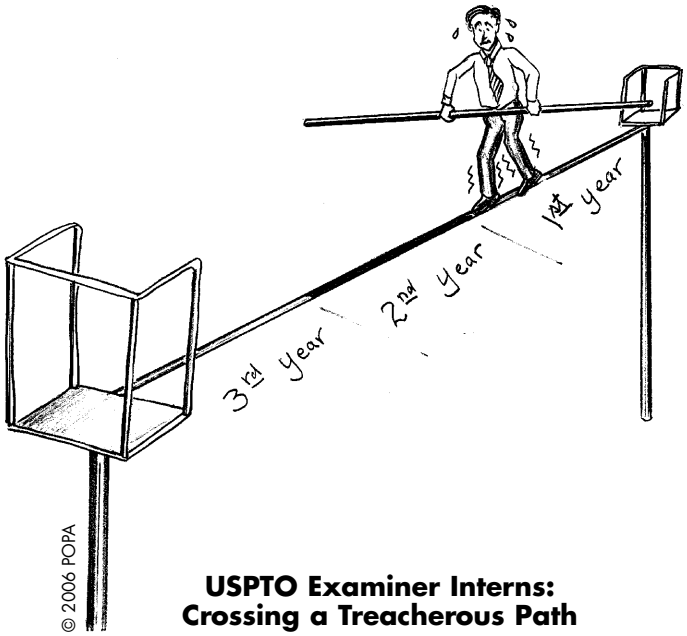
POPA NEWS
Patent Office Professional Association
May 2006 Vol. 06 No. 3

Patents Intern Program Boosts Flexibilities for Firing, Not Hiring

Prospective patent examiners need to take a hard look at the fine print before signing on to the Federal Career Intern Program (FCIP). What the USPTO writes and says about life as a patent examination intern may not be what's really in store.



USPTO Examiner Interns: Crossing a Treacherous Path

At *www.uspto.gov*, the job posting for GS-5,7,9 examiners now states:

> "Individuals will be appointed to a 2-year trial period and will be placed in an extensive training program that is tailored to the patent examiner position. Upon successful completion of the trial period, individuals will be placed into a permanent position in the Competitive service."

However, the official USPTO Agency Administrative Order 202-12 regarding the FCIP states under the heading of "Conversion to Competitive Service":

> "Service as an FCIP intern will confer no right or entitlement upon the completion of the internship to further Federal employment in either the Competitive or Excepted Service, except as provided for below. Competitive civil service status ***may be granted*** [emphasis in the original] to FCIP interns who successfully complete an internship and who meet all qualification, suitability, and performance requirements.
>
> …The length of an individual's intern program under the FCIP will depend on the entry grade of the intern and the target grade of the position, but will not be less than 2 years and not more than 3 years."

In other words, the conversion to the competitive federal service after the two-three year internship at the GS-5,7,9-level is not automatic or guaranteed. All the USPTO needs to terminate a probationary employee is a statement of conclusion by the supervisor that work is poor— no other documentation or examples are necessary. The unstated reasons could be for a supervisor's perception of a bad attitude, poor personal hygiene, personal computer or phone usage, or turnstile records. It is called "summary removal." A probationary employee is not entitled to a hearing, is not entitled to see the agency's evidence, or to cross-examine the supervisor.

Even if the FCIP intern successfully completes an effective minimum two-year probationary period, the USPTO must act affirmatively to hire the intern; otherwise, employment will terminate.

This is an about-face from the competitive service hiring system, which places new employees on a one-year probation. If the examiner successfully completes probation, the employee — who is already within the competitive service — is then entitled to full competitive service rights and protections. (*continued on page 2*)

Leading Congressman Responds to Examiners' Concerns

Rep. Tom Davis

Congressional leader Rep. Tom Davis (R-Va.) requested a study of USPTO hiring and employee retention practices after listening to POPA representatives' concerns about the agency's ability to tackle the growing patent backlog in the face of mounting examiner attrition.

