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POPA, USPTO Boost Productivity and Morale with Laptops

To receive a laptop computer through the Patents Laptop Program (PLP), the USPTO had planned to require examiners to perform at least five hours of overtime per biweek to qualify, until POPA stepped in and said, "That does not compute."

The agency and POPA cooperated to work out the details of the PLP pilot program, which showed enough increased examiner productivity (without the overtime requirement) to warrant program expansion to the full examiner corps. At press time, more than 1,500 employees had signed up to receive the computers and more were expected. The program has also proved to be a big morale booster.

The USPTO and POPA agreed to distribute the laptops first to the most senior of the first 200 examiners to sign up for the program. The remaining 1,300 also will be given out based on seniority. After this initial deployment is completed, laptops will be distributed on a first come-first served basis.

POPA collaborated on the language of the agreements that employees must sign to receive a laptop. Examiners can sign the form with assurance that their employee representative—POPA—has vetted the contract. Though POPA had the required overtime language removed from the document, examiners will have to reaffirm every three months that they work on the laptop regularly.

POPA's Worldwide IP Impact

The following is excerpted from an interview by Emma Barraclough in the June 2007 issue of Managing Intellectual Property.

Examiners around the world are processing more patent applications than ever before. But an increasing number say that the system could collapse unless policy makers radically overhaul the way in which they manage demand for patents. Robert Budens, president of the Patent Office Professional Association, explains why.

Budens is the president of the Patent Office Professional Association (POPA), an independent union of professional employees at the USPTO that was set up in 1964. POPA's officials are elected every two years by the staff they represent and they serve in a voluntary capacity.

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USPTO and POPA officials posed with several of the first employee laptop recipients in the Patents Laptop Program pilot. L to R: POPA President Robert Budens, Venkataraman Balasubramanian, Khanh Dinh, Deputy Commissioner for Patent Operations Peggy Focarino, Len Tran, Khanh B. Pham, Alvin Stewart, Thuy Pardo, Erika Garrett, Commissioner for Patents John Doll, USPTO Deputy Director Margaret Peterlin, Jeffrey Fredman, Kenny Lin, Rudy Zervigon, Chief Information Officer David Freeland.

POPA's Worldwide IP Impact

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Budens is a biotechnology specialist who joined the USPTO as an examiner in 1990.

Can you explain what problems you are seeing at the USPTO?

The USPTO now has around 5,000 examiners, compared to around 3,000 five years ago. That puts incredible pressure on training. When the USPTO just recruited a few hundred people a year, they were assigned to a primary examiner who could teach them and help them work through the cases. Now there are about 1,200 people a year and they have launched a training academy where people spend the first eight months getting the basics of patent law and basics of examining. They still get some on-the-job training, but there is concern that they are not getting enough exposure to real life cases as we think they need.

But the real problem is that we're not retaining people. In fiscal year 2006, we hired 1,200 people and lost 510. What explains that level of turnover?

The number one reason is that you don't have time to do your job. Examiners are stressed out. I started in 1990 and just afterwards, the USPTO issued its 5 millionth patent. It took 200 years to get to that, and yet in the next 17 years, we've reached the 7 millionth patent. More and more references are being submitted and the technology we have to deal with it is not as good as it should be.

In 2003 we moved to fully electronic file wrappers (IFW) but it has slowed the examination process down for a lot of people. There are good points [to the IFW] system, but the overall examination time has gone up.

In 2001 we negotiated the Millennium Agreement. The pay rise for examiners was around 10 percent to 15 percent above the normal Washington pay scale for government staff. At the time we had an attrition rate of around 15 percent.

In the first two years after the agreement the attrition rate was around 6 percent, but [then] the 10 percent differential was eroded. So in November 2006 we negotiated a new rate that raised salaries around 7 percent. The attrition rate was around 10 percent at the time and it has stayed at around that since. The pay rise had no effect. I had people coming up to me and saying: "Gee, thanks for the raise but what I really need is more time."

The agency will tell you that the turnover is average for federal government but when there's such a high learning curve then that's a problem. We lose many people in the first three years so there is an increasing gap between those who are very senior—many of whom are close to retirement, and a whole lot of new examiners.

