POPA NEWS
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Union and Agency Collaborate, Reach Agreement

Collaboration paid off for POPA and the USPTO as officials from both groups worked out an agreement regarding recruitment/retention incentives and union representation that both parties signed in mid-May.

The USPTO agreed to withdraw its collective bargaining agreement proposals that would have, in practice, prevented POPA from effectively representing employees in personnel matters. POPA agreed to withdraw its grievance requesting to bargain over the agency's recently announced retention and recruitment incentives.

This successful effort positively propelled POPA and the USPTO to work on identifying additional priorities ripe for collaboration. The union and agency now are cooperating on drafting a proposal to the Office of Personnel Management to raise the examiners' special pay rate.

Recruitment/Retention Incentives

The incentive bonuses, outlined in Agency Administrative Orders 202-1 and 202-2 dated April 17, 2006, are one-time awards that require the recipient to commit to work for the USPTO for a specified length of time or repay all or part of the sum. The bonuses don't accrue to an employee's basic pay rate. POPA anticipates that the agency primarily will use the bulk of the incentive funds for recruitment, rather than retention.

To address retention and continuing employee attrition concerns, the USPTO agreed to work with POPA to request an increase in the special pay rate. USPTO Supervisory Patent Examiner Maria Nuzzolillo and former POPA President Ron Stern, the authors of the 2001 Millennium Special Pay Rate, are collaborating on a request to OPM.

Effective Union Representation

The USPTO agreed to withdraw its plans to cut union time, eliminate employee-union confidentiality, and other proposals that would have inhibited POPA's aid to

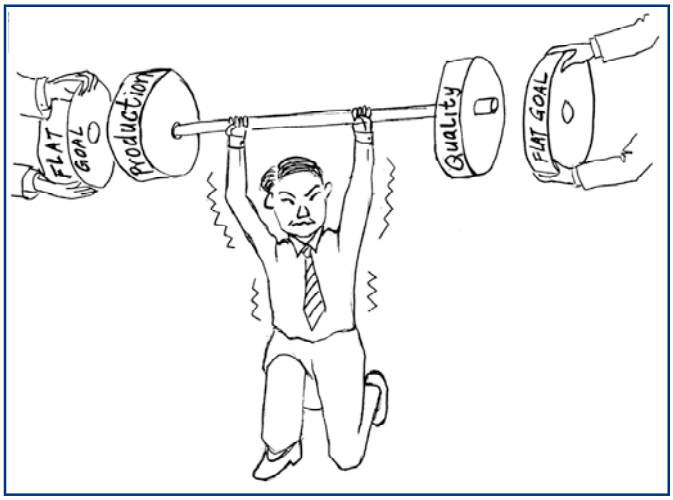
(*continued on page 2*)

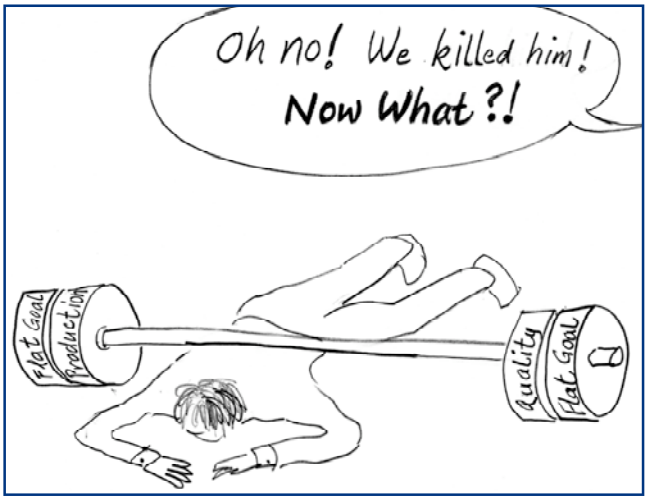
Sen. Mikulski, *POPA News* Reader

Sen. Barbara Mikulski (D-Md.) waved a copy of the *POPA News* to make a point to Secretary of Commerce Carlos Gutierrez during a recent congressional hearing. During the Senate Appropriations Committee hearing on the fiscal year 2007 Department of Commerce budget, Sen. Mikulski stated that the growing patent pendency isn't good for the entrepreneurs of Maryland. She cited the Government Accountability Office study that reported the USPTO's examiner retention problems.

