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New Examiner Performance Appraisal Plan Proposed

POPA Members to Vote on Ratification in October

POPA anticipates that a new performance appraisal plan (PAP) for patent examiners will be proposed for bargaining unit ratification in October, the result of months of negotiation by union and management members of a task force appointed by USPTO Director David Kappos especially for the PAP overhaul.

Patent Examiner PAP Elements

Current For GS 14			Proposed for All Grades		
PAP Elements	Weight	Critical/ Non-Critical	PAP Elements	Weight	Critical/ Non-Critical
Productivity Goal Achievement (Patent Examining)	40	Critical	Production	35	Critical
Patent Examining Functions	10	Critical	Quality	35	Critical
Action Taking	10	Critical			
Patentability Determination	20	Critical			
Workflow Management	10	Critical	Docket Management	20	Critical
Customer Service	10	Non-critical	Stakeholder Interaction	10	Non-critical

The proposed changes with the broadest examiner impact focus on performance plan elements (critical and non-critical). These include new quality and docket management elements, "safety zones" for critical elements, and a new pendency award.

Safety Zones

The safety zone concept accounts for periods of difficulty for an examiner, often due to illness or adversity, while protecting the agency need to maintain performance. The safety zone idea embodies Director Kappos' directive to the PAP task force to use a "framework that focuses on coaching, mentoring, and training" and to "treat problems as fixable."

An employee is limited to using this safety zone protection twice in a five-year period in a given element or, in the case of the quality element, a given subelement. If an examiner falls within the safety zone for a particular element or subelement more than two times over five years, the examiner may receive an oral warning the third and subsequent times this occurs within any five-year period.

Production Element

The most notable changes in production (besides the name, which has been called productivity goal achievement) are the ranges of production percentages tied to performance rating levels and the creation of the production safety zone. The first chart on page 2 illustrates the current and proposed production goal ratings.

Under the production safety zone, an employee falling into an unacceptable level in the 80-87 percent productivity range at the end of a quarter will be allowed the next quarter to achieve at least 88 percent productivity without receiving an oral warning. During the safety zone quarter,

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POPA Testifies to Congress on the USPTO's Way Forward

While praising the USPTO for its recent union-management cooperative efforts, POPA President Robert Budens pointed to examination tools, international work sharing and other areas still needing improvement in his testimony before Congress on May 5.

Speaking to the House Judiciary Committee at its USPTO oversight hearing, Budens opened by saying that the USPTO-POPA efforts have decreased examiner attrition and elevated employee morale by focusing on "significant issues that have plagued the parties for decades." He highlighted progress on initiatives to improve the examiner count system and telework and to expand the first-action interview program.

Moving on to areas needing improvement, Budens noted that efficient examination tools are essential for efficient examination. "Examiners remain frustrated by inadequate and/or dysfunctional systems that slow the examination process," said Budens. "Years of neglect of the U.S. classification system are a hindrance to examiners in technologies that do not lend themselves to keyword searching," especially the mechanical technologies.

POPA supports the concept of a global classification system proposed by the Five IP Offices, a forum of the five largest intellectual property offices also known as the IP5: the USPTO, the European Patent Office, the Japan Patent Office, the Korea Intellectual Property Office, and the State Intellectual Property Office of the People's Republic of

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Performance Appraisal Plan

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Production Element Ratings

Rating	Current	Proposed
Outstanding	110% & above	110% & above
Commendable	105% - 109%	103% - 109%
Fully Successful	95% - 104%	95% - 102%
Marginal	90% - 94%	88% - 94%
Unacceptable	<90%	<88%

the supervisor is charged with coaching and mentoring to assist the employee.

If the examiner reaches at least the marginal level of 88 percent for the next quarter, no oral warning will issue. If the examiner's production falls below marginal for that quarter, without a bona fide justification, an oral warning may result.

If an employee falls below 80 percent for any quarter, the employee is below the safety zone and may receive an oral warning at the end of the quarter.

Quality Element

The former critical performance elements of patent examining functions, action taking and patentability determination will merge in the new PAP into one quality element.

Errors will be grouped into three categories:

- Category 1 errors can be charged after several occurrences of the same error and after individual mentoring and training has failed to eliminate the problem.
- Category 2 errors represent more serious infractions and can be charged after a single occurrence.
- Category 3 errors apply only to primary examiners and are based on improper final rejections or allowances.

Category 1 and 2 errors will be calculated as a percentage of all actions. Category 3 errors will be a percentage of all allowances plus final rejections. A numeric error rating will only apply to and be calculated for examiners at the GS-11 level and above.