What do you think will happen?

Eventually somebody will get sick and tired. We can't continue to have this pendency and backlog without the government taking action. The USPTO want[s] to introduce rule changes [to limit claims and constructions]. But if you don't keep staff, then that will affect the backlog more and patentees will start getting upset. We've been in conversations with the American Intellectual Property Law Association and the Intellectual Property Organization. Everyone except management believes that we need more time to do the job. Their rationale is that if we get more time, then the backlog will grow. In the short term that's right, but in the long term it means that the retention level doesn't drop.

What do you want to see?

We need more time for search and examination and for training. At the moment, the target is to examine a patent in 20.4 hours. That means reading the application, figuring out the invention, searching, reading the prior art, writing a 20-page paper, sending out a first action and then either issuing a final rejection or processing the case for allowance. We also want to see [the USPTO] put pressure on applicants to submit applications that comply with U.S. law. I am in favor of its attempts to change the information disclosure statements to require them to tell us what prior art is out there. I know that will go down like a lead balloon with attorneys but we do need to reach some happy medium.

We are very concerned that the backlog is driving management decisions that impact the quality of patents. The USPTO's flat goal project is a way of increasing production requirements. Similarly in the EPO, management is trying to introduce the PAX system. We wanted to raise the issue internationally, especially since we are moving towards a global economy.

We're a highly trained workforce of engineers and scientists, with a work ethic. The patent system is essential. But we fear that if we don't address these fundamental issues then countries won't have the system they require.

Strength in Unity

Patent examiner representatives from the USPTO, the EPO, Germany, Austria and Canada wrote to the leaders of their offices in April. The patent examiners' organizations make a number of recommendations, including that patent office leaders should provide examiners with more time to search and examine patent applications; remove any bias with respect to granting or not granting patents from any reporting, rating or incentive systems; and provide adequate and continuing legal and technological training.

Budens says that to his knowledge, no IP office has yet offered a formal response.

Know the Transit Subsidy Rules

Most employees understand that the USPTO offers a transit subsidy program, but many don't know that rules governing the program need to be followed. Ignorance (of the rules) is not bliss.

The Basics

- Employees who take public transportation – including Metro, MARC, VRE, bus routes in the area and many vanpools—are eligible for up to $110 per month in subsidy.
- An employee who accepts the subsidy may not have a parking place at the USPTO or its vicinity.
- Employees receive the subsidy quarterly as MetroCheks.
- The employee who receives the subsidy is the only person permitted to use the subsidy. You may not give or sell it to anyone even if that person is eligible for the subsidy.
- At the end of the quarter, if you have any subsidy remaining you are responsible for returning the remaining subsidy to the USPTO Office of Finance.

You must apply electronically for the transit subsidy for each quarter. Attach your quarterly application to an e-mail to the Patent Transit Subsidy (PTS) coordinator and send a copy (cc:) to your supervisor as well.

Important: Submit your quarterly application on time or you will lose a month of subsidy!

If you do not receive your subsidy on the day it is due (the first day of the quarter), you only have ten days to file a claim of non-receipt. You will make a costly mistake if you miss this deadline, namely the loss of the subsidy for the whole three months!

Where does all of this information come from? The Memorandum of Understanding (MOU) that governs this program. If you are getting a transit subsidy and haven't read the MOU yet, you will find it at *http://popa.org/pdf/agreements/transit.pdf*.

The Creeping 95% Production Standard

Most employees know that their production needs to be at least 95 percent at the end of each quarter and at the end of the fiscal year to receive a fully successful performance rating. So what does the 95 percent production standard actually represent? It represents a 20 percent production creep from 1976 for one thing.

In 1976, the USPTO and POPA set the production standard for fully successful performance—the level needed for examiners to receive a within-grade increase—at 75 percent. The union and management deliberately agreed that many examiners would *not* be expected to attain the 100 percent production level.

These values resulted from negotiations between the parties after POPA won litigation requiring management to negotiate over the production standard.

POPA's ability to negotiate over performance standards, including the production standard, was short-lived. The Civil Service Reform Act, passed by Congress shortly thereafter, eliminated that employee right.

