POPA NEWS
Patent Office Professional Association
www.popa.org
PROFESSIONAL REPRESENTATION FOR PATENT PROFESSIONALS
November 2009 Vol. 09 No. 4

POPA Members Vote to Change USPTO Production System

After 33 years, change finally came to the USPTO examination production system when POPA dues-paying members voted to approve a package of measures to adjust the production count system and add time to the production expectancies of examiners. The outcome of the vote was 63.4 percent in favor and 36.6 percent opposed.

The package of changes resulted from the work of the Patents Count System Task Force, a group of representatives from POPA and the USPTO formed by USPTO Director David Kappos and led by Deputy Commissioner for Patents Peggy Focarino and POPA President Robert Budens. The task force worked for more than a month in intense negotiations to craft, compromise and finally agree on its recommendations, which it presented to Director Kappos and the POPA Executive Committee shortly after the end of fiscal year 2009. The POPA Executive Committee then voted to take the package of proposals to the POPA voting membership for a decision.

Over a two-week period, POPA and USPTO management jointly briefed all examiners on the proposed changes and their consequences for examiners. To reach as many examiners as possible, the briefings also were posted on the USPTO Intranet, allowing access for hoteling examiners and others via computer.

With the approval of the membership, Budens and Focarino signed the agreement on the approved production system changes on Nov. 3, 2009, and Director Kappos immediately approved the agreement as "Agency Head." All provisions of the agreement except the revisions to the count system went into effect Nov. 8, 2009. No firm date has been set yet for implementation of the revisions to the count system; the computer system must be modified to accommodate the new process. The USPTO and POPA hope that implementation of the count system revisions will occur early in the second quarter of FY 2010.

(*continued on page 2*)

POPA and USPTO Leaders Outline Policy Priorities

The differing philosophies of the USPTO and POPA became clearer when the leaders of the two groups described some of their policy priorities at an October conference.

USPTO Director David Kappos and POPA President Robert Budens shared the stage during a "Meet the USPTO Brass" session at the annual meeting of the Association of Corporate Counsel in Boston.

Budens credited Director Kappos for directing the agency to work with the union on revising the production system, after many years of POPA's prodding of previous USPTO leaders. He also applauded the agency's increased

(*continued on page 3*)

Panel participants at the ACC meeting: (L to R) Alex Sousa, moderator; Commissioner of Trademarks Lynne Beresford; Under Secretary of Commerce and Director of the USPTO David Kappos; POPA President Robert Budens.

POPA Votes to Change Production System *(continued from page 1)*

Compromise Attains Improvements

Did POPA and examiners get all the changes they desired? No. Did the USPTO get all the changes it desired? No. Such is the essence of a negotiated compromise.

Major concerns with the new system for most examiners centered on the new count mechanism, the loss of production credit for Request for Continued Examination (RCE) applications, the transition from the old system to the new system, and lost production credit for applications on their amended and rejected dockets. Some examiners suspected that the agency would use the changes to take time away from them. Many of those examiners with a large number of RCEs on their dockets were especially concerned about the potential for negative impact on their ability to perform to the standards of their PAP in the critical element of Production Goal Achievement. While these same examiners will receive the largest hours-per-balanced-disposal adjustment to help offset the impact of their large number of RCEs, their concerns remained.

The POPA and USPTO negotiators believe they have addressed the problem of these impacts and others unforeseen by providing an RCE correction factor and a safety net. If the new system adversely impacts any examiners, as a safety alternative the USPTO agreed to apply the old system to these examiners so they will fare no worse than they would have under the current system. This applies to performance issues such as ratings and awards.

Under the new system:

- Examiners will get an additional .25 production counts upfront for a regular first action on the merits [FAOM] and .25 production counts for a final rejection. By spreading out the production counts in an application, the task force insured that examiners would receive work credit sooner in prosecution at the time the work was performed. This should also help smooth out production swings for examiners.
- Examiners will be assured of 1.5 production counts for each transferred "inherited" amendment they receive from another examiner's docket (including 0.75 counts for their first action in the case) and will no longer have to negotiate "other time" with their supervisors for each such application.
- Examiners will receive an additional 1.75 production counts for RCEs transferred to them for which another examiner had already received production credit for the FAOM. The examiner will realize 1.75 total points in such a case, whereas previously they received 1.0 count upon final disposal.
- Examiners can consider both the old and new count systems and use the better of the two calculations to measure performance and earn awards. The USPTO reversed its initial position on this point to broaden the availability of this safety net to include awards for examiners.
- The new system encourages examiners to reach allowable subject matter early in prosecution by providing time for examiner-initiated interviews and removing obstacles that made examiners and supervisors more reluctant to issue patents.
- Examiners will have more certainty that work turned in for credit will be counted in a timely manner.

