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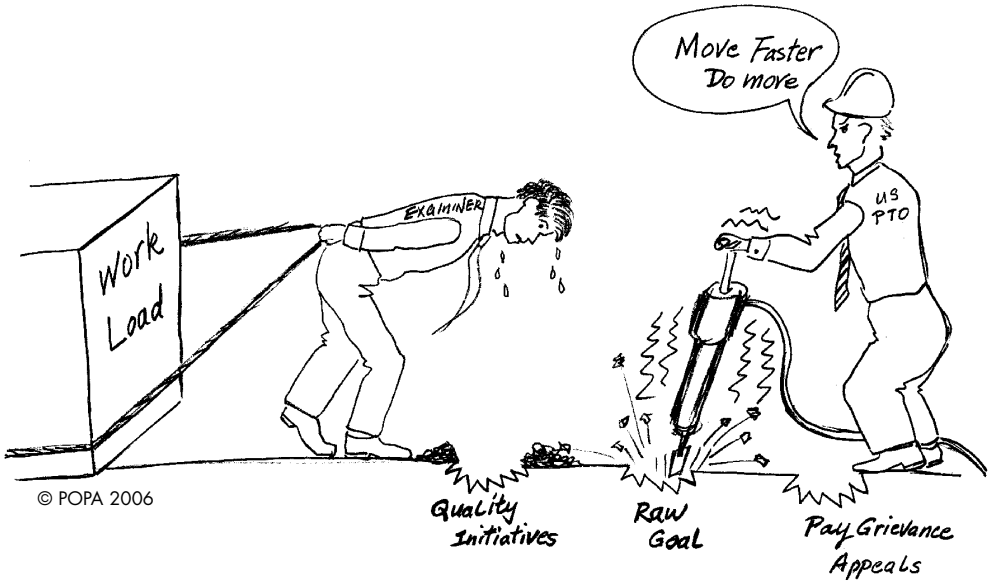
Agency Appeals 2003 Pay Increase Arbitration Decision

Requests 7 Percent Hike for 2007

The USPTO is appealing to reverse an arbitrator's recent decision supporting the Millennium Agreement section that required the agency to "provide substantially equivalent alternatives" when the hoped for special pay rate increase was not forthcoming in 2003.

At the same time, the agency asked the Office of Personnel Management (OPM) for a future 7 percent across-the-board increase to the special pay rate for all patent professionals currently covered by Special Pay Table 0576. If approved, nearly everyone in the 1220, 1222, 1223, 1224, and 1226 job series will receive the increase by January 2007. (Employees with pay equal to the pay cap set by Congress would not be eligible to receive the increase.) When announcing the increase request, Mr. Doll wrote, "Many thanks for your hard work and dedication to making USPTO the leading intellectual property organization in the world."

While Mr. Doll's praise and thanks are most welcome and well deserved, the raise request wasn't made because of employees' job well done. Rather, the agency's request comes as a result of recruitment and retention problems at the USPTO. The agency has failed to meet its congressionally mandated staffing goals and faces a 13 percent attrition rate for fiscal 2006. These are the very recruitment and retention problems that the Millennium Agreement was designed to avoid.



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The Millennium Agreement, signed in 2001, specifically required the USPTO to request OPM to increase the special pay rate each year to "maintain the 10 percent and 15 percent salary differentials relative to the updated GS rates." If OPM does not approve the agency's request, the USPTO is

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Forget Quality, Full Speed Ahead, Examiners Told

Scores of examiners were told by their USPTO supervisors that quality reviews would be severely cut back during the last six weeks of the fiscal year to allow examiners to pump production, and that quality statistics going to Congress and the public would delete those weeks.

Supervisors told many examiners that while the agency has achieved its promised quality goals, it is way behind on fiscal year 2006 production. Dropping most of the quality checks would enable examiners to produce faster. The USPTO's actions represent the agency's recognition that it can't achieve quality while pushing high production.

In addition to verbal orders from supervisors to their employees, an August memo from one quality assurance specialist to more than 100 examiners stated that the agency would conduct "[no] more rolling reviews until the end of September or early October due to quiet time during September. So you will have just second-pair-of-eyes for a while."

During "quiet time," the final weeks of the fiscal year, the USPTO traditionally does not schedule many non-examination activities for examiners to enable them to focus on meeting their fiscal year production goals. Rolling reviews are done by quality assurance specialists, who review the

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Forget Quality, Examiners Told

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work of one art unit and then roll to the next, while supervisors or primary examiners conduct second-pair-of-eyes reviews on allowances.

