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POPA and USPTO Sign Agreement to End Flat Goal Program

The USPTO's voluntary flat goal pilot program, which never lived up to the agency's expectations and which POPA challenged from its start, will come to an end as the result of an agreement between the union and agency signed March 3.

The flat goal program, begun in March 2007, was due to expire March 28, 2009. During the recent negotiations, the USPTO requested a voluntary extension of the program to the end of fiscal year 2009 (Sept. 30, 2009) to enable participating employees to finish the year under their current performance appraisal plan (PAP). POPA agreed, though current flat-goal program participants were allowed to opt out of the program on March 28 and complete the remaining two quarters of the fiscal year under the standard examiner PAP for their grade and signatory authority level. No additional employees will be allowed to join the flat goal pilot.

The agreement also states that the agency will maintain the status quo during the extension for employees who remain on the flat goal program. This means that if such an employee's production declines, he or she would not receive an oral warning disciplinary action, but would be removed from the flat goal program involuntarily without the option to rejoin it. It also means that participating employees can still work from home on their USPTO laptops.

Guarding Examination and Negotiating Rights

The negotiated agreement stipulates that it "shall not be construed in any way as acquiescence" or "in any way as affecting the litigation currently pending before the Federal Labor Relations Authority" or that may result from it. In early 2007 POPA filed a grievance challenging the legality of the flat goal program and declaring that the USPTO committed an unfair labor practice by unilaterally implementing the pilot without completing collective bargaining.

POPA is pursuing the legal challenge to ensure that the USPTO will not try again to start a similar flat goal pilot, or worse, implement a new flat goal performance standard for all examiners. The association's goal is to gain a final ruling on the illegality of flat goal performance standards, reversing an arbitrator's decision allowing the flat goal program to continue. If POPA halted the litigation and the agency attempted to implement a new flat goal standard, the grievance process would need to start from scratch.

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Union-negotiated Transit Subsidy Limit Nearly Doubles

Due to a clause in the negotiated POPA-USPTO Public Transportation Subsidy Program, the maximum transit subsidy benefit available to POPA bargaining unit employees automatically will jump from $120 per month to $230 per month on May 1 when the provisions in the American Recovery and Reinvestment Act become effective. The "escalator" clause in the POPA-USPTO agreement was an important POPA proposal during negotiations almost one year ago. The negotiators at the time had no idea it would kick in so dramatically for employees, thanks to the stimulus bill.

Approximately 5,000 USPTO employees receive a transit subsidy. Even with a subsidy of $230 per month, almost 500 of those employees will exceed that amount to cover their stated monthly commuting costs.

If you have questions or concerns about the provisions of the transit subsidy, contact the USPTO Transit Subsidy Coordinator. To see the POPA-USPTO negotiated agreement, go to www.popa.org, click on Useful Info, then Agreements, then Public Transport Subsidy.

POPA Proposes Patent Reform Amendment to Fund More Examination Time per Case

Members of the new Congress wasted little time before introducing the latest iteration of patent reform legislation last month, and POPA responded promptly with an innovative amendment to enable the USPTO and Congress to better serve the patent community and public.

The Patent Reform Act of 2009 (S.515 and H.R.1260) reflects some changes for the better from earlier patent reform bills. Most of these changes, however, are directed to fixing problems with issued patents through expanded review processes and litigation. It is far better, however, to do the job right the first time than to repair mistakes after a patent has issued. Examiners need to be provided the time, search tools and training to provide high quality examination of patent applications. Therefore, POPA is advocating an even greater improvement to the bills: the direct allocation of fees for examination.

POPA is circulating to members of Congress an amendment to the bill that would effectively fence off certain fees to be used exclusively for examining time. The amendment states that these fees:

"…shall be used only for funding the portion of the salary of patent examiners attributable to examining patent

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Agreement to End Flat Goal Program

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The legal challenge also concerns the agency's refusal to negotiate the union's proposals on behalf of examiners and its unilateral changes in working conditions without completing the collective bargaining process. In other words, simply because an agency doesn't like some of a union's proposals, it doesn't have the right to refuse to bargain over those proposals and go forward with its changes. This directly violates the Federal Service Labor-Management Relations Statute. To allow such a position to prevail uncontested would nullify collective bargaining and employee rights.

The USPTO had originally anticipated that 300 examiners would volunteer for the pilot. At its highest enrollment, the pilot had 175 participants. Approximately 110 remained when the program's termination was negotiated.

To review a copy of the POPA-USPTO agreement, go to *www.popa.org*, click on Useful Info, then Agreements and scroll down to Flat Goal Pilot.

Reform Amendment

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applications and shall not be applied to fund non-examining activities or supervisory activities."

POPA's goal is to concentrate USPTO resources on the primary mission of the agency—patent examination—by increasing the amount of time available for examining individual patent applications and by hiring more examiners to reduce the application backlog.

