

Memorandum of Understanding Between the United States Patent and Trademark Office and the Patent Office Professional Association Regarding the 2011 Examiner Performance Appraisal Plan and Other Matters

October 22, 2010

The agreements contained herein, and policies referenced in this document, supersede portions of any agreements, memoranda of understanding, policies, or practices with which they conflict. If any portion of an agreement, memorandum, policy, or practice does not conflict with the provisions and policies set forth herein, that portion of the previous agreement, memorandum, policy, or practice will remain in force.

I. 2011 Examiner Performance Appraisal Plan

- A. Attached to this MOU, as Attachment A, are grade-specific versions of the 2011 Patent Examiner Performance Appraisal Plan (PAP) and Attachment B, PAP Guidelines. The United States Patent and Trademark Office (USPTO, Agency, or Management) has determined to implement this PAP and PAP Guidelines after extensive pre-decisional involvement by the Patent Office Professional Association (POPA or Union).
- B. The 2011 PAP shall be implemented for all examiners on October 1, 2010, (with exceptions noted in this MOU and/or accompanying memoranda) unless automation or other difficulties make implementation on that date not feasible.
 1. If complete implementation is not feasible on October 1, 2010, the Agency and Union shall discuss, with the intent to reach agreement, the questions of (a) when the PAP will be implemented for the examining corps; (b) whether portions of the PAP may be implemented in advance of full implementation; and (c) how these decisions should be communicated to examiners. However, in order for portions of the PAP to be implemented in advance of others, agreement must be reached by the parties, except as indicated in B.3. below.
 2. The parties contemplate that the 2011 PAP may be applied retroactively so long as this MOU is presented to and ratified by POPA Union members before October 31, 2010.
 3. The new Docket Management critical element will not be implemented until the information technology resources required to support the element (described in I.F, below) are available to examiners. If this creates a delay between the implementation of the 2011 PAP's Production, Quality, and Stakeholder Interaction elements and the implementation of the Docket Management element, the current PAP's Workflow Management standard will apply in the interim, and SPEs will advise examiners on how to best position their dockets for the implementation of the new Docket Management element.
 4. If this MOU is ratified, the new examiners coming on board on or after September 20, 2010 will receive the new PAP within 30 days of their entry on duty date. For

new examiners on duty prior to September 20, 2010, they will be placed on the new PAP (if ratified) at the time of their 120 day rating.

- C. Transitioning between the current PAP and the 2011 PAP will be accomplished as follows:
1. Examiners not on a performance warning or maintenance period will be placed on the 2011 PAP on the Corps-wide implementation date or as soon thereafter as possible.
 - a. Examiners with Production for the 4th quarter of FY 2010 between 80-87% will be in a Safety Zone for the 1st quarter of FY 2011. Examiners with Production for the 4th quarter of FY 2010 below 80% may be issued an oral warning for the 1st quarter under the FY 2011 PAP.
 - b. Examiners with a quality element for the 4th quarter of FY 2010 in the unacceptable range will have this performance factor into their end of year rating but will not be issued an oral warning based on this performance.
 - c. Examiners with Workflow Management in the unacceptable range in the quarter prior to implementation of the Docket Management element of the FY 2011 PAP will not be issued an oral warning based on this performance.
 2. Examiners on an oral or written warning at the end of the 4th quarter of FY 2010 will receive the 2011 PAP as soon as their oral or written warning period has been completed.
 - a. Examiners who are on an oral warning for production in the 4th quarter of FY 2010 will be transitioned to the 2011 PAP as follows:
 - i. Examiners with production of 88% or higher during their 4th quarter oral warning will be deemed to have passed the oral warning.
 - ii. Examiners with production of 80%-87% during their 4th quarter oral warning will not be deemed to have passed the oral warning; these examiners will be reissued an oral warning for production, to be completed under the 2011 PAP.
 - iii. Examiners with production of less than 80% during their 4th quarter oral warning will not be deemed to have passed the oral warning; these examiners will be issued a written warning for production, to be completed under the 2011 PAP.
 - b. Examiners who are on an oral warning for any of the quality elements in the 4th quarter of FY 2010 will be transitioned to the 2011 PAP as follows:
 - i. Examiners who pass the oral warning will receive the 2011 PAP once the oral warning period has been completed.
 - ii. Examiners who fail the oral warning will be reissued an oral warning under the 2011 PAP as follows: A prior oral warning in Patent Examining Functions will result in a warning in Category 1. A prior oral warning in