About this time, the hours-per-balanced-disposal goals were set for examiner dockets. The goals were based on much simpler, much smaller patent applications—before computer programmed methods, biotechnology, genetic engineering, nanotechnology and superconductivity became common topics of applications.

During this time, the USPTO used "short form" office actions, which often included only a single page indicating the claims rejected or objected to, the statutory basis of the rejection or objection, and a very short comment or two referring to the rejection or objection.

Thirty years later, the USPTO search files have probably increased five-fold, office actions are often small novels instead of a single page, the number of claims to be examined has increased greatly, and the size of the specification has expanded, yet examiners have received no additional time. In addition, examiners now must type their own book-length office actions.

The USPTO started chipping away at the 75 percent standard since it was no longer required to negotiate changes with POPA. Then one day 75 percent equaled 95 percent.

The agency and POPA used an inexact science to arrive at the 75 percent standard, but at least the method relied on actual historical data. The USPTO's switcheroo to a 95 percent standard not only used inexact science, but also disregarded quality. Management was fond of saying, "We don't build Cadillacs here, we build Chevrolets," when referring to examining applications. Unfortunately, examiners had to respond that they didn't even have enough time to build a Yugo (a defunct Yugoslavian mini-car).

While the USPTO has upped the production standard by 20 percent, it hasn't relieved the production pressure patent examiners face to retain their jobs and federal careers. Management established and maintains a mere 6 percent margin of error in the production standard for examiners to succeed or fail. At 95 percent you pass and at 89 percent you can be fired. A retiring supervisor once wrote the commissioner that such a small margin of error did not serve the organization well and did not compensate for variances in the applications examined. [See following, *"Supervisor in 1979 Predicts "Misuse of Goals."*] The advice was ignored.

The 6 percent production margin between success and failure also did not enable many examiners to build more quality into their searches or their actions. Some referred to this as the loss of the "examiner conscience."

As the USPTO seeks to apply a volunteer pilot flat goal plan to the whole patent corps, management again will try to raise the fully successful production level from 95 percent to100 percent. Some believe that this additional push for more production, with no increase in examination time per case, will adversely affect the quality of the work. If the flat goal is extended to all examiners, the USPTO will be hard pressed to meet its goals on quality.

(*See sidebar next page*)

Supervisor in 1979 Predicts "Misuse of Goals"

This letter from retiring supervisory patent examiner (SPE) Kathleen H. Claffy to the POPA president and USPTO commissioner appeared in the November 1979 POPA News.

As a retiring SPE, I want to bring some things to your attention that those who are still working in the PTO might feel reluctant to mention. I am deeply concerned that the rigidity of the present goal system has the potential for undermining both the morale and the health of many examiners. I have no quarrel with the existence of goals nor do I believe that all goals are unfair. But in most areas of the office there is no flexibility to allow for changing conditions and/or a mistake in the original setting of the goals. And in some areas of the office, the goal system appears to be used as a tool of oppression.

Flexibility of Goals

When the goals were set by former Commissioner [C. Marshall] Dann, I believe a very honest effort was made to make them as fair as possible. However, it was stated at that time that no changes could be made except for increased complexity of art or a change in dockets. This limitation on change implied that: either the panel that set the goals was infallible (which is absurd) or the management of the office did not care if some examiners had to work forever at an unfair goal (which is tragic).

One of the SPEs in the office has suggested that a permanent panel be established to review any examiner's goal on appeal by the examiner. Unfortunately, the suggestion was not adopted, but something of this nature is sorely needed.

Even the flexibility permitted is little known and less understood. Most of the examiners and many of the supervisors neither know that an adjustment is possible nor do they know how to make an adjustment. At the beginning of this fiscal year, I read a memo from Mr. Feldman to the directors stating that the raw goal for the groups had been decreased to allow for increased complexity of art (among other things). I asked if I could pass on this decrease in goals to the examiners, but I received no answer. I do not even know how much the adjustment amounted to.

I am happy to report that in the course for SPEs that was just concluded, some of the directors teaching the course did demonstrate ways in which they adjusted goals. However, other directors indicated they would make no adjustments that made the average production expected less than their group goal. Obviously, the fairness of an examiner's goal depends largely on luck.