Then holding up a copy of the *POPA News* (POPA's eyewitness, attorney Richard Hirn, couldn't discern which issue), Sen. Mikulski asked Secy. Gutierrez how he planned to implement the recommendations of the GAO to improve communications and retention.

It is good to know that USPTO employees' concerns are being heard in the halls of Congress.





Union, Agency Reach Agreement

(continued from p. 1)

employees. The current time allowances for representational activities will continue through the next USPTO-POPA contract virtually intact.

Union and agency officials sign the memorandum of understanding on recruitment/retention incentives and union representation. [L to R] Seated: Deputy Commissioner for Patent Operations Peggy Focarino; POPA President Robert Budens. Standing: Acting Chief of the Labor Relations Branch Michele Gonsalvas; Labor Relations Chief Negotiator Dave Dalke; TC 3600 Director John Love.

Both parties came out ahead with this agreement. The agency needed monetary incentives to boost a flagging new-hire program. The union needed to maintain its ability to act on employees' behalf—without that, the remainder of the collective bargaining agreement would be worthless. And both groups found a common ground to work together on additional initiatives.

An Editorial

The Role of *POPA News*

Some newer examiners have shared with POPA their concerns about the style of the *POPA News*. They said that the headings made the union look "disgruntled" and that the newsletter generally only tells one "biased" side of the story.

They're right.

POPA is the employees' advocate. It is the Association's job to tell the news from the employees' perspective. The USPTO very capably tells its "biased" side of the story directly to employees via its internal publications and employee e-mails. POPA provides balance.

The *POPA News* supports its positions with USPTO-generated statistics and statements as well as published information from respected organizations within government—such as the Government Accountability Office—and without government, such as the National Academy of Public Administration. The facts are substantiated. They indeed are used exclusively to support positions that stand up for patent examination integrity and the rights and respect due to patent professionals.

Most examiners remember the pride, excitement and optimism of the first years doing the vital and fascinating work of patent examination. We believe in the patent system and its value to American innovation and prosperity. We want it to succeed. From POPA's many years of experience we also believe that many of the current administration's policies are not in the best interest of the U.S. patent system and the employees that make it work.

For good-news reporting in the *POPA News*, go to the newsletter archives at *www.popa.org*. Look at the editions from the first half of 2001. You'll see proud announcements of the USPTO's signing of the Millennium Agreement; POPA's call to Congress to increase funding for the agency; the USPTO's enacting the special pay rate increase for patent professionals. Working together, the USPTO and its employees are capable of great things.

The *POPA News* will continue to advocate for improving the USPTO by educating the agency, its employees, and the wider patent community on the impact of USPTO management decisions and employee-valuing alternatives. We will strive to do so in a way that reflects the sensibilities of as many bargaining unit employees as possible.

Agency Bound to Private-Office Agreement, Arbitrator Says

The USPTO "is committed to provide a private, 150-square-foot office to each GS-13 through GS-15 examiner," stated an arbitrator in a recent decision, setting up a process to ensure private workspace for senior patent professionals.

Arbitrator Paul J. Fasser, Jr., underscored this "plain hard fact" by telling the USPTO to "immediately take action to provide the union with information concerning every GS-13 to GS-15 examiner who is presently doubled and the circumstances of such doubling."

Fasser then said that the examiner may grieve or challenge the USPTO's justification and any examiner "who is determined to have been improperly doubled shall be entitled to appropriate disturbance time." Disturbance time is a 7 percent productivity adjustment for the entire time the examiner is doubled applied to a time when it can do some good for the employee, i.e., at the time the grievance is resolved.

Fasser built this finding upon a 1999 arbitrator's decision, which stated:

> "When it is not possible to provide 150-square-foot private offices to all unit members, then the PTO may double up employees in grades GS-12 and below in offices of approximately 150 square feet, but not employees at GS-13 and above, who will be guaranteed private offices of 150 square feet each."

