POPA NEWS
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USPTO Enacts Flat Goal Program; POPA Challenges

The USPTO is launching its flat goal pilot program after mischaracterizing the union's proposals to practically avoid negotiating on the program altogether. POPA has filed a grievance challenging the legality of this program and declaring that the USPTO is committing an unfair labor practice by unilaterally implementing the program without completing collective bargaining.

The flat goal program requires a flat goal of production units per quarter per examiner based on the examiner spending 80 percent of his/her time examining. It also raises the production level required for a fully successful performance rating from 95 percent to 100 percent. Examiners must complete 100 percent of the assigned goal to maintain a fully successful rating. Historically, however, the patent corps averages 70-75 percent examining time, with the remaining time used for training, appeals conferences, interviews, leave time, etc. The USPTO's assumptions of time needed by examiners to perform non-examining functions were not based on actual examination data. The program makes only limited provisions to deal with sick leave or leave without pay for family or medical reasons and makes no provisions for the use of annual leave carried over from previous years.

The USPTO tried to strong-arm POPA by stating in a Nov. 16 memo to the union:

> "Unless you limit your proposals in this bargaining to the procedures and appropriate arrangements in response to management's decision to implement a Flat Goal Pilot by next Wednesday, November 22, 2006, and agree in writing that you will not further claim that the entire topic is permissive, we will conclude that you have no interest in bargaining over these issues and will begin the implementation process for the pilot, based upon our last best offer."

(*continued on page 2*)

Inspector General's Witness Intimidation of Examiners

In an apparent case of witness intimidation, an agent from the Department of Commerce Inspector General's Office—with cooperation from the USPTO Office of the General Counsel (OGC)—investigated, questioned and pressured two patent examiners who had been subpoenaed as defense witnesses in the trial of a former employee for time and attendance abuse, but were under no suspicion of wrongdoing themselves. POPA is seeking assurances from the USPTO that it will prevent such workplace intimidation in the future.

In one case, a paralegal in the OGC sent Primary Examiner Manual Mendez an e-mail directing him to a mandatory "interview" with the IG at 11 a.m. that same day. Mendez was on sick leave that morning and didn't come to the office until about 3 p.m., missing the mandatory interview. Upon his arrival at the office, Mendez read the e-mail and replied to the OGC explaining his absence, asking to reschedule, and inquiring about the nature of the interview. Mendez did not receive a reply to his request.

Two business days later, IG Special Agent Rachel Ondrik appeared unannounced at Mendez's USPTO office door. Mendez invited her in. She closed the door, notified Mendez that she was conducting a formal investigation and that he must truthfully answer her questions. She did not notify Mendez of his rights, including his right to have representation present. Her questioning began with a statement similar to, "You spend a lot of time here, Mr. Mendez." This indicated to Mendez that Ondrik had

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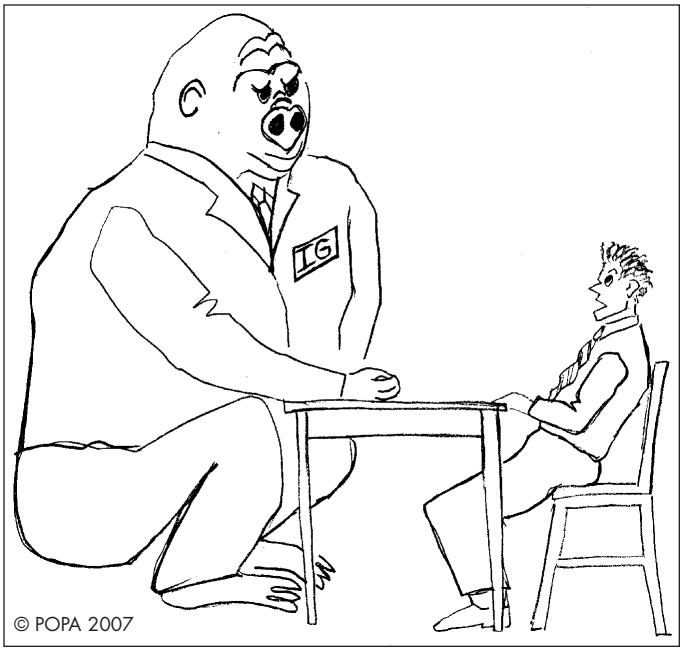

A Typical Inspector General Interview, the 800-Pound Gorilla in the Room

Flat Goal Program

(continued from page 1)

This appears to be an agency attempt to twist POPA's intent as a way to bulldoze its way into the program without required bargaining.