The new PAP creates a quality safety zone for an error component score of 7.5 to 9.99 percent. If an examiner falls within that zone at the end of any recognized fiscal year quarter, the employee will be allowed the next quarter to

Quality Error Rates

Rating	Error Rate Range
Outstanding	0 - 4.49%
Commendable	4.50% – 5.49%
Fully Successful	5.50% – 6.49%
Marginal	6.50% – 7.49%
Unacceptable	Greater than or equal to 7.50%

Truncate to the second decimal - for example an error rate of 5.49X = 5.49

achieve at least a 7.49 percent error component score to avoid receiving an oral warning. As with the production safety zone, during this quarter the supervisor will focus on coaching and mentoring the examiner.

If the examiner reaches at least the marginal level for the next quarter, no oral warning will issue. If the examiner's error rate is below 7.49 percent for the next quarter without a bona fide justification, an oral warning may result. If the employee exceeds 9.99 percent for any quarter, he or she may receive an oral warning.

Docket Management

In the proposed PAP plan, docket management replaces workflow as a critical performance element and will count for 20 percent of overall performance, versus the 10 percent currently for workflow.

The new system eliminates the plus/minus workflow points in favor of an average-day system—an overall weighted average of the number of days used to complete actions. Each application falls into a workflow category, and each category has an assigned number of days for completion. Examiners will receive a composite component score percentage, which will average the number of days used in each category of applications.

The performance levels and safety zone for the docket management element are the same as those shown above for the production element.

The items tracked and the evaluation criteria for the docket management element better align with the USPTO's goals to reduce pendency. With the creation of new software, the administration of the docket management performance element will be virtually fully automated. It will reduce the need for biweekly workflow excusals and enable examiners to earn back performance. The magnitude of the automation changes, however, may delay implementation of this element until later in FY 2011.

Pendency Award

The proposed pendency award is a two-tiered system that rewards examiners quarterly for exceeding their docket management "score" on certain components. The task force believes it's a more meaningful award than the current pendency reduction award. *(continued on next page)*

Performance Appraisal Plan *(from page 2)*

Depending on the level of additional performance above the requirements for the docket management element, employees may earn 0.5 percent of their salary per quarter for tier 1 or 0.75 percent of salary per quarter for tier 2. In addition, there will be a 0.5 percent or 1 percent supplemental payment for continuous performance at the tier 1 or tier 2 level, respectively, over four consecutive quarters. Thus, an employee can earn up to 2.5 percent (0.5 percent per quarter plus 0.5 percent supplemental payment) for four consecutive quarters of tier 1 performance or 4 percent for four quarters of tier 2 performance.

The pendency award will be implemented at the same time as the docket management element.

Employee Briefings and Ratification Vote

The topics discussed in this article represent only highlights of the full PAP proposal. The USPTO and POPA will be informing all examiners about the proposed PAP during a series of official briefings to be held October 4-8 and October 13. All examiners will be allowed time to attend one of these briefings and a schedule of briefing times will be disseminated to all examiners.

All dues-paying POPA members will have the opportunity to vote for or against ratifying the new PAP. A voting station will operate during and after each official PAP briefing at tables outside of the briefing room. All bargaining unit employees who are not dues-paying POPA members may complete the dues-withholding form, SF-1187, and submit it at the voting station.

POPA Testifies Before Congress

(continued from page 1)

China. However, POPA would require that a such a system incorporate "sufficient granularity in the classification of technologies" to allow high-quality, timely classified searching, added Budens.

Another IP5 objective—common access to search and examination results—causes more concern for POPA. To be feasible for the USPTO, Budens stated that a successful work-sharing program must address differences in the world's patent laws, recognize the sovereign nature of patent examination and reduce the issues facing an examiner during prosecution "to truly increase efficiency and reduce pendency."

Fine Tuning Patent Reform

Budens outlined several items in a pending Senate patent reform bill that would cause problems if passed as law. Changes to the one-year grace period for U.S. inventors would harm inventors particularly by failing to protect applicants from other than their own "public" disclosures in the year prior to filing. Non-public disclosures for business purposes, such as licensing, would not be protected under the proposed grace period. Weakening or eliminating the grace period "would force these inventors to withhold disclosure of their scientific or technical discoveries" until after they'd applied for a patent, said Budens. This could delay "public awareness of new drugs or treatments for diseases or the application of newly engineered technologies."

POPA also urged that language be included in the legislation to mandate that patent searches and examination be performed in the United States by U.S. citizens. Without this, "USPTO management will be free to require U.S. examiners to give full faith and credit to a search from a foreign office, effectively transferring patentability determinations and, hence, creation of U.S. property rights, to a foreign government entity," said Budens.