Shortly after the news of the quality review cutoff, the USPTO announced that through the end of the fiscal year the overtime examiners could work was extended to 50 hours per biweek, encouraging examiners to work 65 hours per week to meet USPTO production goals.

"We've been told that no more cases would be pulled for quality review through the end of the fiscal year," wrote one veteran examiner from TC 1700. "It's as if quality doesn't count for these last weeks. The agency has said to examiners that after ten and a half months of toiling, reviewing each other's work, and defending our office actions, promised quality goals have been achieved. And by the way, we haven't met our productivity goal yet, so get pumping."

Apparently quality was important while the agency was producing the quality figures that it will provide to Congress and the public. During that time, examiners faced extreme pressure and disciplinary actions for performance, including termination based upon alleged low quality.

Some examiners welcomed the respite from quality that enabled them to step up production to make or exceed their goals. Others did not.

"People forget how fast you did a job, but they remember how well you did it."

—Howard W. Newton, author

"When John Doll announced the agency's position that it would not be legal to find ways to pay patent employees under the terms of the Millennium Agreement because it was circumventing the Office of Personnel Management," wrote the TC 1700 primary examiner, "I thought maybe our agency officials should also be concerned about circumventing Congress and misleading the public by committing to improve quality for only the first ten and a half months of the fiscal year."

Agency Appeals Pay Increase Decision

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required to work with POPA to provide substantially equivalent alternative compensation.

The Millennium Agreement, which was celebrated by USPTO management five years ago, is now being legally challenged by agency management. The agreement at that time passed stringent legal review by the general counsel, the agency director and the Commerce Department. Federal regulations have not changed in that time to negate its legitimacy. The agency's actions damage its credibility.

Mr. Doll, in announcing the agency's decision to fight the arbitrator's decision, stated, "This has come as a disappointment to many who believe that the Millennium Agreement required the USPTO to maintain the pay increases each year for five years. That interpretation is inconsistent with the law."

"We recommend exploring the strategic use of other compensation flexibilities to address targeted recruitment and retention problems."

—From OPM Memo to Patents Commissioner, 2002

Mr. Doll is right that the Millennium Agreement does not require special pay increases—it only requires a request to OPM. It, however, *does* require the agency to "provide substantially equivalent alternatives" when the desired special pay rate increase is not approved by OPM.

OPM not only allows federal agencies to offer their employees alternative compensation items, it outright encourages it. In the August 2002 memo denying the USPTO special pay rate increase request, then Acting OPM Associate Director for Workforce Compensation and Performance Donald J. Winstead wrote to the commissioner of patents,

> "We recommend exploring the strategic use of other compensation flexibilities to address targeted recruitment and retention problems. These flexibilities, such as recruitment bonuses, retention allowances (individually or on a group basis), superior qualifications appointments, and student loan repayments, can increase your agency's ability to attract and retain employees, especially when used in combination with the existing special rates for patent professionals."

Mr. Doll also contended that the agency appealed because "a largely similar decision from a previous arbitrator was found unlawful on appeal to the Federal Labor Relations Authority (FLRA)."

The FLRA overturned that previous decision because the Millennium Agreement was found, in a novel and completely unexpected interpretation, to excessively interfere with management's right to retain *or not to retain* employees. We believe that the FLRA's decision has an extremely high probability of being overturned on appeal because it is inconsistent with numerous previous FLRA decisions that, themselves, have been affirmed by the courts. For the courts to have jurisdiction over the review of an arbitrator's decision, a case must be argued as an unfair labor practice case. That was not done in the first grievance.

In the current case (outlined in detail in the Aug. 2006 *POPA News*), Arbitrator Salvatore J. Arrigo specified that the agency had committed an unfair labor practice. With that legal standing, and with a wealth of other evidence, POPA anticipates receiving a favorable outcome in this case.

Open Letter to Mr. Doll

An examiner wrote to Mr. Doll after reading his Aug. 28 Commissioner's Corner and shared the e-mail with POPA. It's excerpted with the employee's permission.

Mr. Doll:

I find your explanation of the legal basis for PTO's position on the examiner pay increase cursory and somewhat condescending. We are educated professionals, as you know. Therefore, I believe many examiners would understand and appreciate a more exact explanation of the legal basis to support the decisions concerning the pay increase.

Which rules and laws would the PTO break by requesting the pay increase each year?

What law would the PTO have broken by requesting a pay increase in 2003? How was it "legally [in]appropriate"? How was the arbitrator who found against PTO "simply wrong"?