USPTO Flat-Goal Plan Equals Higher Examiner Production Goals

While the word on the patent community street says that examiners need more time to do a quality examination, the USPTO intends to start a flat-goal production plan that will increase pressure on examiners to do more work faster.

The USPTO announced a new performance appraisal plan (PAP) pilot program beginning Oct. 1 that would require a flat goal of production units per year per examiner and raise the production level required for a fully successful performance rating by 5 percent, from 95 percent to 100 percent. (This does not include any additional production increases from calculating the flat goal.)

Program participation during the pilot's first year would be voluntary, with the agency saying it may extend the program after that time without negotiating with POPA. Probationary employees will not be eligible to participate and all participants must be on the Increased Flexitime Program (IFP). Examiners who opt to participate must do so for the full two-quarter period of the pilot.

An examiner volunteering for this PAP pilot would, in essence, contract with the agency to act on a defined number of cases determined by management during the review period. An examiner would need to complete 100 percent of the assigned goal to maintain a fully successful rating and keep all the benefits that require at least a fully successful rating, e.g., IFP, hoteling, compensatory time, and overtime. In exchange, "The Office has determined to grant awards for each production unit over the established goal to a maximum of $10K," wrote the USPTO in its notice to POPA.

Do the Math

The agency said that the goals would be figured by technology expectancy using a base goal of 80 percent examining time (64 hours/bi-week). Historically, the patent corps averages 70-75 percent examining time, with the remaining time used for training, appeals conferences, interviews, leave time, etc. Therefore, the new goals have a built-in additional average increase of 5-10 percent.

The USPTO's assumptions of time needed by examiners to perform non-examining functions were not based on actual examination data. The USPTO's calculation that employees should average no less than 80 percent examining time per bi-week assumes for each employee:

- 8 hours per holiday;
- 20 days of annual leave per year (26 days for employees in 8-hour leave status, 13 days for employees in 4- hour leave status);
- 6.5 days of sick leave per year;
- 2.5 hours per bi-week to train a junior examiner;
- 1 additional hour per bi-week to train a junior examiner who is a probationary examiner;
- 1 hour per bi-week for classification of new cases;
- 1 hour per bi-week to process pre-grant publications;
- A total of 5 hours per bi-week for all other categories of non-examining time (restrictions, PCTs, legal or automation training, etc.).

Furthermore, management's program makes no provisions to deal with extended sick leave or leave without pay for family or medical reasons until an employee exceeds 26 days per year. In other words, if an employee were ill for more than 6.5 days but fewer than 27 days, the examiner would remain responsible for the production during that time.

Because participants in the PAP pilot will have to elect the Increased Flexitime Program rather than a compressed 5/4/9 or 4/10 work schedule, employees currently working a compressed work schedule will lose the additional holiday pay that they now receive of 10 hours for two quarters or 20 hours over a full year.

Management has proposed a new award program applicable to the flat-goal PAP program. This flat-goal bonus program would replace the existing gainsharing awards for participants, though the special achievement awards (SAAs) would continue.

The new award program would provide a cash award for each production unit achieved above the employee's goal up to a total of $10,000 every two quarters. A GS-14 examiner with an expectancy of 20 hours per balanced disposal (BD) could earn up to $294 per BD. If that same examiner claims the time as overtime, however, he or she can earn three to four times as much (unless the USPTO blocks overtime or the statutory earnings cap applicable at higher pay grades/steps limits the examiner's overtime usage). It's much to the USPTO's advantage to pay awards for piecework balanced disposals rather than overtime.

Examiners who may be tempted to apply for this program and new award are those already working at high production levels and at a high percentage of examining hours per bi-week.

