

**STATEMENT OF**  
**ROBERT D. BUDENS**  
**PRESIDENT**  
**PATENT OFFICE PROFESSIONAL ASSOCIATION**

Submitted to the  
**COMMITTEE ON THE JUDICIARY**  
and the  
**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM**  
**U.S. HOUSE OF REPRESENTATIVES**

On The Subject Of  
**Abuse of USPTO's Telework Program:  
Ensuring Oversight, Accountability and Quality**

**November 18, 2014**

Chairman Goodlatte, Chairman Issa, Ranking Member Conyers, Ranking Member Cummings, and Members of the Committees,

Thank you very much for this opportunity to present the views of the Patent Office Professional Association (POPA) on issues facing the U.S. Patent and Trademark Office (USPTO) and POPA.

POPA represents over 8,500 patent professionals at the USPTO. The vast majority of these, approximately 8,300, are the agency's patent examiners – the engineers, scientists and attorneys who determine the patentability of the hundreds of thousands of patent applications received in the USPTO each year. POPA's members are diligent, highly skilled, hard working professionals. The quasi-judicial work they do is extremely complicated – bridging both technology and intellectual property law. They take great pride in the work they do and are committed to maintaining the quality and integrity of America's patent system.

America's economic struggles over the last several years have highlighted the importance of stimulating innovation and protecting intellectual property in the United States and the world. Throughout its history, America's ability to innovate has been a key driver in reversing economic downturns.

The U.S. patent system is a powerful engine driving innovation in America. It has been the foundation upon which America has built the most powerful and robust economy in history. The vital role of patents to the U.S. and global economies is clearly evidenced by the rapidly expanding efforts of inventors and companies to protect intellectual property throughout the world. And that intellectual property receives protection through the efforts of the many employees of the USPTO, particularly its Examining Corps – the thousands of patent examiners of the USPTO. They are the agency's greatest asset.

In August 2009, after decades of strained labor-management relations that left the USPTO with low morale, high attrition and a 750,000+ backlog of new unexamined patent applications, senior leaders from both the USPTO and POPA came together and agreed to embark on a social experiment to see whether or not we could change the relatively unproductive culture of conflict we had known for so long to a more productive culture of collaboration that would result in effective, workable solutions addressing the many problems facing the agency. Neither side knew whether we would be successful, but both sides knew that we needed to try a

different approach as we faced the many challenges of a massive backlog of work and a rapidly expanding workforce. We had much to gain and little to lose by trying.

Director David J. Kappos, set forth two primary parameters to govern our social experiment. First, he wanted employee performance and conduct problems treated as fixable, not terminal, as they had been treated for so many years. He understood that it usually requires about six years and several hundred thousand dollars to train a single examiner to the level of a primary examiner, i.e., an examiner able to independently examine patent applications and allow patents.

Second, he admonished us to not let the perfect get in the way of the good – find a 70% solution, put it to the test and then make iterative changes to further improve on the 70% solution. We would be much more likely to achieve a successful outcome through the iterative process than to spend considerable time and effort trying to find the perfect solution. To be clear, in 2009 these parameters represented revolutionary concepts in the USPTO labor-management environment.

We formed a joint task force, locked ourselves in a large windowless conference room, unaffectionately referred to as “the bunker,” and set about tackling one of our perennial issues – examiner production goals – the time examiners have to examine patent applications in a given technology. Each examiner has an individually assigned goal or “Expectancy” representing the average amount of time to examine a patent application in the examiner’s assigned technologies. This time is generally expended over about two years of patent prosecution involving multiple Office actions the examiner does during the examination process. Most examiner production goals had been established decades earlier and had not been significantly adjusted since 1976 – before such technologies as cell phones, DVDs, the Internet, and biotechnology even existed.

After months of discussions in the bunker elucidating each side’s issues and interests as well as the pros and cons of various suggested solutions, the joint Task Force, arrived at a set of programs known as the 2010 Count System Initiatives (CSI). The CSI constituted the proof of concept for our social experiment – USPTO management and POPA could come together collaboratively to solve a serious problem. The rest is now history. Since that first CSI Task Force, the agency and POPA have worked together and reached more agreements and resolved more issues than in the preceding forty-five years of collective bargaining combined. In the

process, our attrition dropped to almost negligible levels. This resulted in significant gains in productivity as examiners progressed up the career ladder with its concomitant increases in production goals. Through increased productivity and improved incentive programs, the 750,000+ backlog was reduced significantly. Employee morale improved so much that the USPTO went from the perennial basement of employee satisfaction to one of the very best places to work in the entire Federal government. In 2014, the USPTO had its most productive year in its 224-year history, acting on over 600,000 patent applications and issuing over 300,000 new patents.

Yet, despite these remarkable accomplishments – accomplishments that have been and should be the basis of accolades and case studies in labor-management relations – some have chosen to attack the employees and management of the USPTO with unsubstantiated allegations of wrongdoing, particularly among the agency's many teleworking employees. These allegations and innuendos suggest systemic abuse of USPTO workplace flexibilities available to examiners and other employees such as flexible work schedules and a variety of telework options. Some believe that the USPTO is paying thousands of examiners high salaries and big bonuses for doing nothing. Some have recommended instituting procedures for monitoring every minute of examiners' work time that ignore the practical realities of the patent examination process and are both intrusive and unworkable at the USPTO. Their recommendations suggest that it is far more important for the USPTO to expend its limited resources attempting to know exactly what an examiner is doing every minute of every work day – an impossible goal – than to expend its resources on its Constitutional mission – protecting intellectual property in America by granting patents and trademarks.

