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Arbitrator Upholds Special Rate Increase Requirements

Orders USPTO to Talk with POPA on Alternatives

An arbitrator found that the USPTO in 2003 used "improper and illegal tactics" to avoid giving patent professionals a pay increase to maintain the 10-15 percent special rate pay differential as mandated by the Millennium Agreement, and ordered the agency to negotiate with POPA options for compensating employees with back pay including interest.

Arbitrators have decided two of the five grievances (for years 2002 through 2006) that POPA filed regarding the USPTO's failure to follow the Millennium Agreement on increasing the special pay rate — both decisions were in the employees' favor. More importantly, in this case the arbitrator expressly found for POPA on several critical issues the Federal Labor Relations Authority (FLRA) had relied on in overturning the arbitrator's decision in the first grievance (the 2002 case).

The July 25 decision by arbitrator Salvatore J. Arrigo affirmed that the 2000 USPTO-POPA Initiatives for a New Millennium agreement "obligates PTO to make yearly requests to OPM [the Office of Personnel Management] for approval to increase special pay schedules in line with

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OCIO Revises Position Descriptions to Seek "Younger Blood"

Booing and yelling erupted at an August all-hands meeting of Office of the Chief Information Officer (OCIO) employees when an OCIO official stated that the agency was rewriting all OCIO position descriptions essentially because the office needs to bring in some "younger blood" with fresher ideas.

OCIO professionals—mostly highly trained computer

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Big Expansion of Patents Telework Program

A dramatic expansion of the Patents Telework Program (PTP)—enabling all GS-12 and above Patents employees with a minimum of two years of service to participate—was agreed upon by POPA and the USPTO in late July.

The agreement also delineated the deployment of new Multimedia Communications Systems (MCS) collaboration tools for examiners and made minor clarifications to the eligibility language in the Non-Duty Hours Technical Training Program and the Non-Duty Hours Legal Studies Program.

Noteworthy points of the broadened PTP:

- PTP participants may work from the alternate worksite one day per week;
- A one-time application period of two weeks will commence upon prompt publication of the PTP's announcement and application instructions in the USPTO Weekly and through the chain of command;
- The USPTO will provide within six weeks of the end of the application period written notification of employees' acceptance or non-acceptance to all who file an application;
- Newly selected employees will be eligible to telework as soon as they are accepted into the program and have completed training;
- The USPTO will hold four PTP application periods each year, in November, February, May and August;
- The agency shall notify all PTP participants to update their PTP information each October;
- For librarians this will be a pilot program, with participants required to have high-speed, broadband Internet access at the alternate work site. The pilot will be evaluated at six months; telework for librarians will continue

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Rate Agreement Upheld *(continued from p. 1)*

increases in locality pay." The agency had contended that such requests to OPM were unnecessary when employee attrition was low. The arbitrator disagreed, saying that it "does not prevent the agency from honestly certifying and explaining that the need is based upon the Agency's long-term needs regarding recruitment, training and retaining."

When the agency failed to request an OPM pay increase, it thought it was off the hook in having to fulfill the second step in the agreement, which states, "If OPM refuses the request, the agency shall enter into discussions with POPA in order to provide substantially equivalent alternatives."

Again, Arbitrator Arrigo found in the employees' favor that the purpose of that sentence "was to find a mechanism to maintain the 10 percent to 15 percent salary differential." Therefore, even though the agreement didn't expressly state it, "the most reasonable and sensible interpretation" is to require POPA and the USPTO to find comparable alternatives.

No Stepping on USPTO Toes

The USPTO argued during this arbitration that the entire Millennium Agreement section on pay is inappropriate because it interferes with management's right to retain employees. Arrigo emphatically differed, writing, "The record leaves no doubt that changes in the manner of conducting patent searches by eliminating paper files primarily and adding customer service duties and obtaining a special pay schedule were in relationship as a quid pro quo." He noted that the Millennium Agreement would contain no agreement to change work conditions without agreement on the pay increase elements.

Arrigo concluded that "the agency's improper and illegal tactics as found above have resulted in withholding, for a considerable period of time, money employees were entitled to receive, but for the agency's improper actions," and called for any monetary compensation to include interest.