This new PAP is similar to the one the USPTO implemented more than a year ago for trademark attorneys. (See the April-May 2005 edition of *POPA News* at *www.popa.org.*)

The USPTO impeded POPA's attempts to fully communicate the details of this flat-goal plan. POPA sought to inform all employees of this program at a series of meetings, which all examiners could take two hours of non-examining time to attend. The agency slotted Friday, May 19 for the meetings, despite POPA's protests that many employees flex on that day and would be unable to attend. Due to the size of the room allowed and the scheduling, approximately 2,000 employees attended, with many of the sessions standing room only. That equals less than half of the examining corps.

POPA has requested to negotiate on the impact and implementation of this new PAP plan. Unless and until POPA and the USPTO reach agreement on this issue, POPA cannot recommend participation in this program to examiners.

Hoteling Survey Checks Out Examiner Concerns

Tweaking the current USPTO hoteling program to address employee anxieties about the program would produce greater enrollment and employee satisfaction, according to a recent POPA survey of patent examiners.

The May survey of almost 1,200 examiners showed that only 8 percent of the eligible employees surveyed had signed on to the hoteling program, while 37 percent had chosen not to. (Of those surveyed, 52 percent were ineligible at the time to enroll.)

Responses indicated great employee concern about not being compensated for production time lost when hoteling computer systems are slow or not working. Similarly, employees seemed wary of giving up their USPTO office in the event that hoteling didn't work out for them—nearly 60 percent said they would much more likely apply for hoteling if they had the option of keeping their office for six bi-weeks following their start on the program.

Several of the survey questions showed that the agency can make changes in hoteling that will attract many more examiners to participate, such as granting examiners the ability to continue hoteling during a performance improvement period. Respondents overwhelmingly backed a POPA-USPTO partnership on the terms of hoteling, denoting the need for more employee input on the program.

POPA welcomes the opportunity to work with the USPTO to make the hoteling program more successful for the agency and employees.

POPA Hoteling Survey

1,198 patent examiners responded

1. Without regard to eligibility, what type of telework program would you be interested in *MOST*?
1 day/week (current program) – 13.0%
2 days/week, keep office – 39.0%
3 days/week, share office – 8.9%
Hoteling – 35.5%

2. If you are eligible under management's current criteria, have you signed up for the hoteling program?
a) Yes – 8.2% b) No – 36.6% c) Not Eligible – 52.1%

Questions 3-8:

Regardless of whether or not you are eligible, how important is each of the following items in making you *more likely* to apply for a hoteling program? Please circle either A, B or C for questions 3-8 according to the scale below.

A = not important B = somewhat important C = extremely important

3. Keep your USPTO office for 6 bi-weeks after starting a hoteling program.
A. 13.1% B. 26.0% C. 59.4%

4. You can continue hoteling even during a performance improvement period (after receiving an oral warning).
A. 13.9% B. 33.6% C. 51.0%

5. You get compensated (i.e. non-production time) when the computer systems are slow or not working.
A. 4.5% B. 12.0% C. 82.3%

6. You are permitted to use hoteling space two (2) days per week.
A. 21.8% B. 39.7% C. 36.8%

7. Travel time to and from the office is part of your official duty time.
A. 18.8% B. 27.9% C. 51.5%

8. POPA and the Agency reach an agreement on the terms of the program, and POPA endorses the program.
A. 6.3% B. 18.5% C. 73.4%

9. Do you think that hoteling will negatively impact the quality of patent examination?
a) Yes – 21.2% b) No – 38.3% c) not sure – 39.2%

10. Do you think that hoteling will increase the training burden on the employees not on the program (i.e. employees who work almost exclusively at Carlyle)?
a) Yes – 65.4% b) No – 11.9% c) not sure – 21.2%

11. Do you think it will negatively impact you if your supervisor participates in hoteling?
a) Yes – 51.0% b) No – 30.7% c) not sure – 16.9%

12. Are you a POPA dues-paying member?
a) Yes – 66.5% b) No – 31.6%

Kinks in the Hoteling Chain

Problems Aggravate Program Startup

Many examiners who opted into the hoteling program have been met with inexplicable denials of non-production time for the many hours needed for their office move, training and the associated disturbance time. POPA has filed an Association Grievance on their behalf to have them rightfully compensated for their time.