The fees targeted for direct allocation represent only about 30 percent of patents operations funding. The remaining 70 percent of patent fee income would be used for other necessary overhead costs. In addition, all the suggested fees are currently well-defined figures for which the agency maintains an explicit accounting and tracking system. This specific accounting would enable Congress to follow the USPTO money and to pinpoint where and when fees should be adjusted to address needs or issues that may arise within patent operations. Direct allocation would both improve patent examination and congressional oversight.

For more than 30 years, the USPTO has allocated on average about 20 hours at the GS-12 grade level to examine a patent application. This time-per-case allocation has not changed in spite of increasingly complex technologies, larger specifications and numbers of claims, and an ever-expanding body of prior art for examiners to search and consider. The agency has maintained these numbers because it felt that it did not have adequate resources to allow more examination time. The direct allocation of fees to patent cost center activities allows the resources for improved patent examination while maintaining adequate resources for legitimate agency overhead expenses.

Building a Better Bill

POPA supports the absence in the current bills of provisions such as the Applicant Quality Submission proposal, which would have required applicants to provide a search report of all relevant patent and non-patent literature (prior art), thereby effectively outsourcing the search to anyone, including foreign entities, and dangerously bypassing the outsourcing protections of current statutes.

Also thankfully missing from the House and Senate bills is any provision that grants broad rule-making authority to the USPTO, which would bypass congressional oversight. POPA supports keeping the authority to create new fees in the hands of Congress, while enabling the USPTO to adjust existing fees, if needed, once Congress has created the fees.

POPA's working to ensure that these provisions don't sneak back into the legislation.

POPA will continue to monitor the progress of the patent reform bills and will continue a dialogue with Congress on patent professionals' concerns.

What's Wrong with Production Contests?

When the Winners Take All, Everyone Loses

At first glance, a production contest among art units in a workgroup seems like good fun and friendly competiion. The setup is that, in a given timeframe, whichever art unit achieves the highest production gets the prize—a lunch or dinner party—paid for by the workgroup supervisors.

But such a contest is the antithesis of cooperation and team building. It pits art units against each other, with one group hoping that the others will falter so their own can succeed. When POPA pointed this out to senior USPTO managers recently, they canceled plans for a proposed production contest in one Technology Center.

A better alternative is for a workgroup or Technology Center to develop a competition that would motivate everyone to produce in a spirit of camaraderie. Such a "contest" would reward not just one art unit, but *all* that reach a particular supervisor-determined goal within a set period. Every art unit would receive the prize associated with reaching a particular goal, spreading the incentive and pushing everyone to achieve higher-than-usual production.

The effort could include tiered goals with tiered levels of reward. For example, the lowest level's reward could be a pizza lunch at the office; reaching the next tier might merit lunch at a nearby restaurant; and the highest level could be a dinner. The achievements at the end of the competition could be publicly celebrated and all who reach the higher levels would be honored, not just a single winning art unit.

The problem for supervisors with this model is that it may mean greater out-of-pocket expense. The flip side is that more of the art units would produce more overall, morale would be higher throughout the workgroup, and every supervisor treating his or her employees to lunch would be the hero of the day.

This would create a truly premium event to proactively promote production and simultaneously build workgroup team spirit.

Help with Healthcare Premiums for Terminated Employees

A little-known provision of the recently enacted stimulus package, officially the American Recovery and Reinvestment Act of 2009 (ARRA), gives help with health insurance premiums to workers who have been "involuntarily terminated" (including USPTO employees who have been let go for performance problems) or who may unfortunately find themselves in that position later this year.

The provision temporarily reduces the premium for coverage for eligible individuals under COBRA, the Consolidated Omnibus Budget Reconciliation Act of 1985. COBRA allows certain people to extend employer-provided group health coverage if they would otherwise lose the coverage due to certain events, such as divorce or loss of a job.

Individuals who are eligible for COBRA coverage because of their own or a family member's involuntary termination from employment that occurred from Sept. 1, 2008, through Dec. 31, 2009, and who elect COBRA, may be eligible to pay a reduced premium. Eligible individuals pay only 35 percent of the full COBRA premiums under their plans for up to 9 months. This premium reduction is also available to eligible individuals for group health insurance coverage under state continuation coverage laws.

Temporary premium reduction for COBRA-eligible individuals

If you are eligible for other group health coverage (such as through a new employer's plan or a spouse's plan) or Medicare, you are not eligible for the premium reduction.

Moreover, electing the premium reduction disqualifies you for the Health Coverage Tax Credit, which could be more valuable to you than the premium reduction. Certain high-income individuals may have to repay the amount of the premium reduction through an increase in their income taxes.

At the USPTO, employees who are removed for performance—be it for low production or failures in any of the five critical performance elements—or probationary employees would generally qualify for the reduced COBRA premiums. However, if the employee's termination of employment was for gross misconduct, the employee and any dependents generally would not qualify for COBRA, the premium reduction or other unemployment benefits.