The patent reform feature of a post-grant review process would siphon funds from examination and rack up litigation expenses, Budens testified. "Quality should be built into the patent examination process from the beginning, not months or years after a patent has issued," he said.

Let Our Fees Go

POPA has always supported the USPTO's ability to retain and use all of its fee income, as has been allowed by law since 2005. For fiscal year 2010, however, the agency may have to return any collected fees that exceeded its appropriations, which would limit the USPTO's agility in responding to economic conditions. POPA now supports the creation of a reserve fund "to allow carry-over of unused fees from one year to another."

Patent reform legislation has been pending on Capitol Hill for years, but POPA believes that adequate funding for the USPTO can't wait any longer. "We encourage the committee to consider legislation separate and apart from existing patent reform legislation to address the agency's long-term funding and fee setting authority," said Budens.

USPTO Funding Bill Introduced in House

Shortly after POPA President Robert Budens testified before the House Judiciary Committee in favor of separate USPTO funding legislation, Committee Chairman John Conyers, Jr. (D-Mich.) and Committee Ranking Member Lamar Smith (R-Texas) introduced legislation that, according to their press release, "assists our nation's inventors and innovative businesses by providing the USPTO with urgently needed resources for reliable and sustainable funding."

The Patent and Trademark Office Funding Stabilization Act (H.R. 5322) specifically gives the USPTO fee-setting authority, provides it the authority to impose a 15 percent temporary surcharge for all of the USPTO's fees, and prevents fees collected from being diverted away from the agency for unrelated government programs.

"This bill responds to the present fiscal crisis at the USPTO by helping the agency hire additional examiners, help reduce the backlog of patent applications, and improve patent quality," the press release also stated.

Why I Joined POPA

"POPA is our advocate"

I think of POPA as the only people who look out for our rights. Without the union to look out for us, we'd be at the mercy of management. We need to give the agency our best work, but POPA is our advocate. They're our watchdog. They're the Ralph Nader for patent examiners.

I've been a dues-paying member for five years. I joined pretty much after orientation. There have been a few times over the five years when I needed POPA's guidance and they were totally there for me.

For me, I feel a healthy sense of obligation. I mean, the organization can't run on nothing. I feel it's the responsibility of each of us to contribute. I'd feel like a moocher if I didn't—POPA does so much for us.

—Primary Examiner Susan Moon Lee, AU 2917

Solving Workplace Problems

Sometimes when USPTO employees run into a workplace problem, all it takes is a knowledgeable POPA representative and a reasonable manager to resolve the problem.

For example, in one recent case an examiner was denied telework. The employee had received a marginal performance rating for fiscal year 2009, but earned a fully successful rating at midyear 2010, received a within-grade increase in salary, and learned she could start the partial signatory authority program. When she asked for the ability to telework one day per week, her supervisor said no. The group director supported the supervisor's decision, saying that only fiscal year ratings determine telework ability and that the employee would have to wait until she got her FY 2010 rating. The supervisor said, "Nothing I can do."

After the employee contacted POPA, the union representative talked with the technology center director, who agreed that the examiner was entitled to telework. The next day the employee got e-mails from her supervisor and director letting her know that she would be considered in the next cycle of telework openings in August.

In a second case, an employee received an oral warning for 50 percent production for the third quarter of FY 2010. She had never had production problems before, and even with the 50 percent quarter was still achieving about 100 percent for the fiscal year. She earned more than 110 percent for each of the last five fiscal years; in FY 2008 she reached more than 130 percent. Turns out she is on a part-time schedule to care for her elderly parents. The examiner's father had been in and out of the hospital during the low-production quarter and died in May 2010. For religious reasons, the employee then observed mourning for 40 days. The supervisor accounted for none of this when he gave the employee an oral warning.

When POPA approached the technology center director about this case, the director knew none of the circumstances of the employee's situation and reconsidered the case. Two days later, the warning was rescinded.

It pays to have POPA at work for you.

A Teachable Moment: Keeping Sight of USPTO Goals

The USPTO understands that the patent examiner's job involves a steep learning curve. All new examiners, even those with advanced degrees, receive specific examination training. The agency encourages and expects newer, junior examiners to seek counsel and guidance from more senior primary examiners, quality assurance specialists and supervisors.

Yet some supervisors forget that this mentoring and training of junior examiners is part of their job description—an oversight that harms the USPTO goal to foster the highest quality patent examination.

One particular example began with an examiner and supervisor discussing a §112 issue. The supervisor directed the examiner to seek the opinion of the quality assurance specialist because the supervisor assumed the specialist would support his position. However, the quality assurance specialist said there was no §112 problem.