The agency's program, however, is illegal because statute and case law require that a federal employee's performance appraisal plan "to the maximum extent possible, permit the accurate evaluation of job performance on the basis of objective criteria." 5 U.S.C. § 4302(b)(1).

For years, the current examiner performance appraisal plans have measured examiners' performance in six-minute intervals. The flat goal would no longer account for all the actual duties performed by an examiner and, thus, would not be measuring performance "to the maximum extent feasible."

The flat goal program is also illegal because it denies employees their statutory entitlement to use their accrued sick and annual leave. The flat goal program only accounts for the use of annual leave accrued during a particular quarter. If an employee has accrued leave and desires to take additional leave in a quarter, the examiner would still be responsible for achieving 100 percent of his/her assigned flat goal. This effectively denies the employee the right to use annual leave.

Similarly, an examiner's flat goal would only be adjusted for the use of sick leave if the sick leave becomes "long term." Again, under the agency's flat goal program, examiners are expected to achieve the flat goal even when sick for short periods, effectively denying employees the benefit of sick leave.

POPA will continue to report developments on this program and cautions examiners to thoroughly review the details of the flat goal program before enrolling—this program can be harmful to an examiner's career health.

Numbers Don't Lie

USPTO statistics on examining-time percentages suggest that, if the flat goal program had been enacted in fiscal year 2006, many examiners' performance would have been less than fully successful.

Using FY 2006 production numbers, the agency calculated that, of more than 40 art units in one technology center, only 6 averaged 80 percent or better examining time. Thus, the vast majority of employees in that technology center were averaging less than 80 percent examining time. The benchmark for fully successful performance under the flat goal program, however, is based on the agency's arbitrary determination that an examiner will have 80 percent examining time.

In another technology center of more than 15 art units, not one averaged more than 80 percent examining time in FY 2006.

Using fiscal year 2005 numbers, in a third technology center of more than 30 art units, only one art unit accomplished an 80 percent average examining time.

If the USPTO institutes the flat goal program throughout the examining corps, as it proposes to do in its 2007-2012 Strategic Plan, the numbers indicate that some individuals may meet their goals, but most examiners will fail.

2006 POPA Election Results and 2007 Executive Committee Roster

	Telephone	Art Unit	Office
Union Office	571-272-7161	–	*RND-1D61*
	571-272-7162		
	571-272-2690		REM-2A48
Officers			
President			
Robert D. Budens	571-272-0897	1648	REM-3A35
Vice President			
Lawrence J. Oresky	571-272-6930	3652	KNX-3B11
Secretary			
Howard J. Locker	571-272-0980	1661	REM-2C81
Assistant Secretary			
Pamela R. Schwartz	571-272-1528	1774	REM-10C75
Treasurer			
Randall P. Myers	571-272-7526	2646	KNX-6B81
Chemical Area Delegates			
Renee Berry	571-272-1459	1762	REM-8D54
Dr. Kathleen Duda	571-272-1383	1756	REM-9A65
Dr. Patricia Duffy	571-272-0855	1645	REM-3B05
G. R. Ewoldt	571-272-0843	1644	REM-3C83
Jennifer Graser	571-272-0858	1645	*hoteling*
Adrienne Johnstone	571-272-1218	1733	REM-7B19
Christine Saoud	571-272-0891	1647	REM-4E81
Dr. Larry Tarazano	571-272-1515	1773	REM-6A69
Geraldina Visconti	571-272-1334	1752	REM-9D55