POPA begs to differ.

## **USPTO Performance is Directly Linked to Examiner Performance**

In August, 2014, the Washington Post began publishing a string of articles alleging widespread time and attendance abuse among teleworking examiners at the USPTO. One article discussed a leaked draft USPTO report (referred to hereafter as the 32-page report) to the Commerce Inspector General (IG) that differed significantly from the final agency report

submitted to the IG in July, 2013.<sup>1</sup> The article alleged that the USPTO had filtered out significant information from the final report to hide the worst telework abuses. Another article alleged that the 32-page report found “that thousands of telecommuting patent examiners had lied about their hours,” language that is not readily apparent in the 32-page report.<sup>2</sup> These and many subsequent reports by the Post and other media outlets, assumed that the draft 32-page report was some sort of gospel fact rather than what it was – a draft, heavily biased collection of anecdotes and unsubstantiated allegations. That is why the draft was never sent to the IG in the first place and does not bear the signature of Fred Steckler, the USPTO’s Chief Administrative Officer. It is unfortunate that this leaked draft report has now resulted in such a profound waste of time and resources and distracted so many of us from the important work of the USPTO.

Anyone with a good understanding of patent examining and the many tools at the agency’s disposal for tracking examiner activities, would know that it would be fundamentally impossible for the USPTO to examine some 600,000 patent applications and issue some 300,000 patents, as it did in Fiscal Year 2014, and yet have “thousands” of examiners getting paid for work they did not do. The productivity of the agency is directly linked to the productivity of the examiners. If examiners are not putting out the work, then the agency’s performance suffers and the backlog of unexamined applications would grow quite rapidly. In addition, an allegedly non-working examiner will also be subject to performance-based disciplinary action.

## **Tracking Examiner Performance**

Each examiner at the USPTO is generally responsible for achieving his/her production goal, maintaining an acceptable level of quality across a wide variety of specifically identified examination duties, moving his/her docketed applications through the prosecution process in a timely manner (Docket Management), and provide courteous and appropriate assistance to the public and the examiner’s peers (Stakeholder Interaction). See Attachment 2, Slide Nos. 2-4. Lower-graded examiners, i.e., junior examiners, have lower production requirements and generally require prior instruction from the supervisory patent examiner (SPE) and/or primary

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<sup>1</sup> Rein, Lisa, “Patent office filters out worst telework abuses in report to its watchdog,” The Washington Post, August 10, 2014.

<sup>2</sup> Singletary, Michelle, “Teleworking saves money — but let’s keep it honest,” The Washington Post, August 16, 2014.

examiner before taking action in an application. As new examiners progress through their training and receive promotions to higher GS levels, their production requirements increase and they are responsible for carrying out the examination process. See Attachment 2, Slide No. 5. When an examiner has successfully completed the signatory review program, a significantly heightened review process of the examiner's final rejections and allowances, the examiner is granted the status of primary examiner and is independently responsible for essentially all aspects of the patent examination process.

Each examiner is given a performance appraisal plan (PAP), including a position description (PD), outlining his/her required duties at his/her grade and level of signatory authority. Attachment 1 is a copy of the 28-page FY 2015 PAP/PD for a GS-14 Primary Examiner. Attachment 2 is a slide set providing a detailed description of each examiner PAP element. See Slide Nos. 2-46. Attachment 2 also provides detailed information regarding each of the performance awards available to examiners together with the performance criteria required for each award. See Attachment 2, Slide Nos. 47-58.

Examiner performance is tracked and reported every biweek. In addition, quarterly average performance as well as yearly average performance is measured for each respective time period. Examiners are subject to performance-based disciplinary action for poor performance at the end of every quarter and at the end of each fiscal year. See Attachment 2, Slide Nos. 4-14.

At the beginning of each biweek, an examiner is automatically charged with 80 hours of examining time, i.e., the amount of time for which the examiner is responsible for production. During the course of the biweek, the examiner may spend time doing certain "non-examining" activities. This non-examining time, often referred to as "other" time, is subtracted from the 80 hours of examining time available. By the end of the biweek, the examiner will usually have somewhat less than the 80 hours of examining time for which the examiner must have adequate work credits as calculated according to the Production element of the PAP or face disciplinary action. At the end of each biweek, the examiner and management receive a "Production Report" listing each of the examiner's work credits and a "Statistical Analysis" detailing the examiner's performance in a multitude of metrics. See Attachment 2, Slide No. 45.

Similarly, during each biweek, quarter and fiscal year, an examiner must maintain an acceptable level of examination quality with respect to any of the nineteen different examination

duties set forth in the Quality element of the PAP for which the examiner is responsible at his/her grade and level of authority. The supervisor can review any examiner work product the supervisor desires and charge errors in accordance with the standards set forth in the PAP Quality element criteria for evaluation. See Attachment 2, Slide Nos. 15-27.