POPA reps met recently with Rep. Davis's staff and discussed the growing perception among the business and patent community that USPTO patent examiners are "overworked" and "overwhelmed," as recounted in recent stories by major news media, including the *Wall Street Journal.* The response is very encouraging from Rep. Davis, who is the chairman of the House Government Reform Committee and the representative for many patent

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Patents Intern Program *(continued from p. 1)*

Why Change Competitive Service to Internship?

The USPTO has not clarified the benefit to employee retention, productivity or morale of hiring all new GS-5,7,9 examiner positions as interns. The only gain for employees appears to be an accelerated promotion capability, which the USPTO could have implemented without the FCIP program. The administrative order states:

> "If the supervisor of record determines that the intern has satisfactorily completed the requirements and attained the competencies required at the GS-5, GS-7, or GS-9 level, the supervisor can recommend that the intern be promoted up to six months early. There is no entitlement to an early promotion. Accelerated promotions can be made only from the GS-5, GS-7, or GS-9 level."

This non-assured promotion potential seems an unfair trade-off for the lack of civil service protections.

With examiner attrition rates at double-digit levels, the USPTO needs to consider paths to retaining new hires, not finding easier ways to fire them. The most recently available USPTO statistics for 2005 showed a more than 10 percent average attrition rate, with some technologies much higher. Only 45 percent of examiners have been on staff for more than five years.

Evading Merit System Principles

With the current vogue to run government more like a business, it's easy to lose track of the Merit System Principles as outlined by the Civil Service Reform Act of 1978. Indeed, as long ago as the 1883 Pendleton Act formation of the Civil Service Commission, the Congress and administration passed laws to keep the federal service free of favoritism and focused on hiring and promotion based only on merit and the ability to do the job.

The Merit Systems Protection Board summarizes several of the pertinent Merit System Principles:

- Recruiters should seek to achieve a work force made up of qualified people from all segments of society, and selection and promotion should be based solely on merit, after fair and open competition.
- Retention should be based on performance, inadequate performance should be corrected, and employees who cannot or will not improve their performance to meet required standards should be separated.
- Employees should receive effective education and training in order to achieve better organizational and individual performance.

The USPTO needs to explain why it must have "flexibilities" beyond these merit principles to hire and retain examiners. At this critical time when the USPTO must attract and retain the best employees, the FCIP does not improve the USPTO's hiring flexibilities, only its firing flexibilities.

The USPTO already fires almost 10 percent of all the non-Defense employees terminated for performance in the entire federal government, according to a recent National Academy of Public Administration study. It does not need more firing flexibility. Instead of developing more ways to easily fire employees, USPTO management needs to work with POPA to give examiners more time to do a quality examination of patent applications and pay examiners what was promised in the Millennium Agreement.

Rep. Davis Responds to Examiners

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examiners who live in his congressional district.

As reported at *FederalNewsRadio.com* in April, Rep. Davis asked the Government Accountability Office to clarify:

- If the USPTO has met its hiring goals.
- What impact attrition has had on the examiner workforce.
- The reasons why "so many examiners leave ... in their first five years."
- How efforts to offset attrition have worked, or not.
- The impact of working conditions on attrition.
- How the USPTO figures how many examiners it will need to reduce the patent backlog.

USPTO Wins Right to Block Pay Increase

POPA's legal appeal to get the USPTO to provide employees with an annual adjustment to the examiner special pay rate — as promised by the agency in the USPTO-POPA Millennium Agreement — was dismissed in mid-March by the U.S. Court of Appeals for the D.C. Circuit for lack of jurisdiction. The court stated that judicial review of this Federal Labor Relations Authority case is "statutorily foreclosed."

This court decision does nothing to solve the USPTO's soaring rate of examiner attrition. It does not move the agency towards decreasing the escalating patent pendency and increasing examination quality. It only gives the agency the right to not pay examiners what it promised to pay them.

POPA is currently reviewing its options, e.g., the possibility of pursuing its pending grievances for later years of the Millennium Agreement, and will continue its efforts to get the USPTO to pay examiners what they deserve.

Checks in the Mail

The POPA membership campaign, which ended Feb. 28, netted many new Association members and generated bonuses for the member-recruiters.

All of the bonus checks have been distributed. If you are due a bonus and have not received it, please contact POPA Treasurer Randy Myers at 571-272-7526.