Action Taking will result in a warning in Category 2. A prior oral warning in Patentability Determination will result in a warning in Category 3.

- c. Examiners who are on an oral warning for workflow in the final quarter before the 2011 PAP's Docket Management element is implemented will be transitioned to the Docket Management element of the 2011 PAP as follows:
 - i. Examiners who pass the oral warning will receive the Docket Management element once their oral warning period has been completed.
 - ii. Examiners who fail the oral warning will be reissued an oral warning under the 2011 PAP for Docket Management.
 - d. Examiners who are on a written warning for production in the 4th quarter of FY 2010 will be transitioned to the 2011 PAP as follows:
 - i. Examiners who pass the written warning will be issued the 2011 PAP upon completion of the written warning, and will serve the maintenance period on the 2011 PAP.
 - ii. Examiners who fail the written warning may be subject to removal, reduction in grade, or offer of last-chance agreement, at the Agency's discretion.
 - e. Examiners who are on a written warning for quality in the 4th quarter of FY 2010 will be transitioned to the 2011 PAP as follows:
 - i. Examiners who pass the written warning will be issued the 2011 PAP upon completion of the written warning, and will not serve a maintenance period.
 - ii. Examiners who fail the written warning may be subject to removal, reduction in grade, or offer of last-chance agreement, at the Agency's discretion.
 - f. Examiners who are on a written warning for workflow in the final quarter before the 2011 PAP's Docket Management element is implemented will be transitioned to the Docket Management element of the 2011 PAP as follows:
 - i. Examiners who pass the written warning will receive the Docket Management element upon completion of the written warning, and will not serve a maintenance period.
 - ii. Examiners who fail the written warning may be subject to removal, reduction in grade, or offer of last-chance agreement, at the Agency's discretion.
3. Examiners who are serving a maintenance period for production at the time of transition will be issued the 2011 PAP contemporaneous with the rest of the examining corps, and will complete the maintenance period under the 2011 PAP. Examiners who are serving a maintenance period for quality or workflow at the time of transition will be issued the 2011 PAP contemporaneous with the rest of the

examining corps, and will not be required to serve the balance of the maintenance period.

- D. As detailed in the 2011 PAPs, the Agency has elected to revise the times at which examiners who are at the GS 12 and 13 level will receive credit under the Production element for having submitted work. Examiners at the GS-12 or 13 levels, without permanent partial signatory authority, submit their office actions in final form. These examiners will receive production credit upon submission of non-final actions before review.
- E. When an examiner is charged with a clear error under the 2011 PAP's Quality critical element, and the examiner disagrees with the error determination, he/she may rebut the error either orally or in writing. The SPE will consider the rebuttal and either remove the error or inform the examiner why his/her rebuttal was unpersuasive. If this process does not resolve the disagreement, the examiner may raise the disagreement with his/her Technology Center Director. Any contractual time period for filing a grievance over the error will not start until the TC Director has communicated a decision to the examiner.
- F. The Agency will create a report or reports for examiners to use in monitoring their requirements and performance under the new Docket Management critical element. The report(s) will, at a minimum, allow examiners to (a) see what work is due, and when; (b) see what work has been completed and has received credit under the Docket Management element; and (c) project their rating under the Docket Management critical element and progress towards a Pendency Award. The report(s) will be updated at least biweekly.
- G. The guidelines attached to this MOU are in draft form. The parties will meet biweekly, or as otherwise agreed by the parties, to finalize the sections of the guidelines for the Production, Quality and Stakeholder Interaction elements prior to the end of the 1st Quarter of FY 2011. For the docket management element, the guidelines will be completed at least two weeks prior to the implementation of the docket management element.

