POPA NEWS
Patent Office Professional Association
www.popa.org
PROFESSIONAL REPRESENTATION FOR PATENT PROFESSIONALS
June 2010 Vol. 10 No. 3

Talks Continue on Performance Appraisal Changes

For the past several months, a task force of POPA and UPSTO representatives convened by USPTO Director David Kappos has been meeting to address problems with the agency's administration of the examiner Performance Appraisal Plan (PAP). The goal is to redefine examiner performance standards, take the sharp edges off the agency's disciplinary process, and value employees by treating performance problems as fixable rather than terminal.

The negotiators are discussing a firm commitment from agency management to treat all employees fairly and equitably; retaining grievances for signatory authority denials, oral warnings and written warnings; keeping employee removals arbitrable for both performance and conduct; maintaining and more explicitly defining "clear error"; and updating the existing signatory authority program to reflect the new changes in the PAP while maintaining the other aspects of the signatory authority program.

Below is a more detailed explanation of several major PAP topics:

Production. Under the current PAP, the range for a marginal rating in the production element is very narrow. An examiner who normally produces at the fully successful level, however, can experience difficulties due to one life event, such as a grave illness or death in the family. Suddenly the examiner's production can drop causing the examiner's rating to quickly fall—not just to the marginal level, but perhaps even to the unacceptable range. Currently, this one event can place even a long-established employee's job in jeopardy.

The range for commendable performance also should be expanded to reflect performance above the fully successful level. This would highlight the significant number of examiners who consistently do more work than is required by their performance standards.

POPA is working to change the required performance ranges to more accurately reflect the reality of examination life. The union is looking to change the ranges so that 89 percent is no longer failing and 94 percent is no longer marginal. The hope is also to change the commendable range to 103 percent-109 percent. In addition, and perhaps most significantly, POPA is working to build into the system some allowance for a single quarter dip in production—so that one quarter doesn't automatically trigger the disciplinary process as it does today.

POPA is interested in increasing the time frame for examiners to bring up their production rate from the unsatisfactory level. Employees need more than three months to fully recover from a serious life event.

Workflow (Docket Management). Under the current PAP, most patent examiners successfully manage the workflow element. However, the current workflow element is quite unforgiving. If an examiner falls behind on even a relative few cases, he/she can fall into a hole that can just get bigger and deeper with time. With the current workflow performance metrics, it can quickly become impossible for examiners to dig out of a workflow hole once they have fallen into it.

As the task force began its work, POPA believed that a

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New Count System Queries

Puzzled by one of the features of the new count system? Go right to the experts for the answer.

At the home page of the USPTO employee intranet site, click on the blue Examiner Count System button for a link to frequently asked questions and answers on the new procedures.

For answers to your specific questions about cases, e-mail your inquiries to *NewCountSystemQuestions@ uspto.gov*. Examiners report receiving a useful reply within a few days.

USPTO Grants Employees Leave for Bar Exam

The USPTO recognizes that taking the bar examination is a big deal in an employee's career and offers you some extra support.

In 1974 the agency began the policy and practice of granting USPTO professionals, for one time only, up to three days of excused absence to take the bar exam. Requests for this excused absence must be submitted to your supervisor for approval. Additionally, up to two days (16 hours) of excused absence may be authorized for any required interviews before admissions committees of the bar involved and the like, and the time so spent may include travel time.

However, travel time, wherever reasonably possible, should be performed outside of normal working hours. For instance, those being admitted to the bar in Maryland or Virginia would be expected to appear either early in the

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Performance Appraisal Talks

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few simple changes to the current workflow metrics could address this issue. As it turns out, however, the agency was even unhappier than POPA with the current workflow system, which the agency had created and implemented in 1986. USPTO management was not interested in keeping the existing workflow management element. The agency felt that the current element was too cumbersome for supervisors to properly administer and did not align with current agency goals. The agency is working hard to come up with a new "docket management" system to focus examiner performance more directly toward the agency's congressional and Commerce Department goals to reduce pendency.

The new docket management system would be coupled with a significant new financial award to incentivize examiners to manage their dockets. This would help achieve the agency's goals while rewarding examiners' performance. The docket management element would give examiners a set "average" number of days to do a particular type of office action, resulting in fewer missed deadlines, more examiner control over the workload, and a greater ability to dig out of a workflow hole.

POPA is interested in this discussion, provided that the new Docket Management element puts at least as many employees at the outstanding level, avoids the very real pitfalls of the current workflow system, and accounts for situations out of the ordinary (one of the best features of the existing workflow system). If these requirements can be met, aligning examiners' docket management performance with agency goals and rewarding that performance makes sense.

Quality/Clear Errors. The Patentability Determination element, one of three current quality elements for a primary examiner, is a very harsh standard. It only measures allowed applications and the errors found in them. Until recently, if a primary examiner messed up just one allowance, it could result in an unacceptable rating for the year. POPA worked with the agency on this issue in the recently completed Count System Initiatives Task Force, so that now a single patentability error can no longer sink a primary examiner's performance or serve as the basis for a performance warning.