It is well known throughout the federal government that the FLRA is sympathetic to the management position in the overwhelming majority of cases. It appears to many in the examining corps that management's decision to appeal is not based on high moral grounds, but on an anticipated friendly court. Appealing the arbitrator's decision neither assuages the anger and disappointment felt by the examining corps nor supports your contention that management is willing to pay examiners all that is legally appropriate.

Without receiving specific legal grounds for management's actions, it seems quite simple to me:

Employees have a right to expect management to respect and support any agreement made in good faith. PTO agreed to request a pay raise each year for examiners. Therefore, PTO management should have requested the pay increase in each ensuing year. One of three outcomes would have resulted:

1. Pay raise approved by OPM. Result: Examiners happy.
2. Pay raise not approved by OPM on legal grounds. Result: Examiners unhappy, but satisfied that PTO management worked in good faith to uphold the Millennium Agreement.
3. Pay raise not approved by OPM on arbitrary grounds. PTO management fights OPM for the raise on behalf of examiners rather than fighting examiners, as is now the case (yes, the parties are fighting). Result: Examiners unhappy, but consider PTO the hero for supporting them.

The appearance now to examiners is that PTO did not and does not want to support the pay increase for examiners.

Many examiners eagerly wait to hear exactly what legal grounds prevented the pay increase from taking effect.

Sincerely,
Primary Examiner, TC 2900
(Name withheld by request)

USPTO General Counsel Spends Thousands on Losing Arbitrations

The USPTO is preparing to spend approximately $30,000 of inventors' money (USPTO is funded by fees paid by inventors) to fight employees on an issue on which it has lost four times already and will almost certainly lose again. This will total $90,000 the USPTO has paid and lost opposing employees on their due-process rights – money that instead could be budgeted to reduce patent pendency.

The USPTO Office of General Counsel (OGC) maintains in two current cases that the employees' legal representative (POPA) in an arbitration has no right to question agency witnesses or to receive information necessary to defend employees, even though as recently as July 2006 an arbitrator found that POPA and employees have those contractual rights. That decision was the fourth recent finding in employees' favor on those same issues.

The USPTO expends approximately 200 hours of OGC and Senior Executive Service staff time in each of these arbitration cases, filing multiple legal briefs, interviewing witnesses, and arguing at arbitration. At approximately $60 per hour (a reasonable average of GS-15 and SES hourly rates) plus the $3,000 arbitrator's fees, the USPTO uses about $15,000 of inventors' funds per arbitration.

"Every unnecessary USPTO legal request stands for resources that could be better used for patent examination."

When POPA asked to meet with USPTO General Counsel James A. Toupin to discuss this continuing problem, he said to talk to his subordinate employees, who have not responded to several requests to schedule such a meeting.

The USPTO employs more than 20 GS-15 attorneys in the OGC Office of General Law, which represents the agency in all employee arbitrations and cases before the Federal Labor Relations Authority and other administrative bodies that deal with employee concerns (as opposed to patentee or patent agent legal concerns). The agency also retains roughly 100 Office of Human Resources staff, many of whom contribute time and information for each arbitration.

As the USPTO has increased the number of OGC attorneys and OHR staff, the number of agency requests for motions to dismiss and other legal procedural obstacles thrown at employees has similarly increased. USPTO arbitration cases without agency-placed preliminary roadblocks are rare.

Every unnecessary or repetitious USPTO legal request, brief and/or filing—at $60 per hour of inventors' money—stands for resources that could be better used for patent examination.

Awards May Still Apply for Departing Employees

Examiners may still be eligible for Special Achievement Awards (SAAs) and/or Gainsharing awards when they resign or retire. Employees, supervisors and managers can benefit from understanding how the awards work in these situations.

Several years ago the USPTO denied awards to two employees who left the agency before the end of the fiscal year. Both had more than 700 examining and examining-related hours (SAAs are for any four consecutive quarters and a Gainsharing award is for a fiscal year). One employee had to retire before the end of the fiscal year to qualify for a lump-sum retirement payment. The other employee was expected to start at a new job before the end of the fiscal year.

At the grievance arbitration for these employees, POPA argued that nothing in the negotiation history of SAA or Gainsharing awards required that an employee be a bargaining unit member during the entire award period. Moreover, awards are designed to encourage extra productivity and quality for extra pay. To pull the rug out from under those who worked hard expecting to receive an award was unfair to employees and self-defeating for the agency.