Many examiners were astounded by the "gross inequity" in the refusal of non-production time, as one examiner wrote.

"When I moved my office from Crystal City to [Carlyle], I was granted 18 hours to pack and unpack," he said. "When I moved from [Carlyle] to my home office, I was granted a total of one hour to scrounge boxes, pack 22 boxes, find something to transport those boxes to the front of the building, bring my car to the front of the building for loading followed by returning it to the parking garage to avoid a ticket while I brought another load down, drive the carloads of boxes home, carry the boxes to my basement office and unpack those boxes."

Examiners similarly were denied disturbance time when "the training room where we were forced to work for nine days was a noisy conference room set up with workstations for 11 examiners," an examiner stated.

"My production in the training room was virtually non-existent," wrote another. "People are on the phone, talking to the other examiners in the room, asking questions of the instructors, walking around."

Hoteling employees have also reported to POPA, however, that once their home offices are up and running, the lack of commuting offsets the trials and tribulations of the hoteling startup.

Triple Winners of Community Day Quiz

Many people tested their knowledge of POPA and the USPTO by taking the annual POPA Community Day Quiz, producing a three-way tie for first place.

The three winning participants were bargaining unit members Robert Popovics of TC 1700, Urmi Chattopadhyay of TC 3700, and David Dunn of TC 3600. Congratulations to our winners.

Next, a disclaimer: POPA has never been affiliated with nor utilized lobbyist Jack Abramoff, as some may have thought from Question 1 on the quiz. Former Congresswoman Helen Bentley (Md.) has served as POPA's lobbyist for approximately ten years now.

In Question 2, the last USPTO director or commissioner who was also a patent attorney was Q. Todd Dickinson. To answer Question 3, under management's proposed contract, three years is the time period in which you must not have had an adverse action taken against you to definitely qualify for maternity/paternity compensatory time.

For Questions 4 and 5, the numbers of members of the POPA Executive Committee who held law degrees and who held doctoral degrees at the time of Community Day was six and three, respectively. However, the very next week, POPA Electrical Delegate Julie Anne Watko, TC 2600, graduated from law school, raising the number holding law degrees to seven. Congratulations Julie Anne.

To answer Question 6, POPA negotiated the Gainsharing Award in 1988. Fifteen women serve on the POPA Executive Committee, for Question 7.

The nation's first patent examiner was Thomas Jefferson and the subject of the first U.S. patent was potash to answer Questions 8 and 9, respectively.

Many people were not aware that POPA had negotiated for all of the programs listed in Question 10—Signatory Authority, Compressed Work Schedules, Transit Subsidies, Special Pay Rates, Gainsharing Awards, Compensatory Time, Telework, Part-Time Schedules and Law School Tuition.

The director or commissioner who was a former congressman was James Rogan in Question 11, and the director or commissioner who revived the Law School Tuition Program was Jon Dudas in Question 12.

On a humorous note, an employee in USPTO Labor Relations wrote, in answer to the question of how many members of the POPA Executive Committee hold law degrees, "Too damn many."

The three winners of the 2006 POPA Community Day Quiz receive their cash prizes from POPA President Robert Budens. [L to R]: Robert Popovics, TC 1700; Urmi Chattopadhyay, TC 3700; Budens; David Dunn, TC3600.

POPA Lobbyist Honored

Helen Delich Bentley

At a June 1 celebration of the 300th anniversary of the Port of Baltimore, Maryland Gov. Robert Ehrlich announced that the port would be renamed the "Helen Delich Bentley Port of Baltimore" after its longtime supporter, Helen Bentley, a former Maryland congresswoman and current lobbyist representing POPA's concerns before Congress.

Bentley's association with the port began in 1945, when she started as a reporter for *The Baltimore Sun* covering the port. Her work led to her being named the chair of the Federal Maritime Commission in 1969. During her tenure in Congress from 1985 to 1995, she supported the port's modernization. After leaving Congress she's served as a consultant to the port.

POPA officials credit Bentley for helping the union to gain the ear of Capitol Hill decision-makers on patent examination issues.

