POPA NEWS
Patent Office Professional Association
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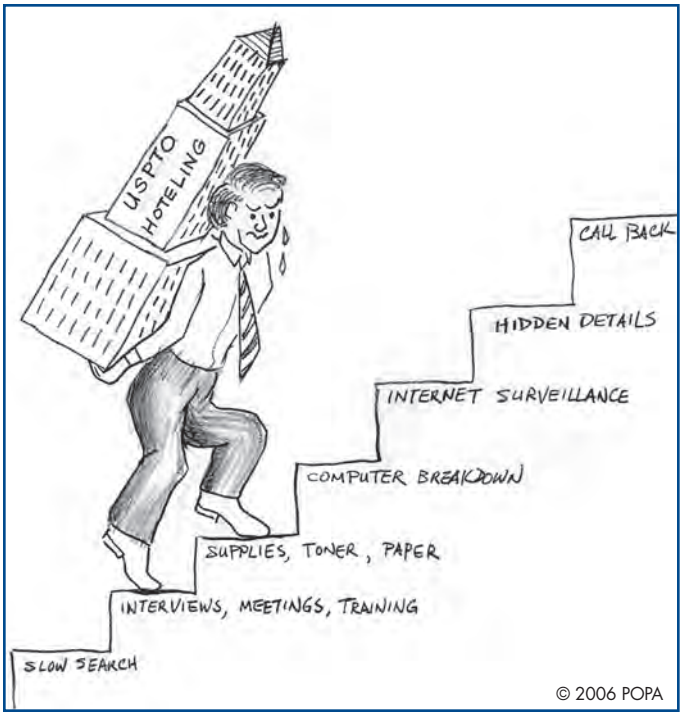
Patents Hoteling: Too Hot to Handle

The Patents Hoteling Program (PHP)—announced on Dec. 12, 2005, by USPTO Director Jon Dudas—may sound like an enticing work-at-home idea to eligible examiners, but the details will bedevil even the most conscientious employees. Instead of accepting a hoteling program that requires employees to sell their workplace souls for the ability to telework, POPA is seeking to work with the USPTO to create a telework program with reasonable protections for all employees.



What the USPTO *Doesn't* Tell You

The specifics that the agency omitted from its hoteling program leave employees vulnerable to potential mistreatment by managers.

The USPTO hoteling program requires that participating employees travel to Carlyle at least one hour each week whether it's needed or not. Does the USPTO believe there is any work you could do better and faster in a hoteling cubicle at the office than you could do at home? No. Management wants you at the office because this gives the agency the ability to make Carlyle the employees' official duty station. This means that employees must pay for their expenses and eat the time for travel to and from the office. Alternately, if the hoteling program makes the duty station an employee's home, every time a manager calls the employee to the office the agency would need to reimburse the employee for travel and the time would count as "other" time.

If an employee spends the overwhelming amount of work time at home, the duty station should be at home. This arrangement is fair and would induce the agency to better respect the employee's time and accept the costs of doing business on site.

If the electricity goes out at your home or your Internet connection goes down or if everything works but very s-l-o-w-l-y, the hoteling program has no provisions for granting "other" time. You will be on your own and on the clock.

The USPTO hoteling program also does not detail the extent of access the agency receives to monitor your equipment or your activities or your personal Internet use. Under hoteling, you'll carry home supplies yourself, including reams of paper. Before signing up, you need to consider how comfortable you will be doing training, meetings or interviews in front of a video Web cam and having these videos archived for possible litigation or disciplinary uses.

In his memo Director Dudas described hoteling:

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POPA Asks the USPTO to Increase Special Rate Pay

The USPTO's rapidly increasing examiner attrition rate —and the agency's failure to comply with 2005 minimum examiner staffing rates mandated by Congress—proves the critical need for the USPTO to seek an increase in examiners' special rate pay for 2006 as requested by POPA in early January 2006.

The agency owns the tools to increase pay and reduce the number of examiners heading for the exit, and it consented in 2001 to use the tools every year, but hasn't. When the USPTO signed the Millennium Agreement in 2001, it sought an increase in examiners' pay by 10 percent over the D.C. area General Schedule rate. It also agreed to annually request the Office of Personnel Management to increase pay to maintain that differential.

Only once, however, in 2002, did the agency actually ask OPM, which denied the raise claiming that it wasn't needed to retain and attract employees. Since then, the agency has refused to ask OPM for an increase, claiming that the agency did not have any problems attracting and retaining employees. POPA continues to litigate the agency's refusal to honor the Millennium Agreement pay proposals.

During the first week of January, POPA met with Commissioner for Patents John Doll to ask that the USPTO

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POPA All-Members Meetings February 15 and 21

Hoteling

We need to hear from you. Tell us what you need in a hoteling program. There will be a written survey of dues-paying members.

Other topics to be discussed:

- Production goal increases
- Patents special pay rate
- Contract negotiations

➔ ***One hour of "other" time will be available for this meeting***

POPA: Keeping You Informed

Patents Hoteling

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"Participants can reserve time in on-campus 'shared offices' to conduct certain business, such as interviewing applicants and attorneys, receiving training, attending meetings, and using on-site resources as needed." He didn't mention that the "as needed" is determined solely by your managers and could be as often as they like and at the drop of a hat, creating logistical nightmares for participants.