Feedback on USPTO's Contract Proposal

POPA received more than 100 "Feedback" submissions at *www.popa.org* in response to the USPTO contract proposals. Here are excerpts from a sampling of the comments received.

■ I am appalled by management's assumption that we employees cannot do simple math and figure out that the bonuses under the proposed agreement are actually less than the current scheme. Those who do 115 percent will still receive much more money under the current plan than the proposed one. We employees feel replaceable and disrespected. Management may not feel that it has to raise the pay scale in order to hire us, but it sure should if it wants to keep us!

■ I am dismayed that management's most recent contract proposal is not at all improved over the previous proposal. This tells me that management's interest in feedback from the examiners is only lip service. I am very concerned with the proposed new restrictions on the examiner work schedules. The sole reason I remain at the USPTO rather than make big bucks at a law firm is the flexible work schedule.

■ Why eliminate the current contractual obligation to treat employees fairly and equitably across art unit lines? Despite the director's kind words about examiners in public, this sort of language in the official contract makes it clear that management does not consider us professionals who deserve fair and equitable treatment. If it were a fair contract, management should have no fear of legal grievance procedures or POPA representation.

■ The purpose of the IFP program is to allow flexibility. What happens if there is an accident on the Beltway and you cannot arrive at your scheduled time? Are you AWOL, do you have to take annual leave, or do you go on LWOP? What happens if you arrive early at work? Do you have to wait before starting? I can envision supervisors denying requests for midday flex because you're not at 110 percent production or you have too many amendments in your docket or you have to give searches to junior examiners.

■ It is proposed that new employee 'interns' may be probationary for two-three years, and also it is proposed that maternity and paternity leave may only be granted for non-probationary employees. When those two proposals are combined, I don't see how anyone between the ages of 22-45 (male or female) with the hope of raising a family would ever consider starting to work here. I don't see how this goes with the hope of hiring 1,000 people per year.

■ Awards for 140 percent production seem unrealistic. I know of few if any examiners who will do 140 percent production, and with no award below that, they will not do much over 100 percent, focusing on quality instead. Maybe that's what management wants, but then there is no need for production awards at all. Focus on quality awards.

■ Adversarial negotiations are harmful to the parties represented. Compromise on a reasonable and balanced agreement must be reached.

■ Why can't more of an incentive program be introduced to increase production? For example, if you do 120 percent of production and have met the quality standards you would get a 15-20 percent bonus. Five primary examiners performing at 120 percent equals the work of an additional primary examiner. Further, if the office increases the incentives for employees to do more work the office saves on the benefits, utilities, and training funds it would take to hire new examiners who take roughly five years to perform at the primary level.

■ I would not work mandatory overtime. Private or semi-private offices are necessary to concentrate on the work. What matters is that the work is done, not when it's done.

■ As a USPTO employee on IFP, I should be able to take the same amount of "other" time as other employees take, regardless of what type of schedule I work.

■ I currently use credit hours for Sundays. I could claim compensatory time or overtime on Sundays, but I just do enough production to complement an 80-hour bi-week already. Plenty of people use credit hours on Sundays (the parking garage is usually packed by the time I leave). It makes no sense to take that away if the office is so concerned about reducing pendency and promoting quality. A lot of the agency's changes take away privileges without giving an explanation as to why it needs to be done.

■ It is alarming to see what is going to happen to examiners [with these proposals]. I am working with a wonderful group of people, a great supervisor and primaries. I will have to leave if things get difficult. Life is just too short to destroy it with these kinds of restrictions. Lots of restrictions will take away the power of innovation and productivity in a professional environment.

■ The proposed [quality] guidelines (although seemingly attractive) are near a farce, as examiners who have earned a performance award are excluded from being eligible for a quality award and visa versa.

■ One of the main reasons I decided to come to the USPTO over higher-paid private jobs was the flexible schedule we are allowed. It shows that the office trusts us and knows we will still do a good job when given freedom. That meant a lot to me. Given that freedom, I have been able to manage my personal and professional responsibilities effectively. In an era when the office desperately needs to hire and retain good examiners, this [proposal] certainly does nothing but hurt that goal.