Director Kappos and USPTO management acknowledge that this may not be a perfect system and may need additional tinkering over time. POPA agrees with that assessment and looks to all examiners to provide feedback on the impact of the new system.

Special Thanks

POPA wishes to thank all those volunteers who helped the recent special POPA membership vote go so smoothly: Jasmine Clark, Ella Colbert, Gerry Ewoldt, Adrienne Johnstone, George Kirschbaum, Kim Lockett, Celia Murphy, Randy Myers, Mark Osele, Dionne Pendleton, Ileana Popa, Craig Price, Dave Reip, Christine Saoud, Melanie Tung, Julie Anne Watko, Howard Weiss; and former POPA officers Larry Oresky and Ronald Stern.

HEAR WHAT'S AHEAD AT THE POPA ANNUAL MEETING

Thursday, Dec. 10, 12-1 p.m.
Madison Auditorium

Learn more about the most important issues facing patent professionals.

USPTO Goes After Employees on Internet Bandwidth Use

A number of patent examiners have been caught in bandwidth "stings" carried out in recent months by the Employee Relations Division in cooperation with the Office of the Chief Information Officer (OCIO).

Patent examiners had counseling letters placed in their personnel files warning them of "abusive" use of bandwidth. Unfortunately, a few who failed to sufficiently heed the initial warning were singled out for conduct-based disciplinary action. These examiners have received proposed suspensions ranging from 5-14 days with loss of pay and a conduct-based suspension notice in their official personnel files.

You really don't want to find yourself in this situation. The OCIO has identified normal monthly Internet usage to be about 0.5 gigabytes per examiner. Examiners did not receive counseling letters unless they were using ten times that much bandwidth monthly. That high usage caused the agency to accuse these employees of improper conduct in using large portions of the USPTO's limited bandwidth, which reduces the bandwidth available for other employees to perform work-related tasks.

Web sites with streaming video consume lots of bandwidth, e.g., YouTube and sites for downloading and viewing movies. Playing streaming audio for background music while you work, as many examiners seem to do, adds greatly to bandwidth usage over a month's time. Even minimizing these sites on your computer while you work still chews up bandwidth. Consuming USPTO bandwidth at the office—whether on duty hours or on your own time—or while working from home on your USPTO laptop raises the same red flag.

POPA understands that increased bandwidth use on the job doesn't necessarily equate to poor work habits for all examiners. Yet because the USPTO is using bandwidth as a marker for further investigation, examiners who wish to avoid detailed bandwidth scrutiny would do well to curb their bandwidth use. Such usage by examiners on the job has increased over time. Playing computer games, building and maintaining Web sites, posting on Facebook, stock market trading, running a business from your office equipment, and other personal Internet uses need to be done on your personal computer at home (not the USPTO laptop). Also be aware that posting or blogging on intellectual property Web sites from USPTO equipment and/or identifying yourself as a patent examiner can land you in hot water.

To date, the agency has been unwilling to provide employees with any means to monitor their Internet bandwidth usage, instead preferring to play "gotcha" and staining the work record of many employees in the process.

Keep Personal Phone Use Personal

Please also remember restrictions on the personal use of USPTO phone equipment either at the Carlyle campus or at home. Due to new security measures, any call to foreign countries can trigger an investigation into your phone usage. One case handled by POPA involved an examiner who had made calls to the United Arab Emirates. USPTO managers summoned the examiner to an investigatory meeting to determine the purpose of the calls. The calls were to a patent attorney, but the examiner had to prove it. Let your supervisor know if you plan to make USPTO-business calls to a foreign country.

Keep your personal usage of government equipment to a minimum either at the Carlyle campus or at home.

POPA, USPTO Outline Priorities

(continued from page 1)

hiring of examiners in recent years to tackle the patent application backlog and the "new tone" that Director Kappos has set for agency-union collaboration. However, Budens noted two USPTO workplace concerns that still need improvement and that he hopes the union and agency can work together on: the information technology infrastructure, which hampers the agency's ability to improve examiner tools, and the legal and technical training.