Employees should not start calculating their back pay award just yet. The USPTO may appeal this decision to the FLRA as they did in the 2002 case. Even if that appeal is successful and the FLRA vacates the arbitrator's decision, POPA would have a good chance of winning its subsequent appeal to the federal court. This entire process could take approximately two more years, which could mean two more years of back interest due employees.

The outcome of this case also bodes well for POPA's grievances regarding the USPTO's inaction on maintaining the special rate pay differential in the other grievances for 2004, 2005 and 2006.

Employees continue to hope that the USPTO will do the right thing by settling these grievances with POPA and paying employees the money the agency promised them in the Millennium Agreement.

Teleworks Program *(continued from p. 1)*

while the USPTO determines whether or not to continue the program.

New Tools Available, Not Required

The agency will deploy MCS collaboration tools to all patent examiners' workstations but agreed that use of the tools by on-site Carlyle examiners will be voluntary until the USPTO has met its legal obligations to officially notify and negotiate with POPA.

The new collaboration tools will permit employees to communicate via video conferencing, use their workstations as a telephone and allow senior examiners to interactively review the work of junior examiners from remote locations.

To view the full agreement, go to *www.popa.org* and click on Useful Information and then Agreements.

POPA and USPTO officials signed the Telework and MCS agreement in late July. [L to R] Seated: Deputy Commissioner for Patent Operations Peggy Focarino; POPA President Robert Budens. Standing: Labor Relations Chief Negotiator Dave Dalke; TC 3600 Director John Love; POPA Vice President/Director of Grievances Larry Oresky.

Grievance Win Allows a Working Vacation

POPA won an informal grievance to enable an examiner to come to the office and examine cases while on approved annual leave, after the supervisor later disallowed the use of the leave.

Yes, you read correctly: An employee had wanted to use vacation time to work and management had prohibited it.

Something's wrong with this picture.

Last May an examiner requested and received approval for 40 hours of annual leave. On Thursday of the vacation week, the supervisor realized that the employee was working on site and charged that day's time to examination time.

After talking with POPA, the examiner in June filed an informal grievance citing the union's negotiated agreement and seeking a correction. In July the USPTO granted the grievance and corrected the time charged.

The big story is the one told between the lines: Examiners feel compelled to burn their annual leave to make their production goals to keep their jobs.

Five-Year Effort Nets Dual Monitors

After successfully collaborating with POPA on a pilot program, the USPTO announced in July that it would be deploying dual, 21" monitors for all on-site examiners. The deployment is currently planned for October. POPA has been advocating for dual monitors for many years and, in particular, since 2001 when POPA representatives first demonstrated the effectiveness of the dual-monitor configuration to USPTO management.

POPA's first dual-screen mock-up for senior Patents management used one of the then-existing monitors and a new 21" flat-screen monitor identical to the ones currently used. POPA showed how installing them would have made it, as the recent USPTO Weekly Extra stated, "easier to navigate documents and filing systems, to switch between open applications and tools, and to cut and paste information." Done five years ago, it would have given the Patent corps this capability much earlier for very little additional expense.

The agency, however, did not want to commit to a budget for two monitors. When new Patents management came on board in 2005, POPA renewed its efforts to educate management about the benefits of a dual-monitor system. Once the USPTO was convinced, it took this past year to run the pilot, evaluate its results, test all the equipment, and obtain approvals for capital expenditures.

POPA extends its thanks to the examiners of art units 1634, 2829 and 3652 for participating in the dual-monitor pilot on behalf of their fellow employees.

This illustrates the useful benefits for employees and the agency that can result when the USPTO is willing to work in partnership with POPA.

TC 1600 Improves Second-Pair-of-Eyes Reviews

After meeting with POPA representatives to discuss examiners' concerns, Technology Center 1600 managers issued an upfront memo Aug. 3, 2006, that rescinded lists that had fallen into employees' hands of "bad" examiners targeted for a "second-pair-of-eyes" quality review.

The managers also revised the second-pair-of-eyes review criteria and expanded "refresher" training on major examining topics to include all TC 1600 examiners.