In reviewing the quality of an examiner's work, supervisors also regularly have the benefit of insights from both the inventor who is an expert in the technology, and the inventor's attorney who is a legal expert. If the examiner has made errors in the examination process, the inventor and his/her attorney will not usually miss an opportunity to point that out in their response to the examiner's Office action. The supervisor may look at the examiner's action and the applicant's response to see if the examiner has committed an error under the PAP Quality element.

During that same biweek, quarter and fiscal year, the examiner must satisfy his/her Docket Management requirements by moving various types of patent applications and/or actions within the prescribed "average expected days" time period and avoid having any applications or actions reach the "Ceiling Control Days" limit and become a "Ceiling Exceeded" case. See Attachment 2, Slide Nos. 28-35. Failure to meet these various time periods set forth in the Docket Management element of the PAP will result in the examiner facing disciplinary action. Charts showing the various categories and types of applications and/or actions with their respective time periods can be found in the Docket Management section of the examiner PAP, Attachment 1.

During that same biweek, quarter and fiscal year, while balancing his/her production, quality and docket management at an adequate level, the examiner is also responsible for providing courteous and professional service to external stakeholders by returning phone calls and emails, providing work schedules and holding interviews. Examiners must also provide advice on searching and provide other assistance to both the public and their peers in the USPTO. See Attachment 2, Slide Nos. 36-44

As one comes to understand the incredible number of different ways the agency can and does measure examiner performance each biweek, quarter and fiscal year, it should become clear that any allegation that the USPTO is or has been paying "thousands" of examiners' salaries and or bonuses while those "thousands" of examiners were not working is a patently ridiculous

allegation. If “thousands” of examiners were not performing the work they were being paid for, the agency would be taking disciplinary action against those “thousands” of examiners and the agency’s performance metrics would be in the basement instead of shooting to new record levels as they did in FY2014.

## **USPTO Management Has Many Tools to Change Behavior**

POPA strongly disagrees with any assertion that the USPTO has some sort of systemic plague of poorly performing employees, as alleged by the now infamous 32-page draft IG report. We do understand, however, that any organization of 12,000+ employees, whether public sector or private sector, will have some employees who run into difficulties in the workplace. Here too, the USPTO has, over the years, developed effective means for correcting undesirable employee behavior, whether performance or conduct.

When an examiner gets into performance problems, they face a series of progressive disciplinary measures coupled with opportunities for improving their performance. Performance actions include Safety Zone Warnings, Oral Warnings, Written Warnings and Removal. Each action prior to removal is accompanied by a seven-biweek performance improvement period. For many years, this process began with issuance of the Oral Warning. While considering performance appraisal in 2010-2011 in view of Director Kappos’ primary parameter to treat problems as fixable, the PAP Task Force agreed to add the Safety Zone Warning. The Safety Zone Warning was created in view of both the recognized difficulties of the examination process and the significant costs in time and productivity training new examiners as compared with providing help to an existing examiner with performance problems.

In August, 2005, the National Academy of Public Administration (NAPA) issued a major study of the issues facing the USPTO.<sup>3</sup> At pages 107-113, the report discusses Employee Relations issues at the USPTO. Data in the report showed that Oral Warnings were a highly effective means of correcting performance issues. For example, the agency issued 329 Oral Warnings in 2004, but only 48 written warnings. Clearly, most employees who received an Oral Warning wisely used the seven-biweek improvement period to change their performance to

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<sup>3</sup> “US Patent and Trademark Office: Transforming to Meet the Challenges of the 21<sup>st</sup> Century,” National Academy of Public Administration, August, 2005.



avoid progressing to the Written Warning stage. Similarly, there were only 17 removals at the USPTO in 2004 indicating that written warnings were also effective in providing an employee an opportunity to get out of disciplinary problems.

Interestingly, the NAPA report also showed that, for example, in 2001, the agency removed 18 individuals at a time when only 210 individuals were removed from Federal service across all non-defense federal agencies. Thus, the agency removed almost 10% of all non-defense federal workers removed in 2001. When it becomes necessary, history shows that the agency is capable of taking appropriate action to correct employee behavior.

In conduct issues, the agency is equally capable of taking corrective action. For example, when the agency Chief Information Officer (CIO) identified a problem with some examiners using too much of the agency's available internet bandwidth, USPTO management and POPA came together and worked out a series of progressive disciplinary actions that helped employees understand the "Rules of the Road" regarding agency internet usage and correct their behavior accordingly. Together, the agency and POPA developed a workable solution to this issue that has almost completely eliminated internet usage problems.

### **USPTO and POPA Work Together to Resolve Issues: Many Issues Have Already Been Resolved**

When the USPTO and POPA began our social experiment to build new and effective labor relations based on a culture of collaboration, POPA informed the agency that, when it came to us with data that identified a legitimate issue or reasonable concern, POPA would work with the agency as best we could to find solutions to the issue or concern. The agency and POPA continue to follow Mr. Kappos' directive to find the 70% solution and then rely on the iterative process to continuously improve upon that initial solution.

The USPTO and POPA continue to meet regularly to review the effectiveness of initiatives such as the Count System Initiatives, Performance Appraisal initiatives, etc., and to address deficiencies and/or unintended consequences of our agreements. Even now, we are meeting to review our various telework programs and address agency and union concerns on this topic. Indeed, several concerns and/or recommendations raised in both the 32-page draft report

and the 16-page actual IG report had already been addressed or were being addressed at the time the Washington Post first disclosed the reports.