■ I don't want to leave, but take away my flexibility, my right to union representation via grievances, etc., or impose mandatory overtime, then there's no reason for me to stay. Those issues would remove all of the reasons why I'm still a patent examiner of nearly four years of service. [The USPTO is] not going to reduce the backlog on the backs of thousands of new examiners — they won't stay long enough to reach the upper GS levels and produce.

Putting Employees First

POPA's Priorities in Contract Negotiations

Patent professionals responded loudly to the USPTO's published contract proposals with many specific comments to POPA. The Association is listening to its bargaining unit members and will take the input into account when at the bargaining table.

Based on employee feedback, POPA's priorities in upcoming contract negotiations will include, but not be limited to, the following:

Flexible Schedules. The USPTO's proposal to change the "Increased Flex Program" turns the term into an oxymoron. POPA recognizes the agency's need to know employees' work status and will work with the USPTO to ensure that the program is sensible and fair, rather than punitive.

Employee Workplace Protections. POPA's position will be to shield employees from undue pressures to grant or not grant particular patents for political or other inappropriate reasons. Employees currently are protected from being fired without just cause, allowing employees to work solely in the public interest. The right to challenge unfair treatment through a negotiated grievance procedure protects employees and the patent system. Without adequate workplace protections, patent integrity is meaningless.

Mandatory Overtime Limits. The current contract prevents the USPTO from mandating overtime without good reason. The agency's proposal sets no overtime limits. Employees need a procedure to contest any unjust or harassing use of mandatory overtime.

Equitable Treatment. POPA's goal is to ensure that the standards for examination and employee worklife are equally applied across all technology centers and art units. Equitable treatment avoids turning individual art units into petty kingdoms. It also ensures that when an employee has successfully completed a performance improvement plan or disciplinary period, he or she fairly will receive all the rights and benefits of an employee in good standing.

Professional Development. To maintain a high standard of knowledge and expertise in their fields, examiners require time to review the latest literature. They also must have adequate training in their technical disciplines, patent law, and in the USPTO patent examination tools and methods.

Adequate, Suitable Office Space. Patent examination demands intense concentration. Examiners must have quiet, private space to do a quality job.

Friends in Need

Be a friend in deed by considering a contribution of annual leave to one of the USPTO patent professionals listed as needing medical/family leave with the agency's leave transfer program.

Please go to *http://ptoweb/ptointranet/ohr/employees/benefits/leave_transfer.htm* to learn how you can help.

SPE Spyware

A patent examiner recently sat in the office of a supervisory patent examiner (SPE) discussing a proposed disciplinary action. He noticed that whenever he'd shift position, the supervisor would move correspondingly. That's when the examiner spotted the Web camera mounted on the SPE's computer. It was pointing right at the examiner and the supervisor seemed to be scooting his chair to keep the two of them within the lens' view.

Was this the examiner's needless paranoia? Maybe. But with the installation of a Web cam and microphone in the office of every USPTO manager and supervisor, the potential to record the audio and visual content of every meeting in those offices is very real.

The software that comes with the Web cams can activate recording via remote control and motion detection. In other words, a supervisor can be out of the office viewing or recording remotely, controlled by a remote mechanism or automatically with the motion detector.

This doesn't mean that your SPE is likely to record you each time you seek guidance on a search or office action. But be aware that your discussions, particularly on performance-related topics, may not be kept in confidence even if the door is closed — and your actions in an office may be recorded even if the office is empty.

"Patent Pileup"

"In recent town-hall meetings, John Doll, the commissioner for patents, unveiled a plan to hire 1,000 additional examiners, who would then be trained for eight months in a new academy. However, the PTO has calculated that even this effort would barely make a dent in the backlog and quality problems (*though its reason for this conclusion is unclear*)."— "Patent Pileup," from *Legal Times,* April 3, 2006 (emphasis added)

Patent Office Professional Association

Letters from readers are welcome. Address to:
The Editor, Patent Office Professional Association,
P.O. Box 2745, Arlington, VA 22202

Officers

Robert D. Budens, *President,* (571) 272-0897

Lawrence J. Oresky
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