	Telephone	Art Unit	Office
Electrical Area Delegates			
Vincent Boccio	571-272-7373	2621	KNX-6D15
Azizul Choudhury	571-272-3909	2145	RND-4C65
Bill Deane	571-272-7484	2642	KNX-7D77
Albert Gagliardi	571-272-2436	2878	JEF-5C83
Kim Lockett	571-272-2067	2837	JEF-10C73
Adnan Mirza	571-272-3885	2145	RND-4A15
B. James Peikari	571-272-4185	2189	*hoteling*
Michael Shingleton	571-272-1770	2817	JEF-5D19
Scott J. Sugarman	571-272-2340	2873	JEF-3D11
Jeff Swearingen	571-272-3921	2145	RND-4C61
Julie Anne Watko	571-272-7597	2627	KNX-8A75
Howard Weiss	571-272-1720	2814	JEF-5A15
Mechanical Area Delegates			
Ella Colbert	571-272-6741	3694	KNX-5D61
David Isabella	571-272-4749	3738	RND-6D15
Vinh Luong	571-272-7109	3682	KNX-3C03
David Reip	571-272-4702	3731	RND-6B81
David Shay	571-272-4773	3735	RND-7A75
Designs and Others			
Melanie H. Tung	571-272-2613	2911	REM-5B87

Witness Intimidation

(continued from page 1)

obtained and reviewed his badge-in/badge-out turnstile records before the interview. She then questioned Mendez's own time recording practices with questions similar to, "Can you certify that your timesheets are correct?" Ondrik also questioned Mendez about his conduct with questions like, "Could you describe any problems or issues of conduct that you had in the past?"

This investigative interview lasted approximately 2.5 hours. Ondrik also made a closing statement similar to, "I checked you out, and you're okay," referring to Mendez's time and attendance. This showed that Ondrik also obtained Mendez's 690E timesheets for comparison with the turnstile records.

In the second examiner's case, Ondrik called the examiner and demanded that the examiner meet with her that day for an interview. The examiner asked to make an appointment on another day because of prior job commitments. Ondrik then called the examiner's group director, who called the examiner to say that the interview was mandatory. This disrupted the examiner's work schedule and caused embarrassment in front of the group director and supervisor.

After setting an interview time, the examiner contacted POPA Vice President Larry Oresky to be present at the interview. With a POPA rep present, Ondrik did not question the examiner about time accounting practices. Ondrik did question the examiner about what had been said to the attorney of the examiner under criminal investigation for time fraud.

At the time of their interviews with Ondrik, neither examiner was suspected of wrongdoing. It appears the only reason for singling out these examiners for IG investigation and questioning was that they both were subpoenaed to appear as witnesses for the defense in a criminal case stemming from irregularities between a former employee's timesheets and turnstile records.

This looks like blatant intimidation of defense witnesses and misuse of official position by an agent of the U.S. government. It appears that the USPTO clearly cooperated with Ondrik's unwarranted investigation of these two employees by providing turnstile records and 690E timesheets.

POPA agrees with Mendez's suggestion, in the following letter to Director Dudas, for better training on timekeeping to avoid mistakes. This would demonstrate a concern for employee success, rather than the agency's current "gotcha" atmosphere. The same is true for the USPTO Office of General Counsel, which needs to protect the rights of agency employees.

The overzealous attention to badge-out details furthers the agency's on-site management by fear and punishment. USPTO office workers face criminal prosecution and the possibility of being subpoenaed to testify against colleagues. Employees are, in effect, punished for coming to work, while those off site on telework or hoteling don't have that intimidation. If the USPTO is not concerned about badge-in/badge-out requirements for employees working off campus, why should it worry so about those who choose to work on campus?

POPA urges any bargaining unit member who is called to a meeting with a representative of the Inspector General's Office to contact a POPA representative immediately.

An Open Letter to Director Dudas

Dear Mr. Dudas:

I am a primary examiner who was interrogated by Department of Commerce Inspector General (IG) personnel after being subpoenaed by the defense [in an ongoing criminal prosecution of a former examiner on time fraud charges].

In the pursuit of justice, the USPTO must recognize that every examiner has constitutional rights that must be respected during investigations on our premises. Clear guidelines need to be established so that all examiners in this office understand their rights and responsibilities, especially in an IG investigation.

It is very disappointing that after my almost 20 years of federal service, no department within this office cares about my rights as an employee. The USPTO General Counsel should be required to do more than just provide information about examiners to the IG. At least, the General Counsel attorneys should ensure constitutional fairness in the IG fact-finding activities instead of justifying their inaction under the false assumption that they cannot interfere with this process. Such inaction will inevitably result in the collection of tainted evidence as the courts recognize the illegalities of these activities.

