POPA NEWS
Patent Office Professional Association
www.popa.org
PROFESSIONAL REPRESENTATION FOR PATENT PROFESSIONALS
April 2008 Vol. 08 No. 2

POPA Supplies Facts to Urge Patent System Progress; Congress Listens

Members of Congress listened respectfully to testimony from the USPTO, POPA and others during a Feb. 27 hearing on USPTO operations. Then, during the question-and-answer period, these congressional representatives grilled USPTO Director Jon Dudas on why the agency had not responded to the Government Accountability Office's recommendation to reevaluate examiner production goals. They also expressed serious concerns regarding the USPTO's attempt to roll back employee worklife gains with its recent patent employees' contract proposals.

When POPA spoke for front-line patent professionals, Congress listened.

POPA President Robert Budens suggested in his remarks to the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property, that Congress focus not on the speed of examination and pendency reduction, but on doing a quality job up front. "After years of trying to do the job faster and cheaper, the USPTO now finds itself facing the same criticism that any manufacturer faces when it cuts corners," stated Budens, "a perception by end-users that the product lacks the quality it needs to do the job it was supposed to do."

Budens refuted Director Dudas's assertion to Congress in a Dec. 2007 letter that examiner attrition has slowed since fiscal year 2005. The USPTO's own figures "show that about 30 to 44 percent of each year's new examiners leave the agency within three years," noted Budens.

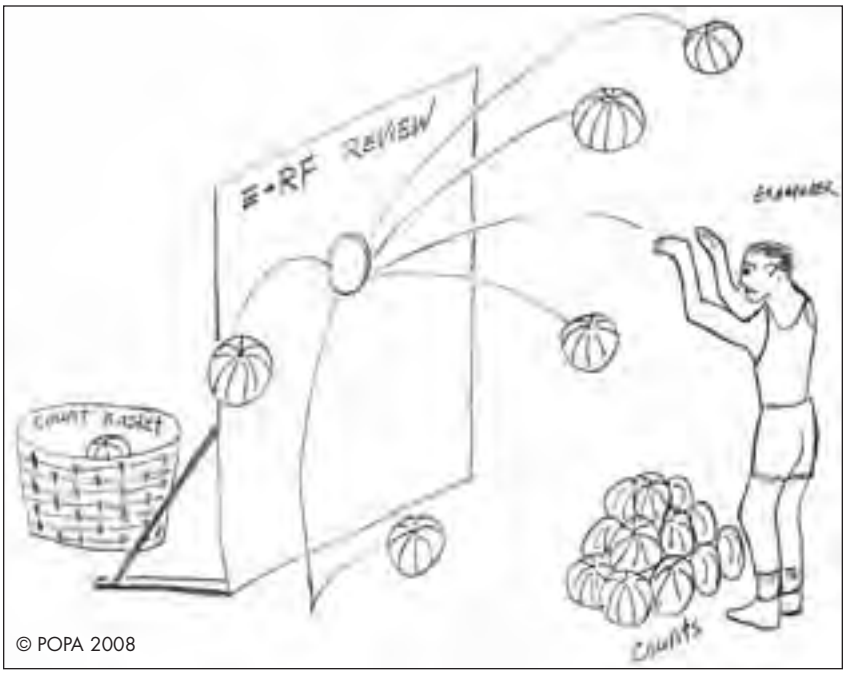
In that letter, Director Dudas also told Congress that the USPTO's "strong work life quality program" is addressing attrition with "retention bonuses (primarily available to patent examiners)."

"POPA is unaware of any examiner receiving a 'retention bonus,'" Budens testified, though the union repeatedly has encouraged such bonuses, would welcome proof that they exist and information on how examiners can attain them.

In fact, USPTO data indicate that 45 percent of examiners received no monetary award for their work in fiscal year 2006, the most recent data available. "In the same period, more than 80 percent of USPTO's patent managers received from $7,500 to $15,000 cash awards," Budens said, "a fact not lost on examiners as they work their unpaid overtime."

