

September 14, 2006

## **USPTO Management Again Refuses to Keep Its Promises**

Dear POPA Bargaining Unit Members,

As many of you know from Commissioner John Doll's August 28, 2006, "Commissioner's Corner," the USPTO has again refused to keep its promises to pay examiners what it promised them in the Millennium Agreement while, practically in the same breath, asking them to go the extra mile to help the agency meet its FY06 goals. Sadly, once again USPTO management has chosen to appeal the arbitrator's decision recently set forth in the second of five grievances POPA has filed on this issue, one for each of the five years management violated the Millennium Agreement.

Employees should not confuse this issue with the recent announcement of a request to the Office of Personnel Management (OPM) for a 7% increase in the current special pay rate. These are two entirely different issues. The recent request for the 7% increase, if approved by OPM, would increase our salaries for the future. It is intended to restore the value of the 2001 Millennium Agreement special pay rate to what it should have been had management maintained the 10% and 15% pay differentials established by the Millennium Agreement (to see the Millennium Agreement, go to [www.popa.org](http://www.popa.org) under Useful Info/Agreements). We commend the agency for working with POPA to seek this increase in the special pay rate.

Each of the five "Millennium pay grievances," however, are intended to obtain compensation for employees due to the agency's failure to maintain the value of the special pay rate for the years 2002 through 2006. The Millennium Agreement special pay provisions were intended to compensate employees for the increased work they would incur from the loss of the paper patent files and the addition of a customer service element to their performance appraisal plans.

Under Section A(2) of the Millennium Agreement, the USPTO agreed to request OPM to increase the special pay rate each year for five years (i.e., 2002-2006) to maintain the 10% and 15% pay differentials put in place by the Agreement. POPA knew that OPM might not approve such increases and that employees on special pay rates do not receive the "locality" part of the annual January pay raises (thereby eroding the special pay rate over time). Thus, the USPTO and POPA agreed that, should the agency's requests be denied, the agency and the union would negotiate some other "substantially equivalent alternative" to the locality pay increase employees did not receive. This was a mechanism to maintain the value of the Millennium Agreement special pay rate to employees over time.

Employees should note that the Millennium Agreement does not specify what type of alternative should be utilized – only that the parties should negotiate a "substantially equivalent alternative" to maintain the value to employees of the original special pay rate. POPA has recommended a performance award to all affected employees with a fully satisfactory or above performance rating as the

simplest solution to resolve this issue. Performance awards less than \$10,000 are negotiable and within the purview of the agency. 5 U.S.C. § 4505a(a)(1); 5 C.F.R. § 451.104(a)(3); 5 C.F.R. § 451.106(b). Furthermore, a performance award is not dependent on recruitment or retention issues within the agency. It is exactly what it purports to be, an award for performance at or above the fully successful level. In addition, performance awards do not require a commitment of continued service, as do recruitment and retention bonuses.

Management says that it “continues to believe that it could not legally and in good faith seek a pay increase in 2003” – “that this is the first time in the past several years that we have had the appropriate legal basis to make such a request”. Nothing could be further from the truth.

Before it was implemented, the Millennium Agreement went through a procedure called “agency head review.” This management review process determines whether any part of a negotiated agreement would be illegal for the agency to agree to or implement. The Millennium Agreement passed agency head review and has been in effect ever since. If the applicable laws and regulations haven’t changed since 2001, how can the Millennium Agreement pay provisions be illegal now? The plain truth is that it is legal – management just doesn’t want to honor its agreements and pay employees what it promised them.

The evidence convinced two well-respected independent arbitrators to find in POPA’s favor. In both the 2002 pay grievance and again in the 2003 grievance at issue here, an arbitrator found that the USPTO should have requested a special pay rate increase from OPM and, if denied, enter into discussions to provide a “substantially equivalent alternative.”

Furthermore, OPM regulations do not require some threshold level of attrition in order to request a special pay rate increase. Thus, it would not violate law or regulation for the USPTO to request OPM to increase the special pay rate each year, as required by the Millennium Agreement. In addition, a request to increase special pay rates may be based on an anticipated recruitment and retention problem, even if existing retention statistics do not reveal a current problem. The fact that the PTO has now requested a substantial increase in the special rates demonstrates that there was a looming recruitment and retention problem in 2003 through 2005. OPM regulations do not require that an agency wait until a manning crisis exists; it provides that special rates may be incrementally increased in order to avoid future manning problems like the ones the agency now faces.

In fact, that is exactly what USPTO management has done. Special pay rates are reviewed by OPM annually. Each year for 2002 to 2006, management has requested that the special pay rate be increased by the amount of the annual January pay raise minus the locality portion. Each time, the Director of the USPTO has had to make the very same certification “that the special rates requested are necessary to ensure staffing adequate to accomplish the agency’s mission.” This is the very same certification that management is telling employees that it could not make “in good faith.” It is the very same certification management has just made in the recent submission to OPM for a 7% increase in the special pay rate.

When OPM denies a special pay rate, that denial does not preclude the agency from using other flexibilities available to it. Even when OPM denied the agency’s 2002 request, it recommended that the

agency explore “the strategic use of other compensation flexibilities to address targeted recruitment and retention problems.” Thus, even OPM has told the agency to utilize other flexibilities in addition to special pay rates to compensate employees. A performance award for fully successful employees, as suggested by POPA, is precisely one of those flexibilities at the agency’s disposal.

Management relies on the decision of the Federal Labor Relations Authority in the 2002 pay grievance that overturned the arbitrator’s decision. The FLRA decided (unexpectedly reversing years of precedent set in its own case law) that the Millennium Agreement pay provisions interfered with management’s rights to **not** retain employees. The Authority argued that, since the arbitrator did not find that Section A(2) of the Millennium Agreement was an “appropriate arrangement” under 5 U.S.C. § 7106(b)(3) of the Federal Service Labor-Management Relations Statute (the Statute), the Millennium Agreement pay provisions were illegal.

This is the same decision that POPA appealed to the Court of Appeals for the D.C. Circuit. Unfortunately, the arbitrator in the first case had not ruled that the agency’s actions constituted an “unfair labor practice” under the Statute and, therefore, the Court did not have jurisdiction in the case.

The arbitrator in the 2003 pay grievance at issue here has specifically addressed both of these issues. In this case, the arbitrator has expressly found both that the Millennium Agreement pay provisions are indeed an appropriate arrangement under the Statute and that management’s refusal to honor those provisions represents a repudiation of the Millennium Agreement and, thus, constitutes an unfair labor practice. Therefore, the FLRA will have to readdress these issues on appeal. Should the Authority again rule against POPA, the case can and will be appealed to the D.C. Circuit because the agency’s actions represent an unfair labor practice.

As you can see, these grievances are very complicated. I hope that this explanation will help you to better understand the ongoing dispute between POPA and the USPTO over this issue. These grievances represent tens of millions of dollars of your money that the agency is refusing to pay you while, at the same time, asking you to sacrifice and work harder so that USPTO management can make their performance goals for this fiscal year.

Rest assured that POPA will continue to fight for your rights and will do everything in its power to persuade the agency to honor its agreements and pay you what it promised to you in the Millennium Agreement.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Budens". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert D. Budens, President  
Patent Office Professional Association