For example, a Jan. 9 memo to all Technology Center 2600 employees announced meetings for the following day, stating, "This meeting is mandatory and your attendance is therefore required." The first meeting was scheduled for 7:30 a.m. and the last would not end until 4:30 p.m. Employees on hoteling would need to rearrange their at-home schedule in fewer than 24 hours to meet this demand.

If after you've signed onto the agency's hoteling program you find that it isn't working for you—or your performance rating falls below fully successful—the USPTO says you will need to return to work on site. Only now, you won't get your office back. Hoteling doesn't give any guarantees on what kind of office you'll return to, and the USPTO is already installing cubicles and planning on three people per office space for those on hoteling.

Without a fair, negotiated agreement instituting a telework program, the USPTO can terminate an individual's participation or its entire hoteling program at any time, throwing the lives of employees into immediate turmoil. The USPTO has cancelled a program without warning before, shutting down the law school tuition program after employees had registered and paid for classes, leaving them with thousands of dollars of debt. Such a turnabout could happen again.

Dealing with USPTO technology through the hoteling program can also consume hours of examination time. Director Dudas in his memo wrote, "PHP participants will have all the communications tools and application processing capabilities they need to do their jobs remotely." The USPTO says it will provide computer maintenance and repair training initially to hoteling participants so they can troubleshoot with tech support staff over the phone. Only when all else fails will the program send a tech support professional to service your at-home equipment or software, but with no assurances of timeliness. And the hoteling program doesn't pledge "other" time for any needed tech support.

Working Together on Telework

POPA has been striving to convince the USPTO to expand the telework program for years. However, to protect employees' rights set forth in several of the existing USPTO-POPA contracts, which the agency hoteling program directly violates, POPA did not enter into formal negotiations on the hoteling program.

Formal negotiation would allow the USPTO to bargain insincerely, quickly declare an impasse, and then have the agency's proposals imposed upon examiners by the Federal Service Impasses Panel (FSIP). The current FSIP, composed of part-time political appointees, virtually always sides with management. This is the same panel that wholly agreed with the USPTO and imposed the "quality initiatives" that many examiners revile.

POPA would negotiate if it had assurances that it would result in an improved patents telework program. The USPTO, however, has refused to partner or discuss the terms without deal-busting formal negotiations. Hence, the agency is creating a program that employees must accept at their own risk with no guaranteed rights or protections.

Carlyle has no space to house all the examiners that must be hired in the next five years. If employees choose not to accept the agency's less-than-adequate hoteling program, the USPTO will be behind the eight-ball and may be obliged to listen to employees' concerns, work with POPA, and create a successful telework program that's acceptable for everyone.

Deputy Commissioner for Patent Operations Peggy Focarino presented outgoing POPA President Ronald J. Stern with a Certificate of Service at an open retirement reception on Dec. 21.

Another Job Saved by POPA

After the USPTO fired an examiner for alleged unacceptable performance in three critical work elements, POPA took the case to arbitration and showed that the USPTO was wrong on all three charges, winning the GS-13 examiner's reinstatement with full back pay and benefits. It is POPA's fifth victory out of six recent removal challenges.

The agency had based the examiner's removal upon alleged unacceptable performance in the critical elements of production goal achievement, patent examining functions (commonly known as quality), and workflow management. Failure in a single critical element during the written-warning improvement period is just cause for removal.

Regarding the critical element of production goal achievement, an examiner gets count credit at the time he or she sends an action to the supervisor. This goes hand in hand with examiners submitting office actions in "final" form. In this case, the examiner was receiving production credit only after the supervisor had reviewed and approved the content of the action. Arbitrator Jonathan E. Kaufmann ruled this improper.

As to the critical element of quality, the USPTO admitted that two-thirds of the errors it held against the examiner were from office actions for which the examiner received no credit during the improvement period. As POPA testified during the hearing and as stated clearly in the performance appraisal plan and its guidelines, the agency calculates the error rate using the office actions *counted* during the performance improvement period. Thus the arbitrator threw out most of the agency's alleged "clear errors" in actions credited at other times.

Regarding the critical element of workflow management, the agency alleged that the grievant was "gaming" the system by not turning in work after getting it back from the supervisor with corrections. Arbitrator Kaufmann agreed with POPA. "The union persuasively argued that this makes no sense," he wrote. "If the grievant does not turn in cases, his count is low, his work production fails, and he receives negative workflow points."

"It appears that management was willing to use every possible basis it could find to support its termination action, even if it did not follow [its] own procedures," wrote Kaufmann.

Supervisor's Attitude "Appalling"

In this case, the group director insisted that the supervisor review all of the examiner's cases, even though the supervisor was on detail elsewhere. Suddenly the examiner found his cases "bottled up," as the arbitrator described, with 30 cases waiting for his supervisor's action at one point. When the employee asked the supervisor for help, the supervisor responded, "I'm sorry, I can only review as many cases as I can."