When it became apparent that a few examiners had managed to receive performance bonuses while having overdue “Ceiling Exceeded” cases on their docket, the agency and POPA came together and modified the criteria for Docket Management awards to prevent this situation. Today, to receive a Pendency Award for docket management, an examiner may have no more than one Ceiling Exceeded case in any Docket Management category within the quarterly award period.

Just recently, when it became apparent that “Returns” of examiners’ office actions for correction could inappropriately skew an examiner’s Docket Management performance, the agency and POPA came together and modified the PAP Docket Management element and award criteria to prevent this from happening.

Every year since the 2010 Count System Initiatives, the USPTO and POPA have met annually to review the effectiveness of these initiatives as well as the PAP initiatives and make any necessary modifications to address both agency and union concerns.

Many people do not realize that, while the public only became aware of the 32-page and 16-page reports after they were disclosed in the Washington Post this past August, the issues disclosed in these reports date back several years. Many of these issues have already been addressed by the USPTO and POPA, working in collaboration over the past several years. And we continue to work today.

Recently, following the recommendations of an independent assessment of labor-management relations at the USPTO performed by Robert Tobias, Director of Key Executive Programs at American University and well-known former national president of the National Treasury Employees Union (NTEU), the USPTO and its three labor unions came together to form a joint USPTO Labor-Management Forum (LMF). The LMF is composed of the senior management of the major business units of the USPTO (i.e., Patents, Trademarks, OCIO, etc.) and the senior leaders of the labor unions. The LMF has already been meeting to further address concerns regarding time and attendance in an attempt to craft solutions applicable across the agency.

One issue of concern to POPA has been the misinformation regarding work credit abuse, or “mortgaging,” by examiners. At page 24 of the 32-page report and in several news articles, it has been alleged that:

Examiners can submit incomplete office actions for credit, called mortgaging, then go back later and complete the office action. As long as the examiner submits an appropriate amount of work by the end of the quarter, the examiner will be eligible to receive a variety of performance awards.

This is just plain wrong and an indication of the personal biases of the authors and lack of rigorous analysis found throughout the 32-page draft report. This allegation is particularly troublesome when one considers that the 32-page report was co-authored by employees of the Employee Relations division of the USPTO Human Resources office (ER) and the Office of General Law (OGL) in the General Counsel’s office (OGC). All these authors already know that mortgaging has never been acceptable behavior condoned by either the USPTO or POPA. Work credit abuse has been an inappropriate conduct issue at the USPTO dating back many years before telework. In fact, the agency and POPA again collaborated to update the agency’s policies on work credit abuse. In June, 2013, the agency issued clear guidance to supervisors to clarify what would constitute mortgaging and what steps supervisors should take when an examiner was found to be mortgaging their work. A copy of the agency’s “Work Credit Abuse” policy is attached as Attachment 4.

## **Monitoring Attendance in the 21<sup>st</sup> Century**

Much ado has been made in the draft and final IG reports regarding the need to ensure that an examiner is working the full 80 hours per biweek for which he/she is paid. While neither the USPTO or POPA condone employees attempting to intentionally falsify time and attendance, the practical reality here is that there is no way to absolutely ensure that an employee is performing work at the exact time that they report on their time and attendance records. This is not a problem unique to the USPTO either. No employer is capable of monitoring each employee every minute of every day. Even if they tried, the employer would likely find it difficult to find anyone willing to work for them. The only way to truly ensure that an employee is working every minute they claim is to hire an individual supervisor for that employee and

making sure that the employee and supervisor are working together side-by-side every minute of every work day. Obviously, doubling the cost of agency overhead in this manner is both cost prohibitive and, frankly, just plain stupid. Not even the Members of these Committees can ensure that every member of their respective staffs is working every minute of every day. Rather, the Committee Member accepts that his/her staff must have been working appropriately because the Member saw the staff member at a meeting or because the Member received the work product of the staff member – briefing papers, poll statistics on an issue, comments and other information from constituents, etc. – in a timely manner.

Patent examining is both physically and mentally demanding work. Much examination time is spent in activities that do not necessarily require being physically parked in front of a computer. Examiners do an incredible amount of reading every day. They have to read and become familiar with patent applications. They have to read prior art references to determine relevance to the claimed invention. They have to answer phone calls. The list can go on. Every time the examiner is interrupted by some intrusive tracking procedure, it represents a loss in productivity of that examiner. Instead of focusing on examination, they have to focus on ensuring that their supervisor is aware that they are working. In essence, their job goal is now to make sure they are properly tracked, rather than fulfilling the mission of the agency by examining patent applications. The point here is that, even such tools as the so-called “presence indicator” in the agency collaboration tools cannot ensure that an examiner is working every minute of every work day. This is simply not a practical reality at the USPTO in the 21<sup>st</sup> Century with a workforce spread across the nation.