II. Pendency Award

- A. A new Pendency Award program will go into effect upon Corps-wide implementation of the Docket Management element of the 2011 PAP.
- B. To be eligible for the Pendency Award in any given quarter, an employee must (a) have a most recent rating of record of Fully Successful or better; (b) have completed one full year of employment with the USPTO before the first day of the quarter under consideration; (c) have corrections component scores in the Docket Management element of at least 1.0 (100%); and (d) meet the award criteria as outlined below.
- C. The Pendency Award Program has two tiers of performance award criteria. Quarterly award payments will be made based on performance achieved during that quarter.

Time periods referenced below will be measured in accordance with the Docket Management element in the FY 2011 PAP.

Tier 1: 0.5% of current annual salary, excluding overtime and awards, paid following a quarter in which an employee meets each of the following criteria:

- 1.25 overall component score (excluding the corrections component), with no single category component score under 1.0, and
- No Board decisions more than 14 days, and
- No amendments more than 75 days and no more than three amendments 60-75 days, and
- Completed average of at least 1.0 oldest new case each pay period.

Tier 2: 0.75% of current annual salary, excluding overtime and awards, paid following a quarter in which an employee meets each of the following criteria:

- 1.50 overall component score (excluding the corrections component), with no single category component score under 1.25, and
- No Board decisions more than 14 days, and
- No amendments more than 75 days and no more than three amendments aged 60-75 days, and
- Completed average of at least 1.5 oldest new cases each pay period.

In instances where an examiner has no available applications in a category that require action during the quarter, eligibility for the Pendency Award will not be precluded.

- D. In addition to the quarterly award payments, supplemental payments will be available to employees who achieve sustained performance at the Tier 1 or Tier 2 level. The supplemental payments will be available at the end of FY 2011, based on performance in the second, third, and fourth fiscal quarters of that year. If the Docket Management element is not implemented for the corps at the start of Q2 FY 2011, but is implemented for Q3 FY 2011, the full supplemental payment will still be available based on performance in the third and fourth quarters. If the Docket Management element is not implemented until Q4 FY 2011, no supplemental payment will be paid at the end of FY 2011

The supplemental payments will be as follows:

Tier 1: 0.5% of current annual salary to any employee who has performed at the Tier 1 level or better in each of the preceding quarters of FY 2011.

Tier 2: 1.0% of current annual salary to any employee who has performed at the Tier 2 level in each of the preceding quarters of FY 2011.

- E. There is no minimum quarterly examining hour requirement for payment of the Pendency Award except as provided below. Approved absences from the office will affect award determinations as follows.

1. If an examiner is on approved absence for four (4) consecutive weeks¹ (beginning any day Monday-Saturday) or more (≥ 28 Days) for reasons that would qualify under FMLA or sick leave (excludes vacations), he/she may elect to receive a prorated Pendency Award. If the examiner can maintain the required award levels during the quarter, he/she may opt to maintain eligibility for the full award. The prorated award will be calculated by considering the examiner's performance in the Docket Management element only during the duty hours in which the examiner worked. If the examiner meets the criteria of either Tier 1 or Tier 2 based upon his/her performance in the duty hours worked and has at least 150 duty hours during the quarter, he/she will receive an award in the amount of (payout for highest Tier attained) \times ((150-299 hours worked)/(300 hours)). An examiner may work four hours or less of examining or examining-related time per week during the absence and still be considered "absent" for purposes of this provision.
2. If an examiner receives a pro-rated award for any quarter as set forth in 1) above, he/she may be eligible for a pro-rated supplemental payment. The examiner must achieve all award criteria for the time worked in each quarter. The supplemental payment will be pro-rated based on:

$$\frac{\text{(Total duty hours for all eligible quarters)*}}{\text{(Total number of eligible quarters multiplied by 300 hours)}}$$