Finally, based on my interrogation, this agency and the Commerce Department IG expect perfection concerning timekeeping reporting requirements. Unfortunately, this standard cannot be achieved unless the electronic security system is linked to the "timesheet" software. More importantly, the USPTO should update the April 2000 memorandum that abolished the sign-in/sign-out sheets to delineate clear disciplinary guidelines based on the perfection standard and requiring supervisors to provide yearly training about timekeeping requirements. It is presently impossible to meet the perfection standard since the security system does not provide instant and verifiable "time in/time out" data, easily accessible by each employee. To bring criminal actions against employees having time discrepancies without offering counseling, rehabilitation, and/or progressive discipline is simply abusive and will inevitably affect the productivity and retention goals of this office.

Very respectfully,
Manuel Mendez, Primary Patent Examiner

7 Percent Special Pay Increase Kicks In

Patent professionals received an early holiday gift of a 7 percent boost in their paychecks as the special pay rate increase requested by the USPTO, with vital input from POPA, went into effect early last December. USPTO Director Jon Dudas announced the increase on Nov. 21, shortly before Thanksgiving.

All but approximately 100 patent professionals currently covered by the GS-1220 job series received the raise in their Dec. 21, 2006, pay. Those remaining recipients should have received their increase with back pay dating to Nov. 21 from the National Finance Center, the pay-processing agency, in their paycheck of Jan. 4, 2007.

The USPTO submitted the increase request in August 2006 after Deputy Commissioner for Patent Operations Peggy Focarino and POPA President Robert Budens agreed earlier in the year to have management representative Maria Nuzzolillo work with former POPA President Ron Stern to craft a formal special pay rate increase request to the Office of Personnel Management.

After receiving the Nov. 21 notice to all affected employees from USPTO Director Jon Dudas, POPA President Robert Budens wrote to Director Dudas, Deputy USPTO Director Steve Pinkos, Commissioner of Patents John Doll, Peggy Focarino and USPTO Chief Administrative Officer Vickers Meadows:

> "I want to extend my and POPA's heartfelt congratulations and appreciation for your outstanding combined efforts in successfully obtaining approval of the special pay rate request for employees. It is especially gratifying to see that it will go into effect in the next pay period. There is no doubt in my mind that this increase in the special pay rate will have a noticeable impact on the morale and retention of employees.
>
> "I would like to offer special thanks to Maria Nuzzolillo, Ron Stern, John Mielcarek, Howard Staik and Dale Polley for all their hard work in putting together the special pay rate submission. Without their institutional experience, this task would have been considerably more difficult.
>
> "Congratulations to one and all on this great news for employees and the agency."

Employees also received a 1.7 percent January across-the-board increase that kicked in the week of Jan.7. Originally, the USPTO had unintentionally requested the 7 percent special rate increase request to be in place of the regular 2007 overall raise. POPA pointed out the need to file the 7 percent special rate increase request as an out-of-cycle, supplemental request. This would allow the 7 percent increase to begin immediately upon approval and then have the new pay scale increased by the 1.7 percent national portion of the regular January across-the-board pay raise. (While the full Washington area locality pay raise was 2.64 percent, employees on special pay rates are not entitled to receive the locality portion of the January pay increase.) Otherwise, the employees' pay increase would almost immediately begin to be diluted when the January across-the-board raise was implemented. The USPTO agreed, enabling the special rate increase to begin in November and the additional 1.7 percent to be added in January.

Recertification Change Announced

The USPTO has heeded feedback from POPA and employees about the recertification process and has temporarily changed the recertification schedule for 2007.

Since fiscal year 2003, the agency has reviewed for recertification one-third of all GS 14 and 15 patent examiners and some at GS 13 in each of the past three years. The change announced by the USPTO states:

"Examiners who were successfully recertified in FY 2004 – FY 2006 will not be subject to the enhanced review portion of the recertification process for one three-year cycle as long as they have earned (or will earn) a rating of at least "Fully Successful" in all quality elements of the performance appraisal plan in the year the examiner was recertified and the two fiscal years following recertification."