The best way to reasonably ensure that employees are working appropriately is to have a good, objective set of performance goals and then determine whether or not the employee met his/her goals. This is how the USPTO has become so successful. The USPTO focuses its limited resources on helping examiners achieve their performance goals so that the agency itself can then reach its agency-wide performance goals. It is much more practical and cost effective to measure examiner work output than it is to track an examiner’s whereabouts and activities every minute of every day. Successful organizations have to focus on measuring results in the 21<sup>st</sup> Century, especially in the age of telework, not creating a workplace GPS system for tracking employee whereabouts. Helping Federal agencies to develop good sets of performance goals

should be the prime focus of both Congress and the President. Then, when an examiner makes his/her goal, there need not be any concern that the examiner was getting paid for not working. The examiner is being paid to accomplish production goals, not to keep an office chair warm and a light flashing on a supervisor's computer screen.

## **Conclusion**

In conclusion, POPA believes that the USPTO is already effectively ensuring that employees are performing the work for which they get paid. USPTO managers have many tools available to them to identify poor performers and take corrective action where necessary. Tools, such as the numerous requirements of the examiner Performance Appraisal Plan, agency Policies, as well as USPTO-POPA labor agreements are all available to assist the supervisor in monitoring examiner performance and taking corrective action where necessary.

History has shown that patent examiners (and virtually all employees everywhere) direct their efforts towards what they understand to be the agency's goals. Similarly, they will respond to performance incentives such as bonuses with enhanced performance. Many examiners work voluntary, non-compensated overtime (VOT) in order to achieve outstanding performance and receive monetary bonuses.

Going forward, POPA will continue to work together with the USPTO to effectively address any reasonable concerns of the USPTO. Our social experiment begun in 2009 has now become a new paradigm for successful labor management relations in a high-performing agency with a nationwide workforce. We work together to keep the U.S. Patent System the very best in the world.

Thank you again for this opportunity to share with you POPA's position and concerns. POPA looks forward to continuing to work with Congress, the Administration and the USPTO to address concerns and ensure that the U.S. Patent System remain the "gold standard" for protecting intellectual property in the 21<sup>st</sup> Century.

# Attachment 1

## CLASSIFICATION AND PERFORMANCE MANAGEMENT RECORD

☐ NEW \_\_\_\_\_

☐ I/A: \_\_\_\_\_

MR #: \_\_\_\_\_

IP #: \_\_\_\_\_

\* Performance Plan      \* Performance Appraisal      \* Performance Recognition      \* Progress Review      \* Position Description

Employee's Name: \_\_\_\_\_ Social Security No: \_\_\_\_\_

Position Title : Patent Examiner

Pay Plan, Series, Grade/Step: GS-1224-14 FSA

Organization:	1.	Department of Commerce	4.	Patent Examining Groups
	2.	Patent & Trademark Office	5.	Technology Center
	3.	D/C for Patent Operations	6.	Art Unit

Rating Period:

Covered By: ☐ Senior Executive Service  
☒ General Workforce ☐ Other

## PART A - POSITION DESCRIPTION

**POSITION CERTIFICATION:** I certify that this is an accurate statement of the major duties and responsibilities of the position and its organization relationships and that the position is necessary to carry out the Government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds and that false or misleading statements may constitute violation of such statute or their implementing regulations.

SUPERVISOR'S SIGNATURE	DATE	SECOND LEVEL SUPERVISOR	DATE

<b>CLASSIFICATION</b>	OFFICIAL TITLE:				
	PP:	SERIES	FUNC:	GRADE	I/A: <input type="checkbox"/> YES <input type="checkbox"/> NO

I certify that this position has been classified as required by Title 5, US Code, in conformance with standards published by the OPM or, if no published standards applies directly, consistently with the most applicable published standards.

NAME AND TITLE OF CLASSIFIER	SIGNATURE	DATE

## PART B - PERFORMANCE PLAN

This plan is an accurate statement of the work that will be the basis of the employee's performance appraisal.

NAME AND TITLE OF THE FIRST LINE SUPERVISOR/RATING OFFICIAL	SIGNATURE	DATE

**APPROVAL** - I agree with the certification of the position description and approving the performance plan.

NAME AND TITLE OF APPROVING OFFICIAL OR SES APPOINTING AUTHORITY	SIGNATURE	DATE

<b>EMPLOYEE ACKNOWLEDGEMENT</b> - My signature acknowledges discussion of the position description and receipt of the plan, and does not necessarily signify agreement.	SIGNATURE	DATE
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**PRIVACY ACT STATEMENT** - Disclosure of your social security number on this form is voluntary. The number is linked with your name in the official personnel records system to ensure unique identification of your records. The social security number will be used solely to ensure accurate entry of your performance rating into the automated record system.

# Instructions for Completing the Performance Management Record

**A. Performance Planning.** Complete Items 1, 2, and 3 of Section I by following these seven steps:

**Step 1.** Identify the performance elements of the employee's job (Item 1). Performance elements are brief, two or three word descriptions of the major responsibilities. (Fill out a separate Section 1 for each performance element.)

**Step 2.** Identify each element as critical or non-critical. Specify whether it is management by objective (MBO). (if so, it must be designated as critical.)

**Step 3.** State the objective of the element by writing a brief statement that defines what the element is intended to accomplish; focus on the overall result. An example of an objective is "To carry out organizational responsibilities by developing and implementing effective administrative procedures."