The arbitrator decided the issue in favor of bargaining unit members. To implement the arbitrator's award in the future, POPA and the USPTO then reached a separate agreement, which states:

> Any POPA bargaining unit member who ceases being a bargaining unit member (either through transfer, resignation, etc.) shall be evaluated for award purposes and shall be notified within one month of when they cease being a bargaining unit member, of the grant or denial of any award and the reason(s) for any denial. If the POPA bargaining unit member returns to the bargaining unit at any time within the award period for which an award was granted, the bargaining unit member shall be evaluated for any additional amounts within one month of the end of the award period, and if entitled to any additional award amounts (over and above the amount determined when the employee left the bargaining unit) only the additional amount need be paid.

USPTO-rehired employees who have satisfied the Gainsharing award criteria by the end of the fiscal year shall receive a Gainsharing award. SAAs would run a full four consecutive quarters including the quarter of the rehiring date. All other criteria (hours, performance, etc.) must otherwise be satisfied.

Know Your Rights

Protect Yourself at Investigatory Meetings

Sometime during your USPTO career, your supervisor may walk into your office and announce that you are being "invited" to an investigatory meeting, which basically means—no surprise—that the USPTO is investigating you. Knowing your rights can defend your job.

Despite the protections of the POPA Collective Bargaining Agreement, the supervisor may refuse to provide you with any more information than you are supposed to appear at a certain date, time and location. Definitely ask for the topic of the meeting and/or what you are being investigated for. Then immediately, without further comment, arrange for a POPA representative to represent you at the investigatory meeting. You are entitled to this representation whether you are a probationary or career employee, so take advantage of it. Management may have several people across the table from you, including your supervisor, peppering you with questions at the investigatory meeting—you likely will welcome having someone with you who is knowledgeable about your statutory and contractual protections.

Don't let your confidence in your performance lull you into complacency in an investigatory meeting with management. Even if you hold a law degree or are in law school, it is very unwise to represent yourself, as you will have no witness on your side while the USPTO may have several. One such employee had two management witnesses contradicting the statements and answers he believed he had given at the investigatory meeting.

No bargaining unit member need be embarrassed to ask for POPA representation because of the issues involved. Trust us, we have seen almost everything under the sun and a little embarrassment is far superior to being suspended without pay or being fired. POPA representatives are trained to protect the privacy of the employees they represent. You are entitled to and encouraged to get representation at an investigatory meeting whether you are a dues-paying member or not.

Stop When the Topics Turn

As a POPA bargaining unit member, be aware when a seemingly innocuous meeting with your supervisor suddenly turns into an investigatory meeting. For instance, you are in a meeting with your supervisor where you are being rated for the fiscal year and the supervisor starts asking you about personal Internet usage on the job. You need to recognize that at this point your supervisor has changed topics from one of job performance to one of conduct on the job and is *investigating* your Internet use. Stop the meeting at once and request representation by a POPA official if you are going to be questioned any further.

Article 4, Section 8(C) of your POPA contract provides,

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Know Your Rights

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"If the employee requests a union representative, management shall be obligated to wait a reasonable time to allow the employee the opportunity to secure representation, before proceeding with the meeting." Other examples of investigatory topics could be telephone usage, leave usage, accounting for hours of work, overtime work, and interactions with fellow employees, just to name a few.

Remember: If it appears you are being questioned about your conduct on the job rather than your job performance under your performance appraisal plan, you are being *investigated* and need to find a POPA representative. See the roster of POPA representatives at *www.popa.org* under "Contact" and under "Officers and Delegates." To read your investigatory meeting rights, click on "Useful Info and Agreements" and "Collective Bargaining Agreement" at Article 4, Section 8.

Seeking Nominations for 2006 POPA Elections

Nominations open Oct. 16 for the 2006 election of Executive Committee officers and delegates who will assume office during the POPA Annual Meeting in December. **Completed nominating petitions will be accepted from 8:30 a.m. on Oct. 16 through 12 noon on Oct. 27.**

The POPA election will be held Wed. Nov. 15 and Thurs. Nov. 16. While all non-managerial patent professionals are members of POPA's bargaining unit, only dues-paying members may vote or hold office. One of the benefits of paying POPA dues is that you get a voice in POPA's organization and a vote in POPA's elections.

The numbers of area delegates from the four designated office areas were reapportioned by vote of the POPA Executive Committee in September. The apportionment is designed to equalize the voting power of members in each office area, creating an almost uniform ratio of members to delegates for all areas. POPA delegate apportionment is based only on the number of dues-paying members in each office area, not on bargaining unit size.