Because examiners' final rejections are also "patentability determinations," i.e., the examiner has said "no" to patentability and finally rejected the application instead of saying "yes" and allowing the application, POPA is interested in a quality measure that looks at examiner performance in a more realistic and encompassing manner. This should serve to level the playing field with respect to examiner patentability determinations by considering errors in allowances and final determinations as equally weighted actions in performance evaluations.

POPA is also working to combine the Patent Examining Functions, Action Taking, and Patentability Determination elements of the current PAP into a single "Quality" element. Coupled with an improved definition of what would constitute a "clear error," POPA believes that such a quality element would more accurately reflect the quality performance of examiners.

These represent just a few of the issues that POPA and the USPTO are hashing out. Both parties hope to agree on revisions that will improve the performance appraisal system, the patent process and employee work life.

For more information, employees can click on the "Patent Examiner PAP" Task Force button on the right side of the "USPTO Weekly" employee intranet home page.

Examiner Caught in the Middle of "Clear Error" Disagreement

Recently an examiner found himself stuck between differing management opinions of "clear error," with his patent examining career hanging in the balance.

The examiner, who was going through the Partial Signatory Authority Program, consulted the 35 USC 101 Help Desk in his technology center. The USPTO had set up the 101 Help Desk to help examiners be consistent in their approach to patentable subject matter. The examiner determined his approach to the claims under consideration and one of the 101 Help Desk members supported his approach. This 101 Help Desk member happened to be one of the authors of the Interim Guidelines on 35 USC 101, which all examiners study during their training.

After his evaluation for permanent partial signatory authority, the examiner was astounded to learn that he had been charged with an Action Taking clear error in evaluating the very claims that he had discussed with the 101 Help Desk expert.

Did a higher technology expert overrule the 101 Help Desk expert? The agency would not reveal the identity of the reviewer who alleged the error. The agency also charged the examiner with another clear error regarding interpretation of claims under 35 USC 101. On that matter the examiner had also contacted the 101 Help Desk expert, who again had agreed with the examiner, stating the positions clearly in an e-mail to the examiner.

It appears that the USPTO had set this examiner up to fail. The agency had created a group of experts in each technology center to advise all examiners on the appropriate approach to take on 35 USC 101 claims. The agency directed this examiner to rely on one of its experts, and then overruled its own guidance.

This situation is an excellent example of the importance of the "clear error" definition in the current examiner Performance Appraisal Plan. The existing clear error standard provides that, where an "honest and legitimate difference of opinion" exists between an examiner and a supervisor, such a difference of opinion does not constitute clear error and cannot be alleged as such in a performance review such as the Partial Signatory Authority Program.

The employee made his case to the technology center director. After several weeks with no word, the examiner

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"Clear Error" Disagreement *(from page 2)*

was called to a meeting with his supervisor and a quality assurance specialist, who told him that the charges of clear error would be dropped. They did not state it in writing.

The employee reported that no one ever said, "We were wrong, you were right." No one apologized for the mistake, the time wasted or the anxiety caused. Just a, "We're dropping the clear error charges."

Ironically, one of the managers involved in this situation was in error. Nevertheless, if the past is an indicator of the future, this manager will not likely be charged with a "clear error" or face any other measurable consequence.

Do's and Don'ts of Sick Leave

The most basic of federal employment benefits—sick leave—is still often misunderstood by employees and supervisors.

Regardless of whether you are a GS-5 or a GS-15 employee, or have been on the job 30 days or 30 years, as a full-time federal employee you accrue (or build up) four hours of sick leave per pay period. Part-time employees accrue one hour of sick leave for every 20 hours in a pay status.

Beyond those basics, however, understanding the legitimate uses of sick leave becomes more complicated.

Caring for Yourself

You can use sick leave for personal incapacitation due to physical or mental illness, injury, pregnancy or childbirth; medical, dental or optical appointments and exposure to communicable disease, i.e., if you must be quarantined due to exposure. However, absences of more than three days may require certification by a medical or dental professional.

Caring for Family Members

Full-time employees can use up to 104 hours of sick leave (40 of these hours can be advanced to employees) for family care or bereavement purposes each leave year (roughly the calendar year):

- to care for a family member who is incapacitated due to physical or mental illness, injury, pregnancy or childbirth;
- to help take a family member to a medical, dental or optical appointment; or
- to arrange for or attend a family member's funeral.

"Family member" is defined as a spouse and his/her parents; children and their spouses; parents; siblings and their spouses; and any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

For part-time employees, this 104-hour allowance is prorated.

To care for a family member with a serious health condition, employees may use up to 12 weeks of sick leave per leave year, but must subtract any sick leave used for family care or bereavement purposes.

Expand Your Worklife Fulfillment

USPTO Community Day

Thursday, June 10 • 11 a.m. – 2 p.m.

Stop by POPA's table for info and freebies

Adoptions

For adoptions, sick leave can be used for:

- appointments with adoption agencies, social workers and attorneys;
- court proceedings;
- required travel;
- any time during which the parents are ordered or required by an adoption agency or court to take off from work to care for the adopted child; and
- other activities necessary to allow the adoption to proceed.