**Step 4.** Assign a weight to the element to show the time devoted to accomplishing the element and/or its importance. The total weight of all performance elements in the plan must equal 100.

**Step 5.** Identify the major activities (Item 2) or results needed to accomplish the performance element, e.g. develop an operating budget for the office, complete performance plans for all staff.

**Step 6.** Complete Item 3, "Criteria for Evaluation" by listing any performance standards that will be used to supplement the Generic Performance Standards (GPS) listed in Appendix A. The GPS must be used to evaluate employee performance. Supplemental standards must be included if they (a) apply to a particular element and (b) will be used to evaluate the employee's performance of the element.

**Step 7.** On the cover page of this form: (a) the rating official must certify as to the accuracy of the employee's position description (p.d.) and authorize the performance plan; (b) the approving official or SES appointing authority must approve the p.d. certification and the performance plan; and (c) the employee must acknowledge discussion of the p.d. and receipt of the performance plan.

**B. Progress Review.** At least once, near the mid-point of the appraisal period, the rating official must conduct a progress review with the employee by completing the following three steps:

**Step 1.** For each element in the performance plan, discuss: (a) The employee's progress toward accomplishing the element; (b) The need for any changes to the plan; and (c) any performance deficiencies noticed, along with recommendations on how to improve them.

**Step 2.** Complete Item 4, "Progress Review" of Section 1, noting the areas discussed in step 1.

**Step 3.** Initial and date the appropriate block in Item 4 (for each performance element) and have the employee do the same to indicate that the progress review took place.

**C. Performance Appraisal.** Near the end of the appraisal period,

the employee's performance during the year must be appraised formally on the basis of the performance plan by completing the following steps:

**Step 1.** The rating official formally notifies the employee of the date and time for the appraisal meeting.

**Step 2.** The employee may participate in a pre-appraisal meeting with the rating official to present his/her assessment of his/her performance during the appraisal period.

**Step 3.** The rating official complete Item 5, "Element Rating and Justification," of Section 1 for each performance element, noting specific accomplishments resulting from the employee's performance and relating them to the appropriate rating level (5-Outstanding, 4-Commendable, 3-Fully Successful, 2-Marginal, (Minimally Successful for SES) 1-Unacceptable (Unsatisfactory for SES)). Note: Element ratings of Fully Successful do not require written documentation unless employee requests it. To assign a Fully Successful element rating, the rating official need only document that: (a) the fully successful standards were met, and; (b) that the rating was discussed with the employee.

**Step 4.** The rating official completes Item 1 of Section II, "Performance Summary and Rating," by transferring the appropriate rating information from each performance element to the summary sheet.

**Step 5.** Item 2, "Performance Rating," of Section II is completed by the rating official and signed by the approving official before the rating is discussed with the employee. NOTE: If any critical element is rated less than fully successful, the final rating can be no higher than the lowest critical element rating.

**Step 6.** All the information documented in Steps 3-5 above is discussed with the employee at the formal appraisal meeting and a copy of the rating is given the employee. The employee signs the form acknowledging that an appraisal meeting was held.

**Step 7.** The employee may comment in writing to the approving official on his/her summary rating within 5 days of receipt. The approving official must respond in writing to any comments within 10 days of receipt. If the approving official changes a rating, he/she must document the reasons in Item 5.a. of 396A. A copy of the final rating must be given to the employee.

**Step 8. For SES Employees Only** - The rating official completes Item 3 and submits the entire form (and any employee comments) to the appropriate Performance Review Board (PRB) for its review and recommendations. The PRB chair signs the correct block in Item 3 and forwards the recommendations and the form to the SES Appointing Authority who then assigns the final rating by completing Item 3.4. A copy of the final rating must be given to the employee.

**Step 9. For general workforce employees only** - The rating official completes any recommendations for performance awards in Section III, and forwards through the approving official, to the proper channels for processing the award.



# APPENDIX A

## GENERIC PERFORMANCE STANDARDS

### INSTRUCTIONS

The generic performance standards (GPS) are the primary basis for assigning element ratings in the Department of Commerce. The GPS are to be applied to each critical (and non-critical) element in the performance plan. (Summary ratings are assigned by using a point scale after each element has been rated.)

When evaluating an element, the rater should:

- 1 Read carefully each performance standard level beginning with the fully successful one (it is considered the base level standard.)
- 2 Determine which level best describes the employee's performance on the element. (Each and every criterion in the standards does not have to be met by the employee in absolute terms for the rater to assign a particular rating level. The sum of the employee's performance of the element must, in the rater's judgment, meet the assigned level's criteria.)
- 3 Provide in writing, on the appraisal form, specific examples of accomplishments which support the assigned rating level.

Element ratings of fully successful do not require full written documentation unless the employee requests it. To assign a fully successful element rating the rating official need only document in writing that (1) the fully successful standards were met, and (2) that the rating was discussed in detail with the employee.

Occasionally, when rating some elements, a rating official may determine that an employee's performance on an element was not consistent. For example, the employee may have performed at the commendable level on several major activities within a critical element and at the marginal level on several others. In such a case, the rating official must consider the overall effect of the employee's work on the element and make a judgment as to the appropriate rating he/she will assign. The rationale for the decision must be documented on the rating form citing specific accomplishments which support the decision.