(*continued on page 2*)

Seeing Red with the eRed Folder



© POPA 2008

POPA has gone to bat for the examiners harmed by the sudden rollout of the electronic Red Folder system to the full patent examining corps, which has resulted in many time-eating problems for many employees. POPA has filed a grievance and is negotiating with the USPTO to lessen the negative impacts and make the software work for everyone.

POPA has received many complaints about operability of the eRed Folder system, including lost files, incompatibility with the Office Action Correspondence System, the inability to post office actions, failure to count office actions, and problems with non-patent literature, among others. From the outset, POPA has attempted to work with the agency to avoid being plagued with such rollout troubles.

When the USPTO notified POPA in April 2007 of its intention to start an electronic Red

(*continued on page 3*)

POPA Testifies; Congress Listens

(continued from page 1)

Improve Quality and Retention by Providing Time for Examination

While POPA works hard for greater employee compensation and worklife benefits, "More than any other factor, the reason examiners leave the USPTO is the unrelenting stress caused by the agency's outdated production system," Budens told Congress.

Budens cited a POPA survey that found that one-third of examiners work unpaid overtime just to keep their jobs. Another third of examiners work unpaid overtime to earn performance awards. He also cited a Sept. 2007 GAO report, which stated, "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 USPTO points to the electronic search and action-writing software as time-saving and production-building tools for examiners, but Budens called the agency's rationale misleading. "Automation can accelerate processes such as searching large databases, but it cannot make the examiner read and understand the results of those searches any faster," Budens told the congressional representatives. He cited private sector studies that indicate "the size of issued patent specifications increased by 85 percent since 1987. The data also show significant increases in the number of independent claims and total claims."

A relatively simple way to retain experienced examiners, increase patent quality upfront and reduce pendency over time is for Congress to allocate an increased amount of examination time per patent case, Budens told Congress.

"Providing examiners with the additional time to do the job right the first time does not necessarily require an increase in pendency," said Budens. Additional time per application will improve retention; more retention means more experienced examiners moving more cases; and doing the job right the first time increases the likelihood that old or obvious ideas will be rejected, meaning "patent applicants will be less likely to expend the money and resources to file patent applications of little or questionable economic value," reasoned Budens.

End Outsourcing Searches

The USPTO is pushing the implementation of Applicant Quality Submissions (AQS), a proposal in the pending Patent Reform Act that would ultimately damage the patent system, Budens testified.

The patent search forms the basis of determining U.S. property rights and should be performed by U.S. government employees who are free of any conflicts of interest, namely USPTO patent examiners, stated Budens.

In addition, the AQS will not improve the quality of the search. Applicants or their search contractors will likely search the same databases searched by patent examiners, but examiners give patent claims their broadest reasonable interpretation, which is not always apparent to applicants, who usually focus on the essence of their invention. For example, applicants would be unlikely "to find such obscure art as the prior art relied upon in the well-known *RIM v. NTP Blackberry* case," testified Budens. "Only millions of dollars and cadres of litigators are likely to uncover that type of prior art." Critical prior art in that case turned out to be some limited-circulation documents found in a Norwegian library.

The real reason the agency wants to outsource the search via AQS, said Budens, is to "gain efficiency" by taking that search time from examiners and requiring them to examine more cases during the time theoretically saved, increasing production pressure on examiners even further.

Budens asked that Congress delete the AQS requirement from the proposed patent reform legislation.

Fee Retention

Almost the entire patent community supports designating all patent-user fees for exclusive USPTO use,

(*continued on next page*)

Testifying at the House Feb. 27 hearing on USPTO oversight are (L to R) USPTO Director Jon Dudas; GAO Director of Natural Resources and Environment Robin Nazzaro; POPA President Robert Budens; American Intellectual Property Law Association First Vice President Alan Kasper.

POPA Testifies; Congress Listens

(continued from page 2)

and POPA is no different. However the union went one step further and asked the subcommittee members to "put a fence around the patent filing fees and directly allocate these fees to provide time for examiners to examine patent applications," testified Budens.

"Fencing off USPTO fees for particular purposes is not without precedent," said Budens. "Such a fence currently exists around USPTO fees collected for trademark applications." As POPA's testimony explained, such an allocation for increased examination time per case will directly improve patent quality and reduce pendency over time.

