POPA NEWS
Patent Office Professional Association
www.popa.org
PROFESSIONAL REPRESENTATION FOR PATENT PROFESSIONALS
October 2008 Vol. 08 No. 5

USPTO Director's Push for Lower Ratings Backfires

When USPTO Director Jon Dudas let the word out that too many employees receive outstanding ratings at end-of-year performance appraisals, one supervisor baselessly lowered a Patent Cooperation Treaty (PCT) special programs examiner's rating on one critical element, causing the employee to lose a significant portion of her Gainsharing Award. POPA filed a grievance on the employee's behalf that ultimately resulted in the invocation of binding arbitration on the issue.

At the hearing before Arbitrator Salvatore Arrigo, the supervisor testified that, sometime prior to the appraisal in question, USPTO management informed supervisors that too many employees were receiving outstanding ratings and "that it wasn't possible that the agency had that many outstanding employees," according to the arbitrator's written decision. When the employee asked the supervisor at the time of the appraisal for specific reasons for the lowered rating, the supervisor offered no other credible rationale.

USPTO management said it wasn't possible that the agency had that many outstanding employees.

After POPA filed the grievance on the employee's behalf, the agency stated that it relied on "several evaluations of training presentations" that the grievant had given. The USPTO presented six evaluations—two gave mixed reviews, three were critical (but only two were applicable to the grievant since there were multiple instructors and, in several instances, it could not be determined which instructor was being evaluated), and one gave the highest possible rating. Arbitrator Arrigo wrote, "given the small number of critical evaluations relied on and the fact that the grievant taught 200 to 300 students during [the performance appraisal period], I am unconvinced that [the supervisor] would reasonably rely on these student evaluations in reaching her conclusions on the grievant's performance."

Arrigo concluded that the special programs examiner would have received an "outstanding" rating if the supervisor had not caved to agency pressure to lower ratings. The arbitrator ordered that the rating be changed to outstanding and that the employee receive back pay of $2,458.16 plus interest. This corresponds to the higher rating point total of 500 points under the Gainsharing Agreement.

Manager Acknowledges Pressure from the Top

This is not the first time POPA has grieved Director Dudas's decision to lower employee ratings. When POPA representatives met with Office of the Chief Information Officer (OCIO) managers who appeared to arbitrarily down-rate several employees, one manager acknowledged that Director Dudas was seeking fewer outstanding performance ratings. Those grievances ultimately settled in the employees' favor, avoiding costly arbitrations.

Similarly in Technology Center 2800, POPA helped three primary examiners file grievances challenging unjustified lower ratings and had the ratings changed and applicable cash awards restored.

POPA has filed for employees at least five additional grievances contesting groundless low performance ratings, many of them in the OCIO. Some of these employees have decades of work experience, have won national awards or have performed work that has saved the USPTO hundreds of thousands of dollars. The outcome of these grievances is pending. These employees and POPA hope that the agency will recognize the error of its ways and discuss settlement of these grievances rather than forcing additional costly and time-consuming litigation.

Know Your Rights

Challenge Wrongful Error Findings

If your supervisor or a quality assurance specialist indicates that you made an error or wrongly allowed a claim, take that allegation seriously. If you know your position is correct and management's position is wrong, you need to defend your actions or the alleged error can seriously hurt your performance evaluation and future career.

If you are faced with an alleged error you believe is wrong, immediately meet with your supervisor or quality assurance specialist and rebut the alleged error. If the situation remains unresolved, see your technology center director. If management continues to maintain the alleged error, see a POPA representative. But do not wait until the last minute to discuss your situation with POPA. Under POPA's current grievance procedure, you only have 20 days to file a grievance. That time goes by very quickly.

(*contnued on page 2*)

Challenge Wrongful Errors

(*continued from page 1*)

A quality error charge can be a big deal, particularly in the critical element of patentability determination, as allowance rates have plummeted in many areas since the agency's implementation of the Quality Initiatives and the recent Supreme Court decision in the *KSR* case. For instance, if you allowed fewer than 20 applications during the year and you then are charged with a single patentability error, your error rate for the year will be above 5 percent. If your error rate is 7.5 percent or higher, you can receive an unacceptable performance rating in the patentability determination element. This would mean that your overall performance rating would also necessarily be unacceptable, even if you were rated outstanding in all of the other elements.

This would also likely result in your receiving an oral warning and being ineligible for any awards even if your production was 110 percent or above.

In the event that you're allowed more errors than have been charged against you, still don't allow improper error charges to go unchallenged. They can add up and count against your fiscal year rating resulting in the reduction or elimination of your Gainsharing Award and/or Special Achievement Award or holding up a promotion or within-grade increase.

Keep an accurate accounting of the time you spend defending against alleged errors. Current practice is that you will be granted non-examining time for the time spent at least in those instances where you successfully rebutted an error.

Your Performance Appraisal Meeting

Another fiscal year is at an end. That means performance appraisals are just around the corner. Please know that you have the right to ask questions and to expect answers from your supervisor during your performance appraisal meeting. In fact, supervisors should be encouraging such open dialogue during this meeting.