Any additional standards that are included in the performance plan must also be considered by the rating official. Such standards are included in performance plans to supplement GPS, not to supplant them. Rating officials should consider such standards within the context of the GPS and rate elements accordingly.

### OUTSTANDING

### SES

This is a level of rare high-quality performance. The employee has performed so well that organizational goals have been achieved that would not have been otherwise. The employee's mastery of the technical skills and thorough understanding of the mission have been fundamental to the completion of program objectives.

The employee has exerted a major positive influence on management practices, operating procedures, and program implementation, which has contributed substantially to organizational growth and recognition. Preparing for the unexpected, the employee has planned and used alternate ways of reaching goals. Difficult assignments have been handled intelligently and effectively. The employee has produced an exceptional quantity of work often ahead of established schedules and with little supervision.

In writing and speaking, the employee presents complex ideas clearly in a wide range of difficult communications situations. Desired results are attained.

### GENERAL WORK FORCE

This is level of rare, high-quality performance. The quality and quantity of the employee's work substantially exceed fully successful standards and rarely leave room for improvement. The impact of the employee's work is of such significance that organizational objectives were accomplished that otherwise would not have been. The accuracy and thoroughness of the employee's work on this element are exceptionally reliable. Application of technical knowledge and skills goes beyond that expected for the position. The employee significantly improves the work processes and products for which he or she is responsible. Thoughtful adherence to procedures and formats, as well as suggestions for improvement in these areas, increase the employee's usefulness.

This person plans so that work follows the most logical and practical sequence; inefficient backtracking is avoided. He or she develops contingency plans to handle potential problems and adapts quickly to new priorities and changes in procedures and programs without losing sight of the longer-term purposes of the work. These strengths in planning and adaptability result in early or timely completion of work under all but the most extraordinary circumstances. Exceptions occur only when delays could not have been anticipated. The employee's planning skills result in cost-savings to the government.

In meeting element objectives, the employee handles interpersonal relationships with exceptional skill, anticipating and avoiding potential causes of conflict and actively promoting cooperation with clients, co-workers, and his or her supervisor.

The employee seeks additional work or special assignments related to this element at increasing levels of difficulty. The quality of such work is high and is done on time without disrupting regular work. Appropriate problems are brought to the supervisor's attention, most problems are dealt with routinely and with exceptional skill.

The employee's oral and written expression are exceptionally clear and effective. They improve cooperation among participants in the work and prevent misunderstandings. Complicated or controversial subjects are presented or explained effectively to a variety of audiences so that desired outcomes are achieved.

### SUPERVISORY

The employee is a strong leader who works well with others and handle difficult situations with dignity and effectiveness. The employee encourages independence and risk-taking among subordinates, yet takes responsibility for their actions. Open to views of others, the employee promotes cooperation among peers and subordinates, while guiding, motivating, and stimulating positive responses. The employee's work performance demonstrates a strong commitment to fair treatment, equal opportunity, and the affirmative action objectives of the organization.

### COMMENDABLE

### SES

This is a level of unusually good performance. It has exceeded expectations in critical areas and shows sustained support of organizational goals. The employee has shown a comprehensive understanding of the objectives of the job and procedures for meeting them.

The effective planning of the employee has improved the quality of management practices, operating

procedures, task assignments, or program activities. The employee has developed or implemented workable and cost-effective approaches to meeting organizational goals.

The employee has demonstrated an ability to get the job done well in more than one way, while handling difficult and unpredicted problems. The employee produces a high quantity of work, often ahead of established schedules with less than normal supervision.

The employee writes and speaks clearly on difficult subjects to a wide range of audiences.

### GENERAL WORK FORCE

This is a level of unusually good performance. The quantity and quality of work under this element are consistently above average. Work products rarely require even minor revision. Thoroughness and accuracy of work are reliable. The knowledge and skill the employee applies to this element are clearly above average, demonstrating problem-solving skill and insight into work methods and techniques. The employee follows required procedures and supervisory guidance so as to take full advantage of existing systems for accomplishing the organization's objectives.

The employee plans the work under this element so as to proceed in an efficient, orderly sequence that rarely requires backtracking and consistently leads to completion of the work by established deadlines. He or she use contingency planning to anticipate and prevent problems and delays. Exceptions occur when delays have causes outside the employee's control. Cost savings are considered in the employee's planning.

The employee works effectively on this element with co-workers, clients, as appropriate, and his or her supervisor, creating a highly successful cooperative effort. He or she seeks out additional work or special assignments that enhance accomplishment of this element and pursues them to successful conclusion without disrupting regular work. Problems which surface are dealt with; supervisory intervention to correct problems occurs rarely.

The oral and written expression applied to this element are noteworthy for their clarity and effectiveness, leading to improved understanding of the work by other employees and clients of the organization. Work products are generally given sympathetic consideration because they are well presented.

### SUPERVISORY

The employee is a good leader, establishes sound working relationships and shows good judgment in dealing with subordinates, considering their views. He/she provides opportunities for staff to have a meaningful role in accomplishing organizational objectives and makes special efforts to improve each subordinate's performance.

### FULLY SUCCESSFUL

### SES

This is the level of good, sound performance. The employee has contributed positively to organizational goals. All critical element activities that could be completed are. The employee effectively applies technical skills and organizational knowledge to get the job done.