To be eligible for COBRA and the premium reduction, the USPTO employee must have coverage under the Federal Employee Health Benefit Program at the time of the involuntary termination of employment.

For more information on eligibility and how to apply for these benefits, visit the Department of Labor Employee Benefits Security Administration at *www.dol.gov/ebsa/cobra.html.*

Know Your Rights – It Could Save Your Career

Workflow Management: You Need to Sweat the Small Stuff

While Workflow Management accounts for only 10 percent of a primary examiner's overall rating, it is a critical element that cannot be overlooked.

Under the USPTO's Examiner Performance Appraisal Plan (PAP), if you as a patent examiner receive a marginal rating in a critical element of the PAP such as Workflow Management, then you can receive no higher than a marginal rating overall even if all the other critical elements are outstanding. Likewise, if you receive an unsatisfactory rating in Workflow Management, you can receive no more than an unsatisfactory rating overall even if all the other critical elements are outstanding.

Examiners have sometimes run into problems with Workflow Management due to leftover amendments from departing examiners, batch processing and mailing by supervisors or legal instrument examiners, or simple unfamiliarity with this critical element—either their own or that of the supervisor.

You automatically earn a positive workflow point each biweek for a total of 26 points during the rating year. These are called "baseline points." If you complete amendments within shorter time frames you can earn additional positive points (see item 7 in the workflow section of your PAP). You must end the fiscal year with a total of 6 points or more to avoid an unsatisfactory rating for this element. You must have a total of 15.1 points or more at the end of the fiscal year to be fully successful.

However, the agency can issue a performance-based disciplinary action for as little as one fiscal quarter's unsatisfactory/unacceptable performance in this or any other critical element. For shorter review periods the number of baseline points earned is calculated differently based on a factor related to the length of the review period. For example, in a single fiscal quarter (seven biweeks) review period, you receive credit for 1.5 baseline points per biweek for a total of 10.5 points possible during the quarter. You must end the quarter with at least 2.42 points or more to be above unsatisfactory for this element. You must have a total of 6.1 points or more at the end of the quarter to be fully successful.

Pay attention to all negative workflow points you receive. According to an agreement between POPA and the USPTO, the agency is required to provide you with a written (e-mail or paper copy) biweekly accounting of all negative workflow points charged against you from the previous biweek, including the serial numbers of the cases involved.

If you get charged with a negative workflow point for an application that you turned in on time but was not properly counted by your supervisor, you need to remind your supervisor that Section IV of the Workflow element of the examiner PAP provides that the application should not

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"Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope."

— Robert F. Kennedy

Stand up for your job and the integrity of the patent system.

Join POPA

Go to *www.popa.org* to learn how to sign up.

Workflow Management

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count against you if the application was completed by the examiner and submitted for credit within the biweek that the application is due.

If you find yourself in a situation where you will not be able to move all your due amendments and/or special applications within the appropriate time period in which each application is due, you should notify your supervisor as early in the biweek as you can. The supervisor should then prioritize your work—designating a reasonable amount of work for you to complete in the biweek (based upon your grade, expectancy, and available examining hours for the balance of the biweek) and excusing the remainder of the work due from workflow deductions.

If you receive negative workflow points for reasons beyond your control, including having too much work to do in the examining time available, you should e-mail your supervisor and request a waiver of the negative workflow points. Waivers should normally be granted in these situations.

The PAP also outlines criteria for earning additional positive points on a quarterly or yearly basis (see items 6 and 8-12 in the workflow section of your PAP). Supervisors sometimes overlook or fail to properly credit positive workflow points. When POPA has presented this issue to a supervisor, it often has resulted in the USPTO rescinding an oral warning or other performance-based disciplinary action.

In the event you receive an oral warning with regard to Workflow Management due to a large number of overdue amendments, the supervisor should meet with you and develop a workflow plan that specifies a reasonable number of amendments you should do each biweek to overcome the oral warning, with the remainder of the overdue amendments being excused. Remember, the supervisor is required to assist you to improve your performance back to the fully successful level.

Do not ignore an oral warning. It could lead to further disciplinary action up to and including removal from federal service. You should be given at least a seven-biweek performance improvement period if you receive an oral warning for Workflow Management (or any other critical element) and it is very important to make every effort to successfully pass the improvement period. Your supervisor should be assisting you during this time as well.

POPA strongly recommends that you use e-mail for any communications with your supervisor regarding workflow issues. Keep all such communications to and from your supervisor in your own records. These documents could become valuable evidence for you should you get in workflow trouble.

Read and Understand Your PAP

Take the time to read and understand your PAP, including the critical element of Workflow Management. What you don't know can hurt you! Contact a POPA representative if you have any questions concerning the Workflow Management element or any other aspect of your PAP.

To read your Workflow Management requirements for your grade, go online to the USPTO Weekly and click on Patents on the left side. This opens the Patents Intranet; click on PAP Handbook and then the Handbook for your particular grade. Once it opens, scroll down until you reach the Workflow Management requirements for your grade.

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