Provide Appropriate Search Tools

Not so long ago, when examiners used paper search files, they could physically leave notes in the files to help other searchers or themselves the next time they looked at the file. That ability to aid the next searcher's work was lost in the move to electronic files, but the technology exists to allow it.

"Putting in place tools that allow reference annotation and providing examiners with the time to do so, will allow today's examiners to share their wisdom and experience with the examiners of tomorrow," Budens told Congress.

Automation also left behind a valuable search tool, the U.S. Patent Classification System. Maintenance of the classified patent search files was discontinued long ago, yet classification speeded the prior art search and would do the same today. "The USPTO needs to reverse its previous policy of neglect, restore full funding to the U.S. classification system," testified Budens, "and develop automated tools to allow examiners to classify and add foreign and non-patent references to USPTO databases."

To read POPA's full Feb. 27 testimony to Congress, go to *www.popa.org* and scroll down to Labor Relations.

Seeing Red with eRed Folder

(continued from page 1)

Folder system, instead of immediately requesting to negotiate on an unknown system, POPA President Robert Budens suggested that the agency and union pilot a program with a limited number of examiners to see how the system operated and to fix any glitches before giving it to all examiners. Four art units launched the pilot and another seven art units were added a little later to get a good representation of the entire examining corps.

POPA representatives attended meetings and suggested changes needed in the system. To the agency's credit, managers addressed various problems and implemented many of the suggestions.

The USPTO decided that it would give the eRed Folder to the entire examining corps in staggered stages beginning January 2008. POPA voiced its concerns that the system wasn't ready for the entire examining corps and recommended expanding the pilot to a larger, but limited, number of examiners. For example, if files posted with eRed Folder were disappearing into cyberspace, it was better to keep the pilot population smaller until that bug was fixed.

Unfortunately, management disagreed and pushed ahead. Once notified of the impending eRed Folder deployment to the entire examining corps, POPA requested negotiations over the impact and implementation of such a change in working conditions and submitted negotiation proposals to the agency on Dec. 14, 2007.

Patent professionals have the right under U.S. statute to negotiate a change in their working conditions with the USPTO through POPA, their exclusive bargaining representative. The USPTO ignored its duty to defer the eRed Folder deployment until completing negotiations and launched training and the eRed Folder on Jan. 9. USPTO-POPA negotiations began Jan. 15.

During the talks, the agency denied that it had changed case-counting procedures and refused to negotiate on proposals concerning counting/crediting of examiners' work.

POPA filed an association grievance Jan. 15 on behalf of all examiners over: 1) the illegal implementation of the eRed Folder system prior to completing negotiations with POPA, 2) the mandatory use of the Multimedia Collaboration System tools without providing adequate training to examiners on the Carlyle campus, 3) the change in counting procedures, and other issues.

During negotiations, POPA objected to the agency's elimination of any correction cycle following counting of an examiner's action and placing any correction, no matter how minor, on the examiner's time. Managers have instructed legal instrument examiners to deny counts to any office action that is not perfect. A typo, formatting faux pas, or other minor error must be fixed prior to counting. The agency asserts that this is the way it has always counted work—that it's changed nothing.

Many examiners know from experience that the truth is otherwise. The agency had assessed negative workflow points to examiners if applications hadn't mailed after 30 days since count. The USPTO also issued "tickler" reports showing which examiners had applications that had been counted and not mailed after 15 days. These USPTO records and standard practices clearly indicate that the agency had used this correction cycle for the completion and mailing of office actions for many years.

The agency's goal to eliminate this 30-day correction cycle may be worthy, and many examiners may find the eRed Folder a helpful tool. But the USPTO has changed how work is counted, which hasn't worked well for all examiners. It opens these employees to possible adverse actions, including removal, for work not counted.

POPA will continue to talk with managers to lessen the negative eRed Folder results on examiner production. If you experience catastrophic problems associated with eRed Folder, use time code 090180.

Mediation Begins on Collective Bargaining Agreement

POPA and the USPTO entered mediation in March to try to resolve disagreements over sections in the negotiated collective bargaining agreement.