When the examiner reported to the supervisor about the §112 non-issue and said that the application was in condition for allowance, the supervisor responded, "Oh, No! No!" The examiner asked what he meant.

The supervisor responded that he had "found a reference."

"Can I see the reference?" asked the examiner, so he could see for himself if a rejection was warranted.

"No!" replied the supervisor.

The examiner was stunned. He suggested that they act in a professional manner and look together at the reference the supervisor had found. The supervisor replied that the examiner should have found the reference in his search and he wasn't going to show it to him. The meeting deteriorated, voices were elevated, the supervisor kicked the examiner out of his office and threatened to call security.

Assuming that the supervisor had a reference available for the application, this was certainly a lost teachable moment for the junior examiner. The supervisor could have shown the examiner how the reference read on the claims and then instructed the examiner on the search strategy the supervisor had used to come up with the reference.

If the supervisor was not sure of the validity of the claims at issue, it would have been a teachable moment for both of them. The supervisor could have guided the examiner to search additional subclasses, if needed, and together they could have asked the primary examiners in that technology to advise on patentability.

Fortunately for the examiner and the patent system, the technology center director granted the junior examiner's request to transfer to another art unit. The new art unit supervisor and the examiner subsequently reviewed the case in question and agreed to place a rejection against the application for reasons wholly independent of the first supervisor's rationale. The first supervisor never supplied the examiner with the reference.

When Hoteling, Keep an Online Presence

The USPTO has investigated a few hoteling examiners because they showed so little activity on the agency's computer system.

The common thread among these examiners seems to be that they claimed many hours of examining time but had spent little or no time on the USPTO computer system, as evidenced by no log-on to the system for extended periods. One examiner had searched on the U.S. Patents database (USPAT) as little as 10 minutes for a new application. Another examiner was showing no time on the agency's system.

The current PAP Guidelines require examiners to search at least the class and subclass in which an application is classified. Using the USPAT database to do that search would help to establish an online presence of the examiner.

Consider varying your search strategy for each of multiple applications, rather than employing the identical search method for 20 or more office actions. One examiner's explanation that the actions had a very close art area did not fly with USPTO officials.

Hotelers enjoy a great deal of freedom and no longer maintain an office on the agency's campus. However, to avoid USPTO investigation, guard against becoming a virtual examiner, i.e., one who turns in work but seems invisible to the USPTO computer system.

POPA Quiz Answers Revealed

Many visitors to POPA's Community Day booth took the famous POPA Quiz to test their knowledge of the USPTO, POPA and the patent system. Congratulations to the five participants who answered all the questions with the fewest errors: Kathryn Trillas, librarian/SIRA; Dave Dalke, Labor Relations; Paul Masur, TC 2400; Henry Yu, TC 2100; and Larry Galka, TC 3700. And the quiz answers were:

Question 1: The date of the first U.S. patent was 1790—this is probably one of the first things an examiner in the patent academy learns.

Question 2: Of the members of Congress listed, two hold U.S. patents: Rep. Darrell Issa (Calif.) and Rep. Roscoe Bartlett (Md.).

Question 3: The Patent Office was located in Washington, D.C., when it was spared from burning during the War of 1812.

Question 4: The POPA lobbyist is Helen Bentley, former member of Congress from Maryland.

Question 5: Four members of the POPA Executive Committee hold doctoral degrees. The answer was in the committee roster, which clearly noted those members with a doctoral degree, and which was available on the POPA table.

Question 6: POPA negotiated the special achievement award (SAA) in 1983.

Question 7: Out of the 34 members of the POPA Executive Committee, 16 are women.

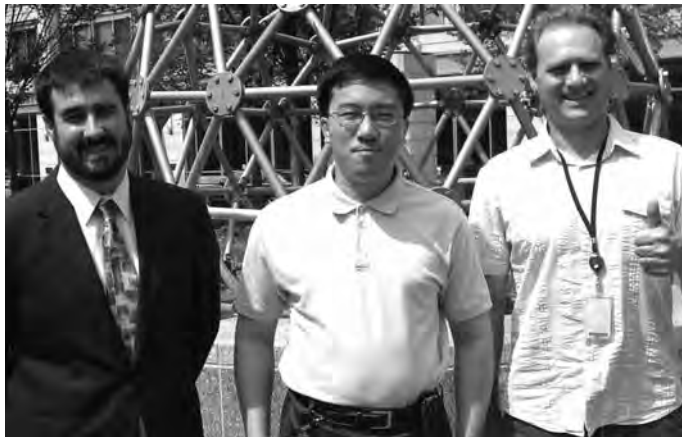
Question 8: Thomas Jefferson is credited with examining the nation's first patent applications.