Delegates from the four office areas will be elected as follows:

- 9 Delegates from the Chemical Area
- 13 Delegates from the Electrical Area
- 6 Delegates from the Mechanical and Business Methods Areas
- 2 Delegates from Designs and Other Areas combined.

The following officers also will be elected from the membership at large: President, Vice President, Secretary, Assistant Secretary, and Treasurer.

How to Nominate a Candidate

Candidates for officers and delegates must be Association members in good standing, i.e., dues-paying members.

Nominations for an officer shall be by petition stating the position sought, signifying the nominee's willingness to serve, and signed by at least 15 dues-paying POPA members.

Nominations for an area delegate shall be by petition stating the organization area to be represented, signifying the nominee's willingness to serve, and signed by at least five dues-paying members from that same organizational area.

For either type of nominating petition, nominees should obtain in excess of the minimum number of signatures in the event one or more signatures are disqualified for not belonging to dues-paying members.

Completed nominating petitions may be turned into any member of the Election Committee or to POPA Secretary Howard Locker. Members of the Election Committee will be listed on the bottom of the nominating petition and at *www.popa.org* under "Elections."

If you wish to vote in the election and are not now a member, you may contact any POPA representative or member of the Election Committee for a dues deduction form. You may also download a form from *www.popa.org* by clicking on "Join POPA." Return completed dues deduction forms to one of the Election Committee members. The completed form may be returned at the time of balloting. To nominate someone or to be nominated, return the dues deduction form by noon on Oct. 27.

Nominating petitions will be available at *www.popa.org*. Click on "Elections."

Letters to POPA

The Best Benefit of Hoteling

I think hoteling is great. I was leery and, believe me, I have had all the computer problems associated with hoteling. I think the training was very good. I have never before felt the supportive environment at the PTO that I did in that hoteling classroom.

However, people are hoteling not really to help the environment or diminish their commuting time and aggravation, but because they hate the working environment at the PTO. Commuting and environmental benefits are secondary to the freedom you gain, which is most examiners' reason for hoteling, and the exact sentiment of my hoteling class[mates]. This is coming from somebody who spent one hour to go five miles crossing the Woodrow Wilson Bridge every morning and evening.

Prospective Employee's Perspective

I applied for and was selected for an examiner's position in the electrical/computer engineering field. When I interviewed for the position, I heard a lot of nice things from the interviewer about USPTO (of course!). I was generally searching the Web for information about the job and I found your Web site. It was quite enlightening. Agency monitoring of phone and Internet usage? Increasing probationary period to 2-3 years? Rigid teleworking rules? Hmm, I think I am not yet ready for this.

If the agency is looking to hire people from the high-tech industry, it really, really needs to rethink this strategy. The high-tech industry thrives on setting goals and then allowing the employees to achieve those goals in whatever manner without micromanaging them. The agency's policy seems to go against that. No wonder it has a high attrition rate. Doesn't management know that it is much more expensive to hire and train a new employee than to retain an existing one?

Anyway, good luck to you and the people you represent.

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"But patent examiners are among the best-educated and most mobile employees of the federal government. That fact, combined with increasingly harsh production quotas, has created a five-year turnover rate of about 50 percent…. 'What we keep screaming to the world,' [USPTO Director Jon Dudas] said, 'is we have to have more examiners.' "

—Tech innovations swamp U.S. patent office
The Atlanta Journal-Constitution, Aug. 27, 2006

USPTO Cracks Down on Time and Attendance Discrepancies

A former examiner's criminal arrest for allegedly falsifying time and attendance forms underscores the importance of employees' meticulous badge-in/badge-out recordkeeping.

Though this former employee's case is extreme (the Commonwealth of Virginia has charged the former employee with obtaining money under false pretenses, which is a felony, for allegedly lying about hundreds of work hours), the agency is investigating other examiners for unwittingly incorrect timekeeping and forwarding that information to the inspector general for possible criminal prosecution.

One probationary employee was achieving high production on a 10-hour per day schedule. The employee stayed at the desk for lunch, not badging out, and left the office each day after 10 hours and claimed 10 work hours. However, in any daily work schedule where an employee works longer than six hours, the employee is required by law to have a 30-minute break for lunch. This means the workday for an examiner working 10-hour days is 10.5 hours long. When the employee claimed 10 work hours after being at the office 10 hours, the agency determined that the examiner was cheating on 30 minutes per day. The agency doesn't see the employee's outstanding work as a viable defense.

Therefore, even if you conscientiously work through lunch every day, you must on your time and attendance sheet account for the 30-minute lunch break.

JOIN POPA

Patent Office Professional Association

Letters from readers are welcome. Address to:
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