Misuse of Goals

I believe that it is humanly impossible to set goals within greater than 5 percent accuracy and expecting even that much accuracy is optimistic. Furthermore, many dockets fluctuate more than 5 percent in difficulty from quarter to quarter. However, many examiners have been castigated or given "90-day letters" for making "only" 95 or 98 percent of their goal. While I know of no examiner who has been fired for production of only 5 percent less than the goal, many have been frightened by fear of reprisal. The result of this feat frequently is "voluntary" overtime to increase his production. When he increases his production he discovers that he is then expected to further increase his production. In several groups, particularly in the chemical area, the *majority* [emphasis in original] of examiners are working many hours of involuntary "voluntary" overtime every quarter (for some examiners it is every week) just to make the goals that are expected of them. Since most of the examiners are thus making their goals (many of them only by so-called "voluntary" overtime), they are trapped by an appearance that the goals must be fair because they are being made. I have difficulty understanding how they got on this treadmill but it does exist. Since these examiners were not ordered to work overtime, the managers can maintain the fiction that the overtime is voluntary. I believe that managers who cause and perpetuate this situation are guilty of cruel and unethical labor practices whether or not they are legal.

Effect of Civil Service Reform Act

I don't even want to think about how this situation could be exacerbated by a bonus-hungry, unscrupulous manager.

Some Suggestions for Correcting Abuses

1. Establish goals within a range of perhaps 10 percent rather than a single magic number.
2. Provide for a review and adjustment procedure that is both known and understood by all examiners and their supervisors.
3. Investigate what practices are being used to achieve goals and change procedures where indicated.

POPA Begins Major Contract Negotiations

POPA began negotiating a basic contract for professional patent employees in June.

This main agreement between POPA and the USPTO covers a broad range of employees' working conditions, including work schedules, non-duty-time training, transit subsidies, performance appraisal plans, and telework. Usually referred to as "the contract," the "basic agreement" or the "collective bargaining agreement," this overarching document will serve as a standard guiding many employee-agency relations.

The process of negotiations will take at least six months, likely longer. The term of a basic contract is usually several years (the contract length itself is negotiated) and the scope of topics covered is wide and very detailed. This is reflected in the protracted agreement bargaining time.

As in every negotiation, both parties will exchange proposals and counterproposals. The process will entail compromise, creativity and steadfastness. POPA will keep you posted on the progress of negotiations.

More Flak on Flat Goal

Following are more examiners' letters shared with POPA regarding the USPTO's Flat Goal Pilot Program. Names are withheld for the employees' protection.

The Flat Goal program is one that management intends to implement corps-wide, based on your strategic plan.

If I were on your Flat Goal last quarter, I would have been fired. I produced 111 percent for the quarter – busting my hump in the process.

If I were on Flat Goal, I would have only had 78 percent production. Are you prepared to accept the attrition rates you will most likely incur if you implement this Flat Goal to the entire corps? Because I will surely quit rather than work my nights and weekends to make the numbers that I currently produce.

The Flat Goal may monetarily benefit a small percentage of examiners, but it is unreasonable for the vast majority of the patent examiners at the PTO. "Other time" was put in place for a reason—not everything we do is application examination. Therefore, we should not be charged for production during a time when we are clearly working, but not on applications. I wonder how many upper management employees would have been able to make the Flat Goal when they were examining.—*Primary Examiner*

* * *

Even though I'm not going on flat goal, thought I'd share my calculations with you.

For the last fiscal year:

Under regular production, I was rated at 136.8 percent with a bonus of $6,324.66.

Under flat goal, I would have been rated 139.9 percent with a bonus of $9,066.89.

I'm giving up approximately $2,700 of potential bonuses because I know this is a bad program, under which management will raise the production numbers in the end for the entire corps.—*Examiner*

USPTO Far From One of the "Best Places to Work"

The USPTO placed near the bottom of the 2007 Best Places to Work in the Federal Government rankings, scoring 172 out of 222 agencies. In other words, 77 percent of federal agencies ranked higher than the USPTO on indices such as pay and benefits and matching employee skills to agency mission.