Union and agency policies part company notably on current portions of the patent reform legislation. On outsourcing patent searches, Budens told the audience, "While POPA is not categorically opposed to work sharing processes that put the best prior art in front of the examiner, the final decision of patentability is an inherently governmental function and should remain with the examiners at the USPTO." POPA supports language in the pending patent reform bills that establishes the sovereign nature of U.S. examination and search duties.

POPA disagrees with another portion of the legislation that would expand the USPTO's substantive rule making authority, preferring for Congress to maintain that authority. "Similarly, we believe that the authority to create or eliminate patent fees should remain with Congress so that the public may have adequate input into the fee setting process," said Budens. Once Congress creates a fee, however, POPA supports authorizing the agency to adjust that fee through rule-making. The union believes an expedited rule-making procedure would allow the agency to more quickly adjust to changing economic conditions. Such a process would require oversight by an independent entity, such as the Patent Public Advisory Committee, to ensure fairness.

Director Kappos's comments focused on the agency's support for the post-grant review portions of the patent reform legislation. "If we get it right in the legislation, we can get post-grant review out of the USPTO in a year or less. Even if you've already been sued, we'll get it done so quickly, we'll beat the district court by a country mile," said Director Kappos, according to an Oct. 26 report by *The National Law Review.*

Both leaders agreed the most basic need for USPTO success is adequate funding. "Now we need your help," Budens told the audience, "to provide the funding the agency needs to give examiners the time, tools and training they need to do the job right the first time."

Know Your Rights

When an Allegation of "Clear Error" is Wrong

Sometimes a charge of a "clear error" can be murky.

Examiners can be notified of a "clear error" at any time: during their yearly performance evaluation, during the signatory authority program, during a quality review proceeding, during a recertification or at any time by their supervisor.

The definition of a "clear error" can be found in the Examiner Performance Appraisal Plan (PAP) under Item 3, "Criteria for Evaluation," of the Performing Patent Examining Functions element, which states, "The deficient performance of a patent examining function will be considered as having occurred where a reasonable SPE [supervisor] could not have permitted the performance of the examiner. If the performance of the examiner is reasonable and that proposed by the SPE is reasonable, this would represent an honest and legitimate difference of opinion and does not constitute a deficient performance."

Examples of what does not constitute deficient performance or a "clear error" can be found in a USPTO document called the "Guidelines for PAP." It was written by managers to outline procedures for supervisors and managers in administering the examiner performance appraisal plan.

One of the "clear errors" that managers or quality reviewers often allege is that the examiner should have made a 35 U.S.C. §102 rejection based upon the same reference that the examiner used to make a 35 U.S.C. §103 rejection in the office action. Such a charge contradicts the USPTO's own PAP Guidelines.

Section (B)(ii) on pages 34 and 35 of the PAP Guidelines, under the Action Taking Element, states, "Anticipation (35 U.S.C. 102) is the epitome of obviousness (35 U.S.C. 103) such that a rejection made under 35 U.S.C. 103 that was proper under 35 U.S.C. 102 is not a clear error."

If you receive an allegation of clear error in your work, you have the right to contest/rebut it, and if you have a supportable position you should do so. You can also contact an experienced POPA representative. Your POPA rep can give you an unbiased and confidential opinion on whether you have actually committed a chargeable clear error under the PAP, if the reviewer is wrong or if there are procedural problems with the agency's error allegation. The POPA representative may also be able to help you formulate a convincing rebuttal that could prove instrumental in reversing the management decision.

The USPTO does not give the Guidelines for PAP information to examiners and hasn't made it available online. Because managers and supervisors continue to use the Guidelines for PAP in reviewing examiners' performance appraisal plans, POPA requests that the USPTO make the Guidelines for PAP document available to all examiners online.

CFC: Charity Can Begin at Work

"If you haven't any charity in your heart, you have the worst kind of heart trouble." —Bob Hope, comedian

Donating to the charities of your choice through the Combined Federal Campaign (CFC) is easy and cost effective. You pick who gets your contribution. Designate one charity or many charities for your donation or you can make an undesignated gift. You have a choice of secure ways to give: payroll deduction, credit/debit card, electronic bank transfer, check or cash. You can give anytime until the end of the campaign on Dec. 15, 2009. And workplace giving through the CFC cuts fundraising costs for participating charities, enabling more of your donation to go to those you wish to help instead of to direct mail and advertising.

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

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

Please review the 2009 Catalog of Caring to learn about charities that you can support, and take advantage of the CFC's opportunity to help others.

Patent Office Professional Association

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