The USPTO can require evidence for these uses. Adoptive parents may not use sick leave for bonding or childcare.

Advanced Sick Leave

A federal employee may be granted up to a total of 240 hours of advanced sick leave. This is at the USPTO's discretion and is not an entitlement. The agency will consider the likelihood that the employee can repay the advanced sick leave in the future.

Bone Marrow or Organ Donor Leave

An employee may use up to seven days of paid leave each calendar year to serve as a bone marrow donor.

An employee may use up to 30 days of paid leave each calendar year to serve as an organ donor.This leave is in addition to sick and annual leave.

Leave Transfer Program

An employee must have a need of at least 24 hours of leave for a medical emergency (of their own or a family member's) to be eligible for a leave transfer. Once the agency approves the leave transfer request, an employee may receive annual leave donated directly to him/her by fellow federal employees.

Recipients are not limited on the amount of annual leave donations that they can receive, but unused donated leave must be returned when the medical emergency ends.

- Only annual leave can be donated.
- Employees donate directly to another federal employee.
- Leave can be donated or received across federal agencies, e.g., a USPTO employee can receive annual leave from an IRS employee.

USPTO maintains a list of eligible recipients on the intranet site (under "Announcements").

Know Your Rights

What is a Grievance Anyway?

In short, a grievance is a dispute between an employee and his/her employer. In the federal sector, unions and agencies are required to have a "negotiated grievance procedure" in place to allow employees and agencies to resolve such disputes—it is one of the advantages of federal union representation. POPA's current negotiated grievance procedure can be found at Article 11 of its Collective Bargaining Agreement (see link below).

If you are a member of the POPA bargaining unit and believe that you have been treated unfairly or inequitably by the agency, your supervisor or director, and you do not believe you can work out the issue through informal discussion, you may consider filing a grievance.

The first thing you need to know is that you only have 20 calendar days from the event or decision that you are grieving to inform your supervisor that you are grieving. You may file a grievance with or without POPA representation.

If you are unsure if you want to pursue your issue or if you would like POPA representation, it is a good idea to discuss your issue with a union representative who works on grievances to help you decide. Contact Pamela Schwartz, POPA director of grievances or David Fenstermacher, deputy director of grievances, to set up a meeting.

During that initial conversation, you will be able to discuss your factual situation and obtain information about whether the agency action is supported by law, policy or agreement. You will also discuss the likelihood of success if you go forward, the pros and cons of doing so, and what is involved in the grievance process.

If you decide you want POPA to represent you, the POPA representative working with you will determine if there is a reasonable basis for moving forward and if moving forward on your behalf is a good decision for you, based upon what you are trying to achieve through the grievance process. Also, POPA will consider in making a decision the impact of filing your grievance on the rest of the bargaining unit. Whether or not POPA represents you, you can move forward with your grievance.

The POPA representative will explain the steps you have to take to do this. The very first step is to send an e-mail to your supervisor letting him/her know that you are filing a grievance over an action or event.

The next step is a meeting at which you and/or your POPA representative will present the grievance to management. Once you receive a response to your presentation, a formal grievance paper has to be filed within 10 calendar days, unless the time is extended by the agency. This formal paper is the opportunity to set forth your issue, the reasons why you believe the agency decision or action is incorrect or unfair, and your requested remedies. Once again, the agency will respond and you will have 10 days to file a final argument paper called "Exceptions to the Agency Response." The agency will then issue a final decision.

If you want to pursue that issue further, the next step is arbitration. Only POPA can take a case to arbitration, so you or your representative will have to take the situation to the POPA Executive Committee to vote on whether or not your case should to go arbitration.

The entire process can take a long time and may require the filing of requests for information to the agency or gathering of evidence, but frequently grievances are settled or otherwise resolved early in the process. Sometimes it is just a matter of the agency providing more information to the employee or the employee presenting more information or more detailed arguments to the supervisor.

For more information on the grievance and arbitration processes, see Articles 11 and 12 of the Collective Bargaining Agreement—go to *www.popa.org*, click on Useful Info, select Agreements and then click on Collective Bargaining.

Bar Exam Leave *(continued from page 1)*

morning or in the evening before the day on which they are admitted where reasonable travel time permits. Similarly, those being admitted to the bar in other states would be expected to travel outside of normal working hours whenever possible.

Excused absence may be authorized only for necessary travel time and for the days during which the examination is administered. Excused absence will not be authorized for time taken for personal purposes on the way to or returning from taking the bar exam. Annual leave or leave without pay must be used for such purposes.

No excused absence is authorized for studying for the examination or for taking preparatory courses. Nor is any excused absence permitted for admission to a bar when the employee is already a member of another bar or for admission to any other courts such as the Court of Claims or the Court of Appeals for the Federal Circuit.

Patent professionals appreciate this longtime support of their career development efforts by the USPTO.

Patent Office Professional Association

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