*For purposes of this calculation, no quarter can exceed 300 duty hours

3. For all other planned absences, defined as any absence for which the examiner has at least one working day advance knowledge, an examiner should plan ahead and position his/her docket in anticipation of the absence. An examiner who is on approved absence will receive the Docket Management adjustments detailed in the PAP (Attachment A), but no additional adjustments will be made for purposes of calculating the Pendency Award.

F. Termination Procedures.

The Pendency Award Program will be in effect for FY 2011. Within the last two months of FY 2011, the Agency and the Union will meet to discuss the Pendency Award article of this MOU, whether the Award program will continue in FY 2012 and, if so, the availability and level of the supplemental payment. Thereafter:

1. Upon providing notice of termination to the members of the bargaining unit, the Pendency Award Program shall terminate at the end of the fiscal quarter in which notice is given. Eligibility standards and award amounts shall be prorated relative to a yearly basis depending on the quarter in which termination is effective.
2. When USPTO terminates the Program, it will provide notice to POPA. POPA will be given an opportunity to bargain over the impact resulting from termination of the

¹ The four consecutive weeks may span quarters.

Program. This will not affect USPTO's right to terminate the Program as of September 30, 2011 or at the end of any quarter thereafter.

3. If a decision is made to terminate, USPTO will provide POPA with Program cost information and productivity and pendency data for the time the Program has been in effect, up to the most recent two full fiscal years.
- G. The existing Pendency Reduction Award will remain in effect until the 2011 PAP's Docket Management element is implemented, and examiners will remain eligible for that award during this time, with payments to be made on a pro-rated basis if the date of the Docket Management element's implementation interrupts an examiner's progress towards a Pendency Reduction Award payment. At the time of establishment of this award, the Pendency Reduction portion of the Gainsharing Award will be terminated.

III. Agreements on Matters Relating to Collective Bargaining Agreement Negotiations

A. Disciplinary and Adverse Actions Based on Conduct

1. The parties agree that primary emphasis should be placed on preventing situations which may result in disciplinary or adverse actions, and that an employee may be more effectively helped through counseling than through a disciplinary or adverse action.

The Office supports the concept of progressive discipline to correct behavior. However, nothing in this section would preclude the Office from imposing the maximum penalty (up to removal) for a first offense in appropriate cases.

2. Letters of reprimand will remain in an employee's Official Personnel File (OPF) for no more than 12 months from the date of the reprimand. To the extent consistent with law, reprimands may continue to be used as evidence that the employee was on notice of any rules that are referenced in the letter, or had been warned about the conduct in question.
3. Oral admonitions, letters of counseling, and letters of reprimand may be grieved. Oral admonitions and letters of counseling are not disciplinary in nature, and reflect only that the employee is on notice concerning the subject of the admonition or counseling. Oral admonitions and letters of counseling do not substantiate the accuracy of the underlying facts, and will not be relied upon for such.
4. Questioning of Witnesses
 - a. Where the Office has relied upon witnesses to support the reasons for the proposed action, the Office will make those witnesses available, to the extent it has control over them, for the employee or his/her representative to question.
 - b. This questioning may occur at any time after the Office has issued a decision on a proposed conduct-based disciplinary or adverse action (excluding letters of reprimand), and must be completed before the pre-arbitration exchange of witness lists.

- c. Questioning will be available only of those witnesses relied upon by the proposing or deciding officials and may include the proposing and deciding officials themselves, to the extent that those officials have made findings of fact including any Douglas factor analysis.
- d. Questioning of a witness will normally be limited to one session, and will not exceed two hours. In rare circumstances, the Union may request a second opportunity to question a witness. If the Office and the Union do not agree on the need for further questioning of a witness, the Union may submit the issue to the arbitrator, who will render a decision.