The issues arose recently when the agency generated lists of examiners whose work was allegedly deemed questionable and therefore targeted for the second-pair-of-eyes review. One list, left in a public place, quickly circulated among employees. A veteran examiner, who'd never had an error charged, was on that list. The employee confronted a manager, who responded that the examiner was on the list because of a quality reviewer's "gut feeling" about the employee's work. The lists included other examiners whose quality of work had not been in question.

To reverse the resulting downward morale spiral, TC 1600 managers talked with POPA officials and afterwards sent a straightforward memo to all TC 1600 employees acknowledging and apologizing for "any inaccurate, off-the-cuff response" by managers to examiners' concerns. The agency said it has reevaluated the review criteria and is "revising the process to consider only allowance review data, and only those situations when a clear problem is verified and correction is necessary."

In addition to spelling out the rationale for the review program, the memo also detailed the beefed-up five-week refresher-training course (two hours per day, four days per week) that will be provided to all TC 1600 examiners. While POPA has always been a strong supporter of training for employees, POPA has requested that the USPTO schedule more hours of training each day to make fewer days of on-site training. This would be easier on employees working remotely, who will have their schedules severely disrupted by the current schedule. POPA hopes that the USPTO will arrange more employee-friendly training hours for TC 1600 examiners.

OCIO Revises Position Descriptions

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engineers and scientists at General Schedule grades 14 and 15—had entered the Aug. 11 meeting anxious that the agency would revise their positions to lower grades. The agency had sent them questionnaires the prior week regarding the particulars of their jobs. The USPTO had also hired contractors to interview individuals in depth about the nature of their jobs.

After the agency presentation, OCIO had allotted 30 minutes for a question-and-answer session. It took two hours.

OCIO officials stated that the USPTO is conducting the position description reviews because the position descriptions had not been properly maintained and updated for possible vacancy announcements. However, during the meeting agency officials repeatedly referred to the actions as "desk audits," which are different from position description updates. Desk audits specify what an individual employee does to determine if he or she meets the job requirements and justifies the position and grade. If a desk audit finds that the individual does not, he or she can be downgraded.

During the Q&A session, officials said that for the 45 positions announced in fiscal year 2006, the agency had to rewrite all of the position descriptions. When a POPA official asked how many of the positions started as GS 14-15 professionals and ended up as lower graded positions, Acting OCIO Director for Administrative Management Francis O'Hearn did not respond directly, but literally caused an uproar with his answer about the need for "younger blood."

POPA has intervened in this process as much as allowable. The USPTO had originally asked employees to

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Know Your Rights

Workflow Management: You Need to Sweat the Little Things

While workflow management only accounts for 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, then you can receive no higher than a marginal rating overall even if the other critical elements are all outstanding. Likewise, if you receive an unsatisfactory rating in workflow, 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 you a performance-based disciplinary action for as little as one fiscal quarter's 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 beat an unsatisfactory rating 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 received. If you get a negative workflow point or points because a supervisor did not review your office action in time or for some other reason beyond your control, including having too many amendments due in a single biweek, then you need to e-mail the supervisor requesting a "waiver" of any negative workflow points. Do this as soon as you find an error in your workflow points or you realize there will be a problem moving all your due cases.

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. Often when POPA has presented this issue to a supervisor, it has resulted in an oral warning or written warning being rescinded by the USPTO.

In the event you receive an oral warning with regard to workflow management due to a large number of amendments, the supervisor needs to meet with you and develop a workflow plan that specifies the number of amendments you should do each biweek to overcome the oral warning, with the remainder of the overdue amendments being excused.

Do not just 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.

Take the time to read and understand what is set forth in your PAP, including in 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.

OCIO Revises Position Descriptions

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complete the questionnaire over one weekend; POPA asked for an extension of two weeks, but the agency only allowed one week with the promise to accommodate employees who were on vacation.

At the August all-hands meeting, the OCIO officials said that POPA could meet to discuss the issues with OCIO bargaining unit members. When POPA requested the meeting, the USPTO backed away from its offer and, thus far, has refused to schedule the meeting with employees.

POPA cannot stop the agency from conducting desk audits, but can and will fight for employees whose positions are improperly downgraded as a result.

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