the parties, in any window in which POPA requests negotiations pursuant to this agreement, if the Agency proposes multiple negotiations or initiatives in a given regularly scheduled window, management-initiated issues will be combined in groups of three issues per negotiating team. The choice of three issues to be bundled together in each negotiation will be at management's discretion. Time frames in the mid-term bargaining ground rules will not be expanded as a result of this bundling. If the parties do not have bargaining windows at the time of the request to bargain from POPA, these provisions will apply to all management-initiated bargaining for which notice is received during the first three months following a union request.

   (d) Issues related to the impact of the rule changes will not be bundled with management initiated bargaining.

   (e) The union's right to initiate post-implementation negotiations shall terminate three (3) years from the effective date of the rules changes except as provided for in Provision 6 set forth below.

3. Remedies that are agreed to in post-implementation negotiations for employees prospectively, will also be applied retroactively to all those who suffered a similar adverse impact, unless the parties voluntarily agree otherwise.

4. The rules changes may result in an increase in the filing of requests for continued examination (RCEs) prior to the implementation of the rules changes. Therefore, in any pay period where an examiner has more amendments on his/her docket due to the increase in RCEs than can be acted on in the amount of examining time available, the SPE will, upon the employee's request, provide written confirmation of the cases that should be acted on within the pay period in order to avoid negative workflow points.

5. Examiners who are negatively impacted by an increase in examination activity or short dockets due to the implementation of the rules changes shall be fairly and equitably compensated for those impacts. In order to allow supervisors to identify and mitigate possible negative impacts due to implementation of the rules changes, examiners who feel that their ability to meet productivity or workflow requirements is negatively impacted must notify their supervisor in writing as soon as they are aware that they are so impacted. The notification must explain specifically the reasons for the impact.

   Should a supervisor take any action against an examiner based on low production or poor workflow within eighteen (18) months following the implementation of the rules changes, the supervisor shall explicitly consider any increased examination activity or short docket problems due to implementation of the rules changes and provide a written explanation of why any said increased activity or short docket problems does not excuse the low production or poor workflow, or indicate that there was no increased examination activity or short docket problems due to implementation of the rules changes in that time period.

6. The time periods set forth in provisions 2 and 5 above, shall be extended by the amount of time, if any, during which the agency is enjoined from implementing the rules changes.

7. This agreement expires upon the conclusion of all negotiations instituted pursuant to paragraph 2 above.

Agreement Between the Patent Office Professional Association and the United States Patent and Trademark Office on the Impacts and Implementation of Position Risk Designations for Personnel Suitability

As a result of the risk designation determinations, employees who have not been investigated at the designated risk level for their occupied positions will be subject to the appropriate investigations. These employees will be notified and required to be fingerprinted and complete OPM Forms OF-306 and the Form 85P online using eQIP (OPM's e-government electronic questionnaire for background investigations).

This agreement shall be included in the parties' next collective bargaining agreement.

Communications to Employees:

Advance notices will be sent to current employees via USPTO Weekly on a monthly basis to let them know that background screening will begin in early January 2008. The Agency will provide a link to the forms so employees can review the forms and start gathering their information. Employees will be informed that they can print the forms from OPM's website and prepare them prior to completing the forms online. Monthly notices will be provided for 6 months.

Time Frame for Form Completion:

Current employees contacted to be screened will be provided a two-week time frame to complete the forms. If an employee is on extended leave or other extenuating circumstances exist, an extension may be granted.

Completing the Forms:

Current employees will be granted one hour to complete the forms and fingerprinting process. If unusual circumstances exist, such as, the employee has lived in numerous locations over the last seven years, upon request to the immediate supervisor, the employee may be granted additional time to complete the forms. Time used will be charged to "other" time.

Employees hired before March 19, 2007, being investigated at a higher risk level will not be required to sign the "Authorization for Release of Medical Information" during the initial completion and submission of the Standard Form 85P, "Questionnaire for Public Trust Positions," Rev. 9/1995 or any successor document. Should evidence obtained during the background investigation warrant further investigation of the employee's medical history, the employee may be subsequently required to sign the Authorization for Release of Medical Information.

Employees hired after the effective date of the agreement:

Employees will be granted up to one hour to complete the forms and fingerprinting process if not already completed by orientation. If unusual circumstances exist, such as, the employee has lived in numerous locations over the last seven years, upon request to the immediate supervisor, the employee may be granted additional time to complete the forms. Time used will be charged to "other" time.

Representation for Case Mitigation involving Financial Issues:

If the background screening results in an initial interview regarding financial issues, a Chief Administrative Officer (CAO) representative will contact the immediate supervisor and provide a general notice of intent to meet with an employee. The CAO representative will also contact the employee to inform him/her of the general nature of the meeting and that, upon the employee's request, he/she may have a POPA representative present. "Other Time" will be granted for the interview. Financial information obtained during a background screening investigation by OPM will not be transmitted to the employee's first or second-line supervisor unless the employee fails to mitigate the issue raised by the background screening within 30 days of the initial interview or the financial information raises concerns that management determines warrants an investigatory meeting that may result in disciplinary action.

(Nothing in this section may be used as a basis in the future to preclude an employee's immediate and/or second line supervisors from involvement in any other meetings or other matters.)

Background Screening resulting in Weingarten Notification

For issues that surface as a result of the background screenings that result in an investigatory meeting, as determined by management, the employee will be informed of the general nature of the meeting and that, upon the employee's request, he/she may have a POPA representative present during the meeting. The employee's immediate supervisor and/or any other management designee will be allowed to participate.

Employees' Order for Investigation:

After January 6, 2008, bargaining unit employees receiving a promotion to GS-13 will be screened upon receiving their promotion. Other GS-13, GS-14, and GS-15 employees will be screened in order of reverse seniority as determined by grade and years of service at the USPTO, i.e., the least senior employees shall be screened first. Retirement eligible employees will be screened last.

New Contract? New Rules? New Year!

Learn What's Ahead at the POPA Annual Meeting

December 5, 12-1 p.m.
Madison Auditorium

Register your opinions on the most important issues facing patent professionals with POPA's brief year-end member survey.

House Telework Bill

(continued from page 5)

Private sector members of the patent community agree off the record that these expenses are ones that should be borne by the USPTO as a standard business expense.

POPA seeks to extend the hoteling benefits to even more examiners by convincing the agency to change the duty-station designation and remove the hefty commuting costs, thereby making the choice to telework affordable to more examiners and potential examiners.

The Telework Improvements Act has been referred to the Federal Workforce, Postal Service and the District of Columbia Subcommittee of the House Oversight and Government Reform Committee. POPA hopes to discuss the bill with subcommittee Chairman Danny K. Davis (D-Ill.) and Ranking Member Kenny Marchant (R-Texas), as well as local committee members Tom Davis (R-Va.), Eleanor Holmes Norton (D-D.C.), Elijah E. Cummings (D-Md.) and John P. Sarbanes (D-Md.).

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