

USPTO Lists One-Third of Patent Jobs as "Commercial"

Would Subject Jobs to Privatizing; POPA Challenges Designation

POPA has submitted a formal challenge to the USPTO's listing of approximately one-third of all engineering and technical full-time-equivalent positions (FTEs) within the patent corps as "commercial" jobs open to private-sector competition.

The agency's November 2002 Federal Activities Inventory Reform (FAIR) Act job inventory, posted on the USPTO Web site, listed 1,176 FTEs in the patent corps performing engineering and technical services as "commercial" and 2,481 FTEs performing such services as "inherently governmental." Because the jobs are listed only by OMB function codes and not the usual OPM occupational series, there is some ambiguity as to precisely which positions are being targeted. But, because the numbers of FTEs are so large, it is safe to assume that they apply largely to patent examiners. The listing of some jobs as "commercial," and others not,

does not necessarily refer to jobs as they are structured today. Based upon the USPTO Strategic Plan, the agency is most likely referring to its intent to separate the prior art search function from the function of determining the legal consequences of the discovered prior art.

Contracting Out Judicial Functions

The job of a patent examiner has long been considered quasi-judicial because it requires examiners to make judgments of the metes and bounds of inventions and, thus, determine individuals' property rights. In this context, searching the prior art may be considered analogous to the judicial function of making findings of fact, while determining the legal consequences of the discovered prior art may be considered equivalent to reaching conclusions of law.

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Permanent Telework Agreement Doubles Work-at-Home Slots

The new Patents Telework Program, recently negotiated by POPA and the USPTO and scheduled to begin by April 30, more than doubles the number of employees that the USPTO had planned to allow to telecommute and makes work-at-home a permanent employee program.

Approximately 800 primary examiners and people in equivalent positions will participate.

The agreement permits reopening negotiations at the request of either the union or the USPTO every two years, and during negotiations the program will continue with the status quo. POPA anticipates that the number of participants will increase as the program succeeds.

Patent Telework Program Highlights

■ A minimum of 60 percent of primary examiners and equivalent positions will be permitted to telework one day a week. Selection priority will be given to those in the prior program and then by seniority.

■ The program is permanent. During any renegotiation, the program will continue with the status quo.

■ Participants may work any full-time schedule, subject to these restrictions:

- Participants must work 6 hours on at least three days Monday-Friday at the USPTO site, between 6:30 a.m. and 6 p.m.

- Regular compensatory time may not be used to fulfill these requirements unless for absences of one week or longer.

- On the telework day, if participants work more than six hours, six of those hours must be worked between 6:30 a.m. and 7 p.m.

- If the participant works fewer than six hours, all work must be completed between 6:30 a.m. and 7 p.m.

- All forms of approved leave, including compensatory time, may be used to fulfill work requirements on a telework day.

■ The agency did not commit to provide any hardware or software support, but if it chooses to do so, participant use will be voluntary.

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POPA and USPTO representatives at the signing of the Patents Telework Program Agreement. Back row: John Cabece, Pamela Schwartz, Kathy Matecki, Michael Ball, William Way, David Dalke. Seated: POPA President Ron Stern and Deputy Commissioner for Patent Operations Esther M. Kepplinger. Not pictured are POPA team members Kathy Duda, Karen Hastings, Howard Locker and Melanie Tung.

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Because making judicial conclusions of law depends on the findings of fact, neither function can be considered a commercial activity. Removing the job of making findings of fact from a judge would transfer much of the judge's function to the person making the findings of fact. Similarly, considering a prior art search a commercial activity would transfer control of the admittedly inherently governmental function of patent examination to the commercial entity.

The Office of Federal Procurement Policy's Policy Letter 92-1 defines "an inherently governmental function" as: "...those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the government. ...An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to: ... (c) significantly affect the life, liberty, or property of private persons."

Patentability determinations unquestionably affect the property rights of individuals. Therefore patentability determinations—and the findings of fact upon which they are based, i.e., the prior art search—constitute an inherently governmental function. Search is inextricably entwined with determinations of patentability and therefore must also be inherently governmental.

Bad Math, Inadequate Notice

The USPTO is wrong if it believes that one-third of all patent FTEs would be devoted to the prior art search if the search and patentability determination functions were separated. Examiners will need to duplicate functions performed during the search, such as reading and understanding the patent application and the references cited. The job remaining after the search is privatized would be 90 percent or more of the previous job.

The USPTO claimed that it has listed the patent corps jobs as "commercial" since its FAIR Act inventory of 2000 and that it has received no challenges to those claims. However, scrutiny of the "Patent Examination" FTEs listed in the USPTO FAIR inventories for 2000 found the only large number of patent jobs identified as commercial were 775 "administrative support" FTEs. In the 2001 patent examination inventory, 375 FTEs were listed as "administrative support" and 1,100 as "management support." Only the 2002 inventory for the first time listed "engineering and technical services" FTEs in the patent corps as commercial.

The commercial listings for 2000 and 2001 clearly can't be describing the patent examination function. The agency gave no indication that these FTEs refer to professional jobs and they cannot be construed as such. The USPTO therefore had not given fair and adequate notice to employees that their jobs may be subject to contracting out.

Huge Contracting Growth

In the cover letter to the Office of Management and Budget regarding the USPTO FAIR Act inventory, the agency stated:

"During FY 2002 alone, the USPTO increased the number of contract personnel onboard by over 1,000... Currently, the USPTO has over 3,900 contract personnel working either onsite at our facilities or offsite at contractor facilities... If the USPTO were given credit for its current contracting efforts, approximately 39% of our total workforce has already been contracted out." ▼

Telework Agreement *(continued from page 1)*

■ Employees with short-term medical conditions may be permitted to telework for up to four months with supporting documentation. Employees may reapply as necessary. Employees must meet all the eligibility requirements, except for seniority. Participants qualifying as medical-exception participants will not count towards the 60 percent minimum.

Previous Work at Home program participants will be grandfathered into the program as long as they meet the requirements. Vacancies will be filled at the end of the first, second and third quarters. Application for the program will be ongoing.

Each week participants may choose one day to telework Monday to Friday. Supervisors cannot arbitrarily deny the choice of telework day and cannot use their own personal schedules as a basis for denying a participant's chosen telework day.

Unlike the prior program, the agency will not be required to fund any hardware or software. However, POPA urges that the USPTO return the existing successful software and equipment from the previous program to the participants. The USPTO would incur no additional costs and would gain productivity from the software-facilitated work at home. Without the proven software, participants will waste time using workarounds. If the agency provides equipment, participant use will be voluntary.

Telework participants may take "other" time while on their day at home, including but not limited to time for training others, transfers and written restrictions. The USPTO made it abundantly clear that it expected employees to provide the same training and consulting services that they would provide if they were on site. Basically, all activities listed on a patent examiner's 690e, except for union time, are appropriate activities that may be done at home.

If a participant has received a disciplinary or adverse action, he or she may be removed from the program. The USPTO committed at the table that a disciplinary action for these purposes is, at a minimum, a written letter of reprimand and does not include oral actions.

Participants may also be removed from the program for abuse of the program guidelines. The agency had at first proposed removal for significant or repetitive rules

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