The Partnership for Public Service and American University's Institute for the Study of Public Policy Implementation create the Best Places to Work rankings based on data received from the Office of Personnel Management's biannual Federal Human Capital Survey. The 2007 rankings reflect the data from OPM employee surveys taken during summer 2006. Approximately half of the employee survey responses comprising the OPM data came from USPTO managerial/supervisory employees.

In the Pay and Benefits category, the USPTO came in at 187 of the total 222 agencies scored. The employee dissatisfaction reflected in this ranking came from data collected before the special rate pay increase in December 2006. The pay increase conceivably could have changed employees' opinions on this index; the USPTO could say that this ranking is no longer accurate.

However, another index that reflects employee pay and benefits satisfaction is the employee attrition rate. After USPTO employees received the 2001 special rate pay increase, employee attrition dropped from 14 percent to 7 percent. After the recent pay increase, attrition remained virtually unchanged. Deputy Commissioner of Patents Peggy Focarino said in May that attrition still hovers at about 10 percent annually, the same as last year.

Employees' discontent with pay and benefits may be linked to their dissatisfaction with Work/Life Balance, another index in the rankings on which the USPTO fell near the bottom (at 169 out of 222). This Best Places to Work category "measures the extent to which employees consider their workloads reasonable and feasible, and managers support a balance between work and life." Employees may be receiving pay and benefits that meet their career targets, but they may believe they're working too many hours of required unpaid overtime in exchange.

The USPTO scored as one of the top federal agencies in the Family Friendly Culture and Benefits category, with a ranking of 28. This category "measures the extent to which employees believe family-friendly flexibilities are offered to them, including telecommuting and alternative work scheduling, along with personal support benefits like child care subsidies and wellness programs." The USPTO is to be

(*continued on next page*)

Excerpts from 2006 USPTO Human Capital Survey Employee Responses

Survey Question	Positive	Neutral	Negative	Don't Know
The people I work with cooperate to get the job done.	82.2%	10%	7.8%	
My workload is reasonable.	40.6%	19.4%	39.6%	0.5%
My work unit is able to recruit people with the right skills.	50.4%	28.8%	15.3%	5.4%
My talents are used well in the workplace.	57.6%	20.3%	21.8%	0.3%
The work I do is important.	88.9%	8.4%	2.1%	0.6%
Employees are rewarded for providing high quality products and services to customers.	41.0%	23.5%	34.1%	1.4%
Creativity and innovation are rewarded.	24.6%	32.6%	39.5%	3.3%
In my organization, leaders generate high levels of motivation and commitment in the workforce.	37.3%	26.8%	34.6%	1.2%
Complaints, disputes or grievances are resolved fairly in my work unit.	37.9%	29.3%	18.6%	14.3%
Considering everything, how satisfied are you with your pay?	51.3%	23.3%	25.4%	
Considering everything, how satisfied are you with your organization?	51.3%	26.1%	22.7%	

Note: Full survey included 73 questions. To view the USPTO results, including demographics of respondents, go to www.popa.org.

USPTO Far From Best Place to Work

(*continued from page 5*)

lauded for these innovations. However, one examiner commented to POPA that the USPTO salary, flextime and fitness center are nice, but he doesn't have time to enjoy them because of all the unpaid overtime hours he needs to work.

For all of the USPTO's ratings on the 2007 Best Places to Work rankings, go to: *http://bestplacestowork.org/BPTW/rankings/agency.php?code=CM56&q=scores_subcomponent*.

Skewed Data

The demographics of OPM's 2006 Human Capital Survey of the USPTO indicate that the results don't tell the true story of USPTO employee opinion.

Of the 1,105 USPTO respondents to OPM's survey, 50 percent were managers/supervisors. In reality, of the nearly 8,000 employees in 2006, perhaps 1,000 fell in that category.

Therefore the results of both the survey and the Best Places to Work rankings weight management opinion more heavily than the rank and file. Yet the management-skewed results still placed the agency in the lowest quarter of federal agencies overall.

POPA officially requested the data from the Human Capital Survey broken down by bargaining units within Patents and Trademarks. The USPTO responded that it asked OPM for the data but OPM indicated that the data was not available. For the 2002 and 2004 surveys, OPM told POPA that the USPTO has access to the data via password. The agency has not shared the data or access to it with POPA.

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