It is a good idea to write down a few things beforehand that you would like to discuss with your supervisor.

It is also a very good idea to take a notepad into the meeting with you. You may well want to take notes during your meeting, particularly if things do not go as smoothly as you had expected. Alternatively, as soon as the meeting is over, go to your office and immediately memorialize the date, time and location of the meeting as well as what transpired during the appraisal meeting. These contemporaneously generated notes could be the difference should your concerns escalate into a grievance.

Pay Grievance Awaits FLRA Quorum

Due to a recent resignation from the three-member Federal Labor Relations Authority (FLRA), one of POPA's more prominent grievances will remain in limbo.

The grievance seeks backpay resulting from the USPTO's failure to maintain the value of patent employees' special pay rate as agreed to in the 2001 Initiatives for a New Millennium Agreement.

FLRA Chairwoman Dale Cabaniss resigned on July 14 leaving only one sitting FLRA member, Carol Waller Pope. The lack of an FLRA quorum (at least two members) means the authority cannot render decisions until someone is appointed. A decision on POPA's grievance will need to wait until additional members are appointed to the FLRA.

For additional information on the grievance, go to *www.popa.org*, scroll to Pay, Bonuses, Compensation, click on "USPTO Appeals Millennium Pay Decision."

Partisan Political Do's and Don'ts for Feds

Except for specified job series that are listed at the Web site of the U.S. Office of Special Counsel, federal and D.C. employees (including USPTO employees) **may:**

- be candidates for public office in nonpartisan elections
- register and vote as they choose
- assist in voter registration drives
- express opinions about candidates and issues
- contribute money to political organizations
- attend political fundraising functions
- attend and be active at political rallies and meetings
- join and be an active member of a political party or club
- sign nominating petitions
- campaign for or against referendum questions, constitutional amendments, municipal ordinances
- campaign for or against candidates in partisan elections
- make campaign speeches for candidates in partisan elections
- distribute campaign literature in partisan elections
- hold office in political clubs or parties

These same federal and D.C. employees ***may not:***

- use official authority or influence to interfere with an election
- solicit or discourage political activity of anyone with business before their agency
- solicit or receive political contributions (may be done in certain limited situations by federal labor or other employee organizations)
- be candidates for public office in partisan elections
- engage in political activity while: on duty in a government office; wearing an official uniform; using a government vehicle
- wear partisan political buttons on duty

For more information, go to *www.osc.gov*.

Seeking Nominations for 2008 POPA Elections

Nominations open Oct. 24 for the 2008 election of POPA's Executive Committee officers and delegates. Elected members will assume office during the POPA Annual Meeting on December 4, 2008. **Completed nominating petitions will be accepted from 8:30 a.m. on Oct. 24 through 12 noon on Oct. 31.**

The POPA election will be held Nov. 20, 21 and 24. While all non-managerial patent professionals are members of POPA's bargaining unit, only dues-paying members may vote or hold office. One of the benefits of paying POPA dues is that you get a voice in POPA's organization and a vote in POPA's elections.

The numbers of area delegates from the four designated office areas were apportioned by vote of the POPA Executive Committee in September. The apportionment is designed to equalize the voting power of members in each office area, creating an almost uniform ratio of members to delegates for all areas. POPA delegate apportionment is based only on the number of dues-paying members in each office area, not on bargaining unit size.

Delegates from the four office areas will be elected as follows:

- 9 Delegates from the Chemical Area
- 13 Delegates from the Electrical Area
- 6 Delegates from the Mechanical and Business Methods Areas
- 2 Delegates from Designs and Other Areas combined.

The following POPA officers will be elected from the membership at large: President, Vice President, Secretary, Assistant Secretary, and Treasurer.

How to Nominate a Candidate

Candidates for officers and delegates must be POPA members in good standing, i.e., dues-paying members. Nominations for an officer shall be by petition stating the position sought, signifying the nominee's willingness to serve, and signed by at least 15 dues-paying POPA members. Nominations for an area delegate shall be by petition stating the organization area to be represented, signifying the nominee's willingness to serve, and signed by at least five dues-paying members from that same organizational area.

For either type of nominating petition, it is recommended that nominees obtain in excess of the minimum number of signatures in the event one or more signatures are disqualified for not being dues-paying members.

Give completed nominating petitions to any Election Committee member or to POPA Secretary Howard Locker. The Election Committee will be listed on the nominating petition and at *www.popa.org* under "Elections."

If you wish to vote in the election or sign a nominating petition and are not now a dues-paying member, you may contact any POPA representative for a dues deduction form. You may also download a form from *www.popa.org* by clicking on " Join POPA." Return completed dues deduction forms to any POPA officer or representative. Completed forms may also be returned at the time of balloting.

To nominate someone or to be nominated, you must return your dues deduction form by noon on Oct. 31. For voting in the election, if you have not already turned in your dues deduction form by the week before the election, please hold onto it and bring it with you when you come to vote.