In the Know

Transit Subsidy Info

A new employee recently asked a POPA representative about how to handle the excess money remaining on a SmartTrip card provided by the USPTO transit subsidy program. POPA inquired and the USPTO representative replied (verbatim):

> Currently a maximum of $300 may be put on the SmartTrip card. If, at the end of the calendar quarter (March 31, June 30, September 30, or December 31), there is transit subsidy benefit remaining on the SmartTrip card, the employee can write a check for the amount of the unused transit subsidy benefit to the "Director of the USPTO," and turn it in to the Office of Finance (Carlyle Place, Suite 300).

USPTO Heeds POPA, Cancels Proposed Firing

The USPTO rescinded an employee's notice of proposed removal after heeding POPA's oral and written replies on the employee's behalf, signaling the agency's possible willingness to consider the mistaken actions of its supervisors instead of seeking costly arbitrations.

POPA had argued that the GS-13 examiner—who'd received the proposed removal notice for unacceptable performance in the critical element of production goal achievement—did not make his production because his supervisor refused to promptly and properly review the work that he had timely turned in. The supervisor also denied production credit for any of the examiner's work until the supervisor had signed it, even though GS-13s routinely submit work in final form. The supervisor's lack of action set the examiner up to fail.

Given his GS-13 status, the employee was entitled to "cursory review" and the supervisor had ample time to review and credit all the work that was handed in prior to the end of "count Monday." Instead, after 2 p.m. on that count Monday, the supervisor refused to review any more of the employee's work, though the supervisor could count work until 5 p.m. that day and knew that the employee needed the two extra counts to meet production and avoid being fired.

POPA pointed out to the USPTO that this case was even more compelling than another similar case that POPA had arbitrated, winning the employee's reinstatement. The agency apparently agreed and withdrew the notice of proposed removal, seeming to realize that its own agent was responsible for not promptly reviewing and counting the employee's work.

Patent Office Professional Association
Box 15848, Arlington, VA 22215

June 1, 2006

RESOLUTION

In support of the Staff Union of the European Patent Office

Whereas:

- A strong patent system is a necessary and powerful stimulus of innovation and economic growth;
- Quality initial examination of patent applications by well-trained and highly skilled patent examiners forms the basis of a strong patent system;
- The lack of quality examination threatens the integrity and credibility of a patent system
- The Patent Office Professional Association agrees with the Staff Union of the European Patent Office that:
  - The complexity of patent applications and the volume of available prior art have increased significantly over the last 20 years;
  - Examiners in both the USPTO and EPO are working at maximum capacity;
  - Patent offices world-wide are coming under increased public scrutiny and criticism for the quality of issued patents;
- Unless a system for evaluating examiner performance is both objective in nature and based upon the actual amount of work required to examine each individual application, it will create the wrong incentives and will adversely impact the quality of examination.

Be it RESOLVED that:

The Patent Office Professional Association stands in support of our friends and fellow examiners of the European Patent Office as they continue the fight for adequate time for quality patent examination at the European Patent Office.

Robert D. Budens, President
Patent Office Professional Association

Supporting Quest for Quality Examination in Europe

The members of the Staff Union of the European Patent Office (SUEPO) are, like USPTO examiners, fighting with their management to maintain quality patent examination. EPO management wants to change their performance standards in ways that would dramatically increase their production requirements and adversely affect the quality of examination.

The POPA Executive Committee unanimously approved a resolution of support for its fellow examiners at the EPO, which POPA President Robert Budens transmitted in June to SUEPO Central Chairman Francois Basty.

EPO management, like the USPTO, is attempting to increase the production of its examiners at the expense of quality. POPA wishes its fellow EPO examiners well as they continue their fight to maintain high quality examination.

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
Vice President/Director of Grievances, (571) 272-6930

Howard Locker, *Secretary/*
Director of Adverse Action Challenges, (571) 272-0980

Pamela R. Schwartz, *Assistant Secretary/*
Director of Unfair Labor Practices, (571) 272-1528

Randy Myers, *Treasurer,* (571) 272-7526

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