Several workplace rights that POPA remains steadfast in protecting include:

Due Process and the Grievance Procedure. The contract that now governs USPTO patent professionals' rights, negotiated more than 20 years ago, states in the section covering the grievance procedure:

"The Office and the Association recognize and endorse the importance of considering and resolving complaints and grievances promptly and, whenever possible, informally. The parties agree that this grievance procedure will provide a mutually acceptable means of resolving complaints and grievances at the lowest level possible, and the Office and Association agree to work toward this end."

The grievance procedure that the USPTO now wants to force employees to accept would be the opposite, limiting employees and the union to filing grievances only when there is no other way to have a complaint against an agency action reviewed.

The contract that now covers patent professionals allows the option of filing a grievance—enabling the USPTO and POPA to work together toward resolution—or of taking a matter to the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, the Merit Systems Protection Board or the Office of Special Counsel. Unfortunately, these agencies are generally viewed as less fair toward employees than independent arbitrators used in the current grievance procedures. The USPTO's proposed grievance procedure would compel the employees and union to take issues to one of those agencies whenever possible—allowing no option for "lowest level possible" resolution.

Therefore, if an employee or the union wishes to deal with an issue between supervisor and employee at the USPTO level, informally or formally, and files a grievance when a matter could have gone to an outside adjudicating agency like the FLRA, their grievance will be inadmissible —end of story.

In addition, the agency would not allow any grievances/complaints about, 1) a denial of partial or full signatory authority and, 2) performance warnings. The USPTO wants employees' first opportunity to challenge a supervisor's unfair performance warning to come after they have received a proposed-removal letter. Employees' only recourse at that point will be to state their case to the deputy commissioner for patents to try to stop their termination. By that stage, the agency presumes the proposed firing is valid and an employee is given little time to prepare a defense to prevent being rushed out the door.

If you think shrinking the grievance process may be due to the USPTO's reduced resources to handle the costs for employee relations, think again. In the last 10 years, the USPTO has more than doubled its labor relations staff, which includes many attorneys. The resources the agency has devoted to resolving employee issues at the agency level have increased, and the USPTO has shared no plans to decrease them.

More due process and transparency in performance decisions will make the USPTO a better a place to work. Agency officials should not be permitted to hide potentially unfair decisions by making their decisions unquestionable.

A Fair Awards System. As POPA President Robert Budens testified to Congress, approximately 45 percent of examiners did not receive any monetary award in 2006, the most recent year available for these figures. Yet about 80 percent of first-line supervisors received awards of a minimum of $7,500, up to $15,000. Supervisors are receiving generous awards even if examiners in their art units receive none.

POPA is seeking fairness in workplace awards for examiners.

In common business practice it's unusual for supervisors to receive awards if his/her employees do not meet their goals. Yet at the USPTO, if a supervisor's art unit is doing poorly yet the technology center overall is doing well, the supervisor receives an award, often equal to 10 percent or more of salary.

Many primary examiners assist their supervisors with duties, such as training, second-pair-of-eyes review and classification. These primary examiners get no additional compensation or recognition for this value, while supervisors receive cash awards.

If all supervisors in a technology center can be awarded when the TC does well, so should examiners. POPA is asking the agency to consider such award possibilities for its patent professionals—it will help to motivate employees and improve an already lagging morale.

Communication. The wider patent community understands the value of a patent examiner's time. The USPTO and others value the maximum number of examiners' working minutes spent on examination. Then why does the USPTO want to require that examiners waste time by electronically logging every request—even the smallest request for sick leave—to their supervisors?

The USPTO's contract proposal would oblige patent professionals "to use automated systems for reporting information such as time and attendance."

This sounds fine, but employees who know the rigmarole necessary to amend filings on the WebTA automated time-keeping system will be rolling their eyes at the potential for time wasting. POPA agrees that ultimately filing all leave for a bi-week on WebTA is reasonable, but the USPTO has refused to allow for any oral or e-mail requesting/granting of leave between employees and supervisors.