Nominating petitions will be available after 8:30 a.m., Oct. 24, at *www.popa.org*. Click on " Elections."

Back-out Overtime to Qualify for an Award

At the end of each fiscal year, if you're a bargaining unit member who has worked overtime during that year, you should check your production to see if you qualify, or are close to qualifying, for a Gainsharing or Special Achievement Award (SAA). Some supervisors forget to tell their examiners that this could pay off.

You can calculate your fiscal year production for the awards by "backing out" your overtime hours as provided for in the Gainsharing Award Agreement negotiated for employees by POPA. The closer you are to the next level of either award or to qualifying for either award, and the more overtime hours you have, the more significant this calculation could be.

Say for example that you're an examiner who worked 1,700 hours of examining and examining-related time in the fiscal year, and 300 of those hours are overtime hours. If you have 20 hours per balanced disposal (BD), then the expected BDs for the year at 100 percent would be 85 BDs. If you produce 92 BDs for the fiscal year for 108 percent production (92/85), then you can "back out" 300 hours of overtime at 100 percent, which would be 300/20 = 15 BDs. Thus, the percentage expectancy for the fiscal year, with the overtime "backed out," would be (92-15) / (85-15) = 110 percent. By "backing out" the overtime in this example, you would qualify for an award—you wouldn't qualify for an award with the overtime added into the total examining hours.

One other caveat in the POPA-USPTO Gainsharing Award Agreement is that, if the total examining hours used for your award is at least the minimum 700 hours required for an award, but below the 1,400 hours required for the maximum award, the award amount will be prorated by the ratio of the number of examining hours worked divided by 1,400 hours. By "backing out" overtime hours, this could drop you below the 1,400 hour cutoff and result in a prorated award. However, nothing prevents you from "backing out" any portion of your overtime hours that you wish.

To read the Gainsharing Award Agreement, go to *www.popa.org.* Click on "Useful Info," then click "Agreements," and finally "Collective Bargaining Agreement." Go to Appendix A, titled the "Agreement on Awards," and Appendix C, entitled the "Gainsharing Award Agreement of 1988."

Note that your time doing examining-related activities is included with examination time in this calculation to determine the percentage reward received.

Why I Joined POPA

"I left in tears, my supervisor was embarrassed – I turned to POPA."

I started as an examiner in 1990 and became pregnant a couple of years later. I worked out a plan for my maternity leave with my supervisor, who then cleared it with the technology center director. I planned to return to full-time work after just six weeks leave (and to start the signatory authority program two weeks after that). In preparation I logged 80 hours of comp time and was granted an advance on my sick leave. This was all set up and approved months ahead.

One week before my due date, the TC director who'd already okayed my leave called my supervisor and me into his office and said I couldn't use the comp time because it was illegal and that I couldn't get an advance on my sick leave. I left in tears; my supervisor was embarrassed and apologetic, but could do nothing.

I turned to POPA.

My POPA rep immediately intervened on my behalf. I went on maternity leave and the issue wasn't resolved. I gave birth to my daughter, returned to work after six weeks and still had no answers, but POPA didn't give up. Finally Patents senior management agreed that I could use the comp time and advanced sick leave. Six months later POPA and the agency negotiated the current maternity/paternity leave policy.

I joined POPA because I don't want to see other employees treated this badly. I then educated myself about all the regulations and policies—I'm now the one people come to for information on maternity/paternity, part-time, and other family and leave issues. Not a day goes by that I don't get a call, e-mail or visit from someone needing help.

When I started at the PTO, I had the same impression a lot of people get from some managers—that it's taboo to join POPA. I was told that I wasn't allowed to join for two years! You can join from the start, and it's great to see people nowadays handing in their POPA forms during orientation.

Why should you join POPA? We're not just here for people who are in danger of losing their jobs. We can answer your everyday workplace questions—POPA often knows more than your supervisor or manager about your rights and benefits. And the only way to make sure that POPA is there for you when you have questions—or when you end up in a bad situation through no fault of your own—is to join.

—Primary Examiner Kathy Duda, Art Unit 1795
POPA Chemical Area Delegate

New POPA Address

Please note in your address books POPA's new mailing address:
P.O. Box 25287
Alexandria, VA 22313

CFC: Your Opportunity to Help

Contributing to the charities of your choice through the Combined Federal Campaign is simple. You choose who gets your donation; only the charities you designate will receive your money. You may spread 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 telemarketing and direct mail.

Charitable giving through the CFC is your personal choice. POPA and the USPTO have negotiated safeguards to your confidentiality. The collective bargaining agreement states in Article 4, Section 14 (F):

"…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 2008 CFC Catalog of Caring to find worthwhile organizations and take advantage of your opportunity to help.

JOIN POPA

Make the USPTO a better place to work

Patent Office Professional Association

Letters from readers are welcome. Address to:
The Editor, Patent Office Professional Association,
P.O. Box 25287, Alexandria, VA 22313

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