The only reason given for this temporary change was to enable the USPTO "to more effectively focus our quality improvement efforts." The announcement states that the agency plans to reinstitute the enhanced review in 2010. What's not clear from the agency's explanation is: If it is more effective to focus quality improvement efforts elsewhere now, how and why would that be different in 2010?

POPA urges the USPTO to make this change permanent, saving the agency time and cost, and saving the employees a lot of unnecessary grief.

Is a Certification Exam Necessary?

The following is excerpted from a letter POPA received in early November.

I don't think [the certification exam] is necessary for two reasons: 1) It's not practical. The test materials are not related to our work. If the exam is irrelevant to our daily work, it's not going to improve the quality of our work, and therefore it's not practical; 2) It's not fair. If we are doing the same work as the GS 13+ people who have not taken the exam, if they can do their jobs fine why do junior examiners need to take the exam to become GS 13 examiners?

One of my coworkers took two biweeks leave just to study for the exam, and she failed it. Her production dropped to below 50 percent and she had to work lots of overtime to make her production back to 100 percent in the following months. I don't think encouraging examiners to use their personal vacation time to prepare for the exam is a right thing, but they really don't have any other choice.

Please reevaluate the necessity of the exam.

Know Your Rights

Calculating Awards with Promotions

You recently got a promotion? Congratulations! Were you promoted during an award period? If yes, you need to properly calculate your production to qualify for an award. Award periods and promotion periods often coincide and this can complicate the calculation of an employee's production achievement necessary to receive an award.

Examiners generally can strive for two examiner production awards—the Special Achievement Award (SAA) and the Productivity Gainsharing Award. The award period for an SAA is any four consecutive quarters. For the Gainsharing Award, the award period is the fiscal year (Oct. 1 through Sept. 30). The promotion period, on the other hand, is the 13 biweeks preceding the promotion.

Supervisors are responsible for explaining to examiners how to calculate production for an award when a promotion occurs during the award period. But most examiners can benefit from this review.

- If the promotion occurs during the award period, the production goal changes after the promotion to the new, higher productivity level of the new grade or signatory authority.
- The minimum production required to justify a promotion up to GS 13 during the promotion period is half way between the regular goal of the previous grade and the goal of the newly promoted grade. But that is not sufficient to get an award; in fact, it is merely the base goal for calculating the productivity necessary to justify an award.
- When the promotion occurs during an SAA award period, an employee must achieve 110 percent of the production goal necessary to receive the promotion for the 13 biweeks of the promotion period and, in addition, have whatever other achievement would be required to qualify for an award during the portions of the award period before and after the promotion period.
- Likewise, when the promotion occurs during a Gainsharing award period, an employee must achieve 110, 120 or 130 percent of the production goal necessary to receive the promotion for the 13 biweeks of the promotion period and, in addition, have whatever other achievement would be required to qualify for an award for the portions of the award period before and after the promotion period.
- For permanent grants of signatory authority, i.e., permanent partial signatory authority or permanent full signatory authority: You must do 10 percent above the required productivity level to get the permanent grant, which is 95 percent of the level of the permanent partial signatory authority or permanent full signatory authority, for the period of the temporary grant. Note that in both temporary partial and full signatory authority the period of the grant is 13 biweeks. The productivity base for an award for the short period between the end of the temporary partial signatory authority or the end of the temporary full signatory grant and the effective date of the permanent grant is GS 13 and partial signatory authority, respectively. This is because the temporary grant ends before the grant is made permanent.

Examples for Differing Awards

Consider this award and promotion example:

For one GS 9 examiner, the SAA award period begins Dec. 11, 2005, and ends Jan. 6, 2007 (28 biweeks). This number can vary between 26-28 biweeks depending on how many biweeks the USPTO has assigned to each quarter. The examiner receives a promotion to GS 11 on Aug. 20, 2006.

- For the first five biweeks (Dec. 11, 2005, to Feb. 18, 2006) GS 9 production applies.
- For the 13 biweeks of the promotion period (Feb. 19, 2006, to Aug. 19, 2006), the production goal base for an award is halfway between the GS 9 and GS 11 goals.
- For the remaining 10 biweeks of the award period (from Aug. 19, 2006, to Jan. 6, 2007), the GS 11 production goal applies.
- To qualify for an award, the examiner must perform at least 10 percent more than the above identified production goals for each of these three respective periods.