All other requests from employees to supervisors, regarding any and all work concerns, will have to be submitted in writing to be considered. However, the USPTO

(*continued on next page*)

Collective Bargaining *(continued from p. 4)*

will not obligate supervisors to respond in writing on any occasion.

Therefore, if a supervisor tells an employee that his/her work needs improvement in any regard, the employee may not get that input in writing, even if it will help the employee to improve.

POPA is asking the USPTO to take responsibility for its actions. If the agency demands that patent professionals place all requests in writing, supervisors need to show accountability and respect for employees by placing their requests of employees in writing as well.

Why I Joined POPA

"POPA was One Resource I Could Rely on to Get the Truth"

I joined POPA fairly soon after I started working at the patent office 18 years ago. I had two motivating factors: one, my natural inclination is to be pro-union. Two, my father was a long-time examiner and while his natural inclination was not necessarily pro-union, he had great things to say about POPA. He admired the labor knowledge of the POPA representatives. He appreciated the flexible work schedules POPA negotiated for the bargaining unit. And he was personally familiar with many of the representatives, whom he thought were intelligent, creative people who were there to assist employees in case managers treated them unfairly.

As a naïve young employee, I asked my then-supervisor (who was a long-time supervisor) if I should join POPA, and he told me yes, he thought POPA was a good organization and did helpful things for employees. I was fortunate to have such an open-minded supervisor!

The rest is history: I volunteered with POPA and then was elected as a delegate.

It is still sobering to see how people can be treated so unfairly and arbitrarily at the USPTO. One thing employees do not realize is how vulnerable each and every one of us is—at any moment, a manager can decide to target you and make your worklife miserable or even get you fired. We need a union to protect us from that arbitrary and unfounded management behavior.

Perhaps most importantly, I also learned that POPA was one resource I could rely on to get the truth.

—Melanie Tung, Primary Examiner, Art Unit 2911 Design/Others Area Delegate

Watch Out Where You Surf

If you're ever tempted to surf the Web for fun or personal use while on the clock for the USPTO, think twice. The agency tracks *all* computer use and has increased its investigations of employees using their USPTO computers to surf morally objectionable Web sites.

If you surf, you could hit the turf.

POPA Executive Committee 2008

OFFICERS		
President		
Robert D. Budens	571-272-0897	REM-3A35
Vice President		
Lawrence J. Oresky	571-272-6930	KNOX-3B11
Secretary		
Howard J. Locker	571-272-0980	REM-2C81
Asst. Secretary		
Pamela R. Schwartz	571-272-1528	REM-10C75
Treasurer		
Randall P. Myers	571-272-7526	KNOX-6B81
CHEMICAL AREA DELEGATES		
Dr. Kathleen Duda	571-272-1383	REM-9A65
Dr. Patricia Duffy	571-272-0855	REM-3B05
Dr. G. R. Ewoldt	571-272-0843	REM-3C83
Jennifer Graser	571-272-0858	Hoteling
Adrienne Johnstone	571-272-1218	REM-7B19
Ileana Popa	571-272-5546	REM-2A74
Dr. Christine Saoud	571-272-0891	REM-4E81
Geraldina Visconti	571-272-1334	REM-9D55
ELECTRICAL AREA DELEGATES		
Vincent Boccio	571-272-7373	RND-10D39
Azizul Choudhury	571-272-3909	RND-4C65
Bill Deane	571-272-7484	Hoteling
Albert Gagliardi	571-272-2436	JEF-5C83
Kim Lockett	571-272-2067	Hoteling
Adnan Mirza	571-272-3885	RND-4A15
B. James Peikari	571-272-4185	Hoteling
Dionne Pendleton	571-272-7497	KNOX-8B15
Michael Shingleton	571-272-1770	Hoteling
Scott J. Sugarman	571-272-2340	JEF-3D11
Jeff Swearingen	571-272-3921	RND-4C61
Julie Anne Watko	571-272-7597	KNOX-8A75
Howard Weiss	571-272-1720	JEF-5A15
MECHANICAL AREA DELEGATES		
Ella Colbert	571-272-6741	KNOX-5D61
David Fenstermacher	571-272-7102	KNOX-3B07
Vinh Luong	571-272-7109	KNOX-3C03
David Reip	571-272-4702	RND-6B81
David Shay	571-272-4773	RND-7A75
Nicholas Woodall	571-272-5204	RND-6D18
DESIGNS AND OTHERS		
George Kirschbaum	571-272-4232	REM-5A70
Melanie H. Tung	571-272-2613	REM-5B87

Got Questions?
POPA's Got Answers

Stop by the POPA table at Community Day, May 22.
Pick up free info and POPA giveaways.