Arbitrator Kaufmann agreed that the examiner should not be penalized for others' actions. "I found particularly appalling [the supervisor's] e-mail in which he complained he was too busy working his other job and that (by implication) the grievant should be sympathetic to his situation," Kaufmann wrote. "Such a response is simply unsupportable."

The arbitrator also found that the agency had not given the examiner a reasonable opportunity to show acceptable performance and therefore had not treated him fairly and equitably. The USPTO representatives testified that supervisors must take care to ensure that an employee with performance problems receives appropriate attention, including training. Yet the agency did not take such care with this employee.

USPTO Acknowledges Its Error, Avoids Grievance

The USPTO rescinded a warning regarding an examiner's alleged unacceptable "workflow management" performance after POPA intervened to point out workflow data that management had overlooked. The USPTO's acknowledgement of its mistake in discussions with POPA circumvented the need for a formal grievance, saving the agency, the employee and the union much time and effort.

In October 2005, the agency sent the employee a confirmation of oral warning based on alleged unacceptable performance in the critical element of workflow management. Upon reviewing the employee's workflow data, POPA uncovered instances in which the employee did not receive positive workflow points for having completed amendments within one month of their receipt. The USPTO also had charged negative workflow points to the employee even though he had timely sought excusal of an overdue amended case because he'd had to wait for the actions of another examiner before acting on the amendment.

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MAKE YOUR VOICE HEARD

$50 Bonus Campaign Extended!

Current dues-paying POPA members have until February 28 to receive $50 for every new member they sign up for POPA. See your POPA representative for details.

Stand Up and Be Counted as a Dues-Paying POPA Member!

Special Rate Pay *(continued from page 1)*

seek a special rate pay adjustment to make up for the erosion of the special rate pay differential over the last five years. With the government-wide pay raise that took effect Jan. 8, 2006, examiners' pay is now 7 percent below what it would be had the agency kept its promises.

The National Academy of Public Administration (NAPA) in a 2005 report underscored the need to increase pay to stem the swelling attrition tide. "In 10 out of 13 years, from FY 1992-2004, for every ten patent examiners hired, five left; many within the first three years," wrote NAPA. From FY 2000 through 2004, the agency hired 2,309 examiners yet lost 1,527. NAPA also noted, "…unchecked attrition of recent hires is at historical levels and will likely exacerbate the pendency problem and reduce the quality and consistency of patent determinations."

USPTO Lets Down Congress

Congress saw examiners jumping ship and for the first time, in its fiscal year 2005 appropriations, directed the USPTO to attain a staffing level of not less than 5,848 positions for patent application searching and examination by the end of fiscal year 2005. Yet the agency didn't; it hired more than 900 new examiners, but 428 left. Approximately 10.3 percent of the total examination staff moved on. POPA estimates that the agency fell about 130 examiners short of Congress' mandate.

Though the USPTO knew that it had missed the legislatively mandated minimum, it neglected to mention that point in its 2005 annual report to Congress.

The USPTO's noncompliance with Congress' wishes was not lost on House and Senate appropriations conferees. The 2006 appropriations conference report stated, "The conferees note their disappointment with the USPTO's inability to adhere to Public Law 108-447, which mandated staffing levels for patent and trademark examiners."

USPTO Avoids Grievance *(cont. from page 3)*

Know Your Rights

The employee's rights in this situation apply to all examiners. The USPTO's Guidelines for Performance Appraisal Plans states,

> "An examiner shall not be held responsible for a delay which is beyond his or her immediate control. A prescribed time period or special handling instruction will be waived, excused, or extended provided that the examiner has timely informed his or her supervisor of a delay which is beyond his or her immediate control."

The guidelines also list examples of situations in which "it shall be unreasonable to adversely evaluate an examiner for failure to meet a particular timeliness standard."

Know your rights, understand what is expected of you, and know that POPA is your workplace resource and partner.

New POPA President Installed

The POPA Executive Committee installed Robert D. Budens as the new POPA president in early January after Lawrence J. Oresky stepped down from that post to resume his position as vice president. Oresky had taken over for former President Ronald Stern, who retired Dec. 31.

Budens joined the USPTO in July 1990 as an examiner in the Biotech group. Since 1994 he has been a GS-15, Ph.D.-level primary examiner. Trained as a clinical immunologist, Budens examined vaccines and treatments for HIV/AIDS. He has been a POPA delegate since 1998, has chaired POPA's automation committee, and negotiated several issues for POPA. For several years he's worked side by side with Ron Stern on legislative and public relations matters.

Speaking of POPA's many challenges in the months ahead, Budens noted that the USPTO wants to negotiate a new contract with POPA that likely "will try to reduce or eliminate many of our benefits and protections." He pointed to two recently issued USPTO rule-change proposals to increase examiner production requirements by as much as 10 percent, and the patents hoteling program, which is "fraught with uncertainty for employees."

"Only by standing together can we meet these challenges," said Budens. "POPA needs the support of each and every bargaining unit member now more than ever."

POPA officers for 2006: [L to R] Randy Myers, Treasurer; Robert Budens, President; Howard Locker, Secretary; Pam Schwartz, Assistant Secretary; Lawrence Oresky, Vice President.

Patent Office Professional Association

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