Question 9: Potash was the subject of the first U.S. patent application.

Question 10: POPA negotiated *all* of the programs listed: the Signatory Authority, Compressed Work Schedule, Transit Subsidies, Special Pay Rate, Gainsharing Award, Compensatory Time, Telework, Part-Time Schedule and Learning Curves.

Question 11: Former Director James Rogan was also a former member of Congress from California.

Question 12: Of the individuals listed, two had been patent examiners—Albert Einstein (Swiss patent examiner) and Robert Stoll (U.S. patent examiner).



POPA Community Day Quiz winners (left to right) Paul Masur, Henry Yu and Lawrence Galka.

Additional POPA Quiz winners Kathryn Trillas and Dave Dalke.

From the POPA President

Due to some back problems, I spent a good part of this past summer in the hospital and rehabilitation, and continue with physical therapy and treatment for chronic pain. I want to take this opportunity to thank one and all for your kind wishes and leave donations while I was on extended sick leave and thank you for your continued support since my return to the office. Thanks also to the POPA officers and Executive Committee members for stepping up on my behalf during my absence.—*Robert Budens*

Know Your Rights

Providing Comments to Your Fiscal Year Rating

At the end of each fiscal year, your supervisor will meet with you to give you your annual performance rating. Your supervisor may actually go over the rating with you or just ask you to sign your performance appraisal plan (PAP) once you get to see the final outcome on the summary sheet. The supervisor will then take back the PAP so the technology center director can sign it.

When the supervisor directs you to sign the PAP, you have an opportunity to disagree with ratings given or the rationale behind the ratings.

On the summary sheet, towards the bottom, look for a check box that reads, "Comments attached." Check this box if you want the opportunity to comment on your annual performance rating.

According to the examiner PAP, after you check the box during your meeting you have five days to provide your supervisor with comments to attach to your PAP that then become part of your PAP record.

If you fail to check this box, it is very likely that your managers will not allow you to add comments to your record.

If you detect a lack of specificity when you first review your PAP with your supervisor, you can ask for actual details to support the rating in any element.

You could at a minimum state in your comments that you don't understand your rating or the basis for it because you have not been provided the information necessary to review it for accuracy. You can allege that the rating is deficient and defective since you have been given no specific findings of alleged errors.

If you are provided with some specifics, by all means, check them out. Make sure that your supervisor is not alleging an error that Quality Review had decided in your favor. Also ensure that the office action in question was actually "counted" within the fiscal year in review. In some instances a supervisor may not count your office action for production within the rating period, yet counts an error against you within that rating period.

Patent Examining Functions

In the patent examining functions element in your PAP, your supervisor may simply tell you that the high quantity of your errors dropped you to a marginal rating in this element. You could accept the rating without finding out about the alleged errors or you could ask what these alleged errors are and who alleged them, e.g., your supervisor or the quality assurance specialist. Your supervisor may not even have stated the number of errors or the serial numbers containing these errors.

Production Goal Achievement

For the production goal achievement element, check all the numbers to make sure they are correct. Be sure that your supervisor rounded off your production achieved to the next digit if your production is .5 or higher. For example, if your production goal achievement is 94.5 percent, it is rounded to 95 percent. Some supervisors may dispute this rounding, but you can find this specified in the first sentence of the production goal achievement element write-up in your PAP.

Also check that your leave and other time were accurately reported if your production is very close to one of the rating percentage levels.

Finally, if you worked overtime during the rating year, don't cut your production so close that your rating is harmed if, at the last minute in a fiscal year, you lose an office action count. Don't miscalculate and jeopardize your job rating due to insufficient production to gain a few more dollars of overtime. Examiners who are just short of a production level needed for an award can back out overtime hours at 100 percent to meet the required production level.

Workflow Management

Regarding the workflow management element, find out the serial numbers of the applications that your supervisor alleges missed deadlines. In this element, you must be proactive throughout the fiscal year. Request a waiver of negative workflow points from your supervisor during the fiscal year if you are unable to get to all of the amendments due on your amended docket. It is much more difficult to recoup those negative points at the end of the fiscal year. Beware of any manager who says, "Don't worry about the negative workflow points." These points sneak up on you. If you lose more than 11 workflow points during the fiscal year (without any positive points), you can find yourself with an unsatisfactory rating for the year.

If you have any further questions regarding comments on your PAP, please contact a POPA representative.

Patent Office Professional Association

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