Know Your Rights

About Oral and Written Warnings

When an examiner's performance carrying out the patent examining duties in the patent examiner Performance Appraisal Plan (PAP) is found to be unacceptable, as a first step the examiner may be subject to an oral warning for performance and given an opportunity to improve. Should the examiner fail to satisfactorily improve during the oral warning Performance Improvement Period (PIP), the second step can be a written warning.

The Examiner PAP has several critical performance elements. They are Production Goal Achievement, Performing Patent Examining Functions, Action Taking, Patentability Determination, and Workflow Management. All five of these critical elements apply to primary patent examiners. Junior examiners who are no longer probationary and are not yet on the partial signatory authority program are responsible for the critical elements of Production Goal Achievement, Performing Patent Examining Functions, and Workflow Management.

Failure to perform above the unacceptable level in any of the critical elements that apply to your grade level may result in your receiving an oral warning in that critical element. If you wonder if you can receive an oral warning in more than one critical element, the USPTO has determined that you most certainly can.

Your supervisor will issue a written "Confirmation of Oral Warning," spelling out your deficient performance in one or more critical performance elements. Your supervisor will also issue you a PIP, during which you must achieve above the unacceptable level in those elements.

For example, in the Production Goal Achievement critical element the examiner must achieve at least 90 percent production during the Oral Warning PIP in order to pass. The PIP should be seven pay periods in duration, and the agency should be providing notice to the examiner prior to the beginning of the PIP. This PIP may or may not coincide with a fiscal quarter. If it does not, ask your supervisor to provide you with means to track your performance during this PIP, as your PALM reports do not track production this way.

Take Oral Warnings Very Seriously

Why? If an examiner fails the Oral Warning PIP, the examiner can expect that a Written Warning will soon follow. This last chance is a seven bi-week Written Warning PIP, during which the examiner must perform above the unacceptable level in the noted critical element(s) or face possible removal from federal service. Even if the examiner passes the Written Warning PIP, the examiner must now maintain his/her performance above the unacceptable level in the noted critical element(s) for one year from the beginning of the Written Warning PIP. Failure to do so will likely result in the agency proposing the examiner's removal from federal service.

Bargaining unit members, whether dues-paying or not, should consult a POPA representative upon receiving an oral warning. By the time an examiner has failed to meet the requirements of the Oral Warning PIP and the Written Warning PIP, he/she is about to receive a Proposed Removal—the horse has not only left the barn, it has left the city. If the examiner only then contacts a POPA representative, it may be too late.

POPA exists to protect patent professionals and the integrity of the patent system. Contact your POPA rep at the first hint of a problem. And join POPA to help support the association that supports you.

New Patent Pros Get POPA Help from Day One

You may be a probationary employee, but POPA can still assist you with expert advice and counsel on your job-related concerns. To set the record straight:

Probationary Employees *Can* (and Do) Join POPA. New patent professionals are members of the POPA bargaining unit from their first day on the job. You are covered by the collective bargaining agreement and are entitled to many of its rights and protections. You can become a dues-paying member of the association at any time by completing a dues-withholding form (available at *www.popa.org*, click on Join POPA) and returning it to any POPA representative.

POPA Can Counsel You on Job Issues. As a probationary employee you can turn to POPA to better understand your rights and alternatives if you face discipline or job termination. A grievance may be beyond your reach, but the employee relations experts at POPA will advise you on your options.

Patent Office Professional Association

Letters from readers are welcome. Address to:
The Editor, Patent Office Professional Association,
P.O. Box 2745, Arlington, VA 22202

Officers

Robert D. Budens, *President,* (571) 272-0897

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

© 2008 Patent Office Professional Association