In another example, with the same award period for the same GS 9 examiner, change the promotion date to Feb. 5, 2006:

- For the four biweeks prior to the promotion (from Dec. 11, 2005, to Feb. 4, 2006) the base production for an award is halfway between the GS 9 and GS 11 goals.
- For the remaining biweeks in the award period (Feb. 5, 2006, to Jan. 6, 2007), the GS 11 goal applies.
- To qualify for an award, the examiner must perform at least 10 percent above the award base for each of these two respective periods.

If the promotion or permanent grant of signatory authority occurs before the award period, it determines the new productivity level for the award period. If the promotion or permanent grant of signatory authority occurs after the award period, the productivity for the award period faces no adjustment because there's no guarantee of a promotion. If the promotion is not received, the employee will not be penalized.

"Pleasure in the job puts perfection in the work."

—*Aristotle*

POPA Recognizes Members' Service

POPA acknowledges outstanding volunteer service for the association with annual awards. Recipients take home a plaque and our thanks for the many, many hours of time they contribute to bettering the work lives of their fellow USPTO employees.

[The awardees pictured below attended the annual meeting; those not shown were unable to be present.]

The Lifetime Achievement Award, one of POPA's highest awards, went to **Lawrence J. Oresky** for his leadership, dedication and tireless efforts in effectively representing his fellow patent professionals for 36 years, 22 of them as vice president.

Lawrence Oresky [right] accepts the Lifetime Achievement Award from POPA President Robert Budens.

The Ronald J. Stern Outstanding Service Award was bestowed on **Howard J. Locker** for his achievements in successfully representing his fellow professionals in adverse actions and arbitrations.

The Grievance Director's Award went to **Patricia Duffy** for her achievements in representing her fellow professionals in grievances and investigations.

The Special Service Award for dedication and service to patent professionals was given to **Kim Lockett** for representing her fellow professionals and fostering effective communications among professionals, and to **Celia Murphy** for providing her graphical artistry to POPA's communications with fellow professionals.

Celia Murphy receives the Special Service Award from POPA President Robert Budens.

The Voluntary Service Award for enthusiasm, dedication and volunteer spirit in conducting the 2006 election was bestowed on POPA Election Committee Chairman **Edward Miller** and on Election Committee member **Mark Osele** for the considerable assistance he provided to Ed throughout the election process. POPA also extends its thanks to the members of the Election Committee who assisted in conducting the POPA election: Rashmi Sharma, Jasmine Clark, Diane Mizrahi, Noreen Ferrante, Nahid Amiri, Celia Murphy, Thomas Valone, and Stephen Elmore.

Ed Miller [right] accepts the Voluntary Service Award from POPA President Robert Budens.

IN MEMORIAM
Gene M. Munson

TC 2800 Primary Examiner Gene M. Munson passed away Sat., Dec. 30, 2006. Gene was a long-time POPA representative and POPA supporter.

We extend our condolences to Gene's wife, Suzanne, and three sons, Mike, Tim and Bjorn.

Gene began his USPTO career in 1974 and was first elected as a POPA representative for Group 250 in 1983. With subsequent reelections he represented Group 2500 and Tech Center 2800, continuously serving his fellow examiners for 23 years.

Gene was both an examiner and an attorney. Over the years as a member of the POPA Executive Committee Gene provided legal representation for the entire bargaining unit and for individual unit members. Gene was instrumental in the early automation negotiations. He served as chair of the automation committee and filed several legal briefs in litigation surrounding those negotiations. Gene also served as chief negotiator in the religious compensatory time negotiations, which resulted in an agreement on religious compensatory time for patent professionals. More recently Gene had used his legal expertise to write an appeal brief and present oral arguments before the Court of Appeals for the Federal Circuit on a removal action for a fellow examiner in TC 2800.

Gene went about his work as a POPA representative in a quiet manner, always helping those in his area by dispensing legal advice or referring examiners to the POPA representative who could offer the best counsel.

His many friends on the POPA Executive Committee and in Tech Center 2800 will greatly miss Gene.

JOIN POPA

Patent Office Professional Association

Letters from readers are welcome. Address to:
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