B. Employee Rights

1. Employees will be treated fairly and equitably by management. Therefore, only employees who believe they have been personally subjected to unfair or inequitable acts shall have the right to contest such treatment by use of the negotiated grievance procedure as set forth in the collective bargaining agreement.
2. With respect to actions taken under 5 U.S.C. Chapter 75, the parties acknowledge that different deciding officials may reach decisions which are slightly different from each other, even given identical factual circumstances, and that this does not constitute unfair or inequitable treatment.
3. With respect to actions taken under 5 U.S.C. Chapter 43, the Agency's decision as to which action to take (no action, demotion, or removal) is not subject to challenge under this article. However, the determination that the employee's performance was unacceptable and other determinations underlying the performance-based action may be challenged as unfair or inequitable.
4. With respect to all other employment decisions and actions, the Agency's commitment to treat employees fairly and equitably will be interpreted as requiring similar decisions to be made under similar circumstances, absent good reason to the contrary.

C. The parties agree that these provisions will be effective on the implementation date of this Agreement and the concepts contained therein will be incorporated into the next Collective Bargaining Agreement:

1. Letters of counseling, oral admonitions, letters of reprimand, oral or written performance warnings, and signatory authority determinations are grievable. Performance- or conduct-based removals are grievable and may be submitted directly to arbitration with the consent of the Union.

The Agency hereby withdraws any proposal(s) to the contrary from the currently-open CBA negotiations.

2. Both parties agree that the negotiated grievance procedure will contain a provision that performance-based grievances over "lesser included" disputes will be merged into the subsequent grievance; e.g., a grievance over an oral warning will merge into a grievance over the subsequent written warning for failure to successfully overcome the oral warning, which would in turn merge into the grievance over the

subsequent performance-based removal for failure to successfully overcome the written warning.

3. Grievances concerning individual performance may have overlapping issues, which may not be “lesser included”. In these instances the first grievance to be arbitrated will be precedential as to the overlapping issues. The parties agree that if one of the grievances concerns a removal, the removal will be arbitrated first.
 4. The Union hereby withdraws any proposal(s) from the currently-open CBA negotiations that create a right to interrogatories.
- D. The parties agree that Provisions III (A) – III (B) above will be effective on the implementation date of this agreement and will be incorporated into the next collective bargaining agreement in their entirety.

IV. Miscellaneous Provisions

A. Requests for Information

The Agency agrees to assume that POPA has a particularized need for certain information relating to conduct-based and performance-based actions/proposed actions.

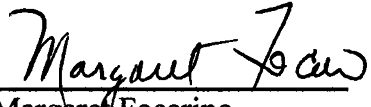
1. When POPA submits an information request regarding a proposed conduct-based action or conduct action, the Agency will provide, without any need for further elaboration of particularized need, the following information:
 - a. The most recent 10 cases (proposed conduct actions and decisions/dispositions, including oral reply summaries, written replies, and oral reply summaries if any) of a similar nature by the same deciding official. This may include proposed actions that are still pending based on conduct of a similar nature to be decided by the same deciding official. If less than 10 exist, each will be provided. The documents may be redacted to remove personally identifiable information in accordance with the Privacy Act.
 - b. If less than 10 cases were provided per provision (a) above, the Agency shall provide the balance through cases of a similar nature decided by other deciding officials in the last five years. If more than 10 such cases exist, the Union will be provided the most recent 10 cases. The actions may be redacted to remove personally identifiable information in accordance with the Privacy Act.
 - c. The Agency will generally provide at least 10 sets of information with a brief explanation of how the conduct actions provided in provisions (a) and (b) of this sub-section were selected or an explanation of why there are less than 10 cases provided.
2. When POPA submits an information request regarding a specific performance-based action or proposed performance-based action, the Agency will provide, without any need for further elaboration of particularized need, information regarding assistance provided to the employee:

- a. in a proposed removal/removal case, during the Written Warning PIP, the Oral Warning improvement/opportunity period, and the maintain period (if applicable).
 - b. In a Written Warning case, during the Oral Warning improvement/ opportunity period.
3. Provisions 1 or 2 above do not otherwise affect the rights/responsibilities of the parties regarding the provision of information/documents. Requests for the information/documents in Provisions 1 or 2 above may be made by emailing Labor Relations.
- B. Once signed by the parties, this MOU shall become effective at the earlier of Agency Head approval or 31 days after the date it is signed by the last signatory. If the Agency Head approves or disapproves the MOU, the Union will be notified of the date of that approval or disapproval.
- C. On the effective date of this MOU, the following Agency-issued memoranda, attached hereto, shall be implemented:
1. "Safety Zones" and Repeated Performance Warnings Under the New Examiner Performance Appraisal Plan;
 2. Letters of Reprimand and Witness Statements for POPA Bargaining Unit Employees;
 3. Effect of New Examiner Performance Appraisal Plan on Signatory Authority Program;
 4. Procedures for Considering Transfers of Examiners;
 5. Application of Oral and Written Warnings and Statutory Performance Improvement and Maintenance Periods;
 6. Transition for Examiners under Abeyance Agreements.
- D. The parties shall meet at the request of either party, to discuss the impacts of the provisions of this MOU including all attachments in meeting objectives and to determine if any further changes should be implemented. Agreed-upon changes will be implemented.
- E. The Union acknowledges that the Agency's obligation to negotiate over the substance and/or impact and implementation of the changes described in this MOU, the attached 2011 PAP, 2011 PAP Guidelines, and the above-referenced memoranda has been met.
- F. Either Party shall have the right to reopen Article 1 of this MOU and its Attachments within two years of full implementation of the 2011 Performance Appraisal Plan.
- G. General Reopening
1. Notwithstanding any reopening provisions of the collective bargaining agreement, after two years from the effective date of this Memorandum of Understanding (MOU), either party may reopen this MOU at any of the first four subsequent

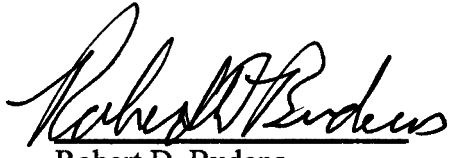
bargaining windows as provided by the collective bargaining agreement (CBA) in place at the time of the reopening. If the CBA in place at the two year anniversary date of this MOU does not provide for bargaining windows, this MOU may be reopened at the two year anniversary date and at three additional times at three-month intervals thereafter using the midterm bargaining ground rules in the CBA.

2. Following the expiration of the reopening opportunities in paragraph 1 above, reopening will be based on whether the parties have implemented a new CBA.
 - a. If the parties have implemented a new CBA, reopening provisions of the CBA will govern.
 - b. If the parties have not implemented a new CBA, this MOU may be reopened bi-annually on every even numbered anniversary of its effective date by providing at least 120 days notice (prior to the anniversary date) to the other party of the desire to reopen the agreement.
 - i. The notice must be in writing and contain the Articles of this MOU that the party wishes to renegotiate.
 - ii. The receiving party will respond within 30 days from receipt of the notice by indicating whether that party wishes to renegotiate any articles not reopened by the party initiating reopening.
 - iii. 30 days following the response to the notice of reopening, both parties will exchange proposals over the articles opened by either party. If a party does not submit a proposal on a given topic, it shall be assumed that the party wishes to maintain the existing language regarding that topic.
 - iv. Bargaining will begin the second full week following the exchange of proposals and be conducted in accordance with the midterm bargaining ground rules in the CBA.

Signatures:


Margaret Focarino
Deputy Commissioner for Patents
U.S. Patent and Trademark Office

10/22/2010
Date


Robert D. Budens
President
Patent Office Professional Association

10/22/2010
Date