The employee successfully carries out regular duties while also handling any difficult special assignments. The employee plans and performs work according to organizational priorities and schedules.

The employee also works well as a team member supporting the group's efforts and showing an ability to handle a variety of interpersonal situations.

The employee communicates clearly and effectively.

All employees at this level and above have followed a management system by which work is planned, tasks are assigned, and deadlines are met.

## GENERAL WORK FORCE

This is the level of good, sound performance. The quality and quantity of the employee's work under this element are those of a fully competent employee. The performance represents a level of accomplishment expected of the great majority of employees. The employee's work products fully meet the requirements of the element. Major revisions are rarely necessary; most work requires only minor revision. Tasks are completed in an accurate, thorough, and timely way. The employee's technical skills and knowledge are applied effectively to specific job tasks. In completing work assignments, he or she adheres to procedures and format requirements and follows necessary instructions from supervisors.

The employee's work planning is realistic and results in completion of work by established deadlines. Priorities are duly considered in planning and performing assigned responsibilities. Work reflects a consideration of cost to the government, when possible.

In accomplishing element objectives, the employee's interpersonal behavior toward supervisors, co-workers, and users promotes attainment of work objectives and poses no significant problems.

The employee completes special assignments so their form and content are acceptable and regular duties are not disrupted. The employee performs additional work as his/her workload permits. Routine problems associated with completing assignments are resolved with a minimum of supervision.

The employee speaks and writes clearly and effectively.

## SUPERVISORY

The employee is a capable leader who works successfully with others and listens to suggestions.

The employee rewards good performance and corrects poor performance through sound use of performance appraisal systems performance-based incentives and when needed, adverse actions, and selects and assigns employees in ways that use their skills effectively.

The employee's work performance shows a commitment to fair treatment, equal opportunity, and the affirmative action objectives of the organization.

## MARGINAL

## SES

This level of performance, while demonstrating some positive contributions to the organization, shows notable deficiencies. It is below the level expected for the position and requires corrective action. The quality, quantity or timeliness of the employee's work is less than Fully Successful, jeopardizing attainment of the element's objective. The employee's work under this element is at a level which may result in removal from the position.

There is much in the employee's performance that is useful. However problems with quality, quantity or timeliness are too frequent or too serious to ignore. Performance is inconsistent and problems caused by deficiencies counterbalance acceptable work. These deficiencies cannot be overlooked since they create adverse consequences for the organization or create burdens for other

personnel. When needed as input into another work process, the work may not be finished with such quality, quantity and timeliness that other work can proceed as planned.

Although the work products are generally of useable quality, too often they require additional work by other personnel. The work products do not consistently and/or fully meet the organization's needs. Although mistakes may be without immediate serious consequences, over time they are detrimental to the organization.

A fair amount of work is accomplished, but the quantity does not represent what is expected of Fully Successful employees. Output is not sustained consistently and/or higher levels of output usually result in decreased quality. The work generally is finished within expected timeframes but significant deadlines too often are not met.

The employee's written and oral communications usually consider the nature and complexity of the subject and the intended audience. They convey the central points of the information important to accomplishing the work. However, too often the communications are not focused, contain too much or too little information, and/or are conveyed in a tone that hinder achievement of the purpose of the communications. The listener or reader must question the employee at times to secure complete information or avoid misunderstandings.

## GENERAL WORK FORCE

This level of performance, while demonstrating some positive contributions to the organization, shows notable deficiencies. It is below the level expected for the position, and requires corrective action. The quality, quantity or timeliness of the employee's work is less than Fully Successful, jeopardizing attainment of the element's objective.

There is much in the employee's performance that is useful. However problems with quality, quantity or timeliness are too frequent or too serious to ignore. Performance is inconsistent and problems caused by deficiencies counterbalance acceptable work. These deficiencies cannot be overlooked since they create adverse consequences for the organization or create burdens for other personnel. When needed as input into another work process, the work may not be finished with such quality, quantity and timeliness that other work can proceed as planned.

Although the work products are generally of useable quality, too often they require additional work by other personnel. The work products do not consistently and/or fully meet the organization's needs. Although mistakes may be without immediate serious consequences, over time they are detrimental to the organization.

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The employee's written and oral communications usually consider the nature and complexity of the subject and the intended audience. They convey the central points of the information important to accomplishing the work. However, too often the communications are not focused, contain too much or too little information, and/or are conveyed in a tone that hinder achievement of the purpose of the communications. In communications to coworkers, the listener or reader must question the employee at times to secure complete information or avoid misunderstandings.

## SUPERVISORY

Inadequacies surface in performing supervisory duties. Deficiencies in areas of supervision over an extended period of time affect adversely employee

productivity or morale or organizational effectiveness. The marginal employee does not provide strong leadership or take the appropriate initiative to improve organizational effectiveness. For example, he/she too often fails to make decisions or fulfill supervisory responsibilities in a timely manner to provide sufficient direction to subordinates on how to carry out programs, to give clear assignments and/or performance requirements, and/or to show an understanding of the goals of the organization or subordinates' roles in meeting those goals.

## UNSATISFACTORY

## SES

This is the level of unacceptable performance. Work products do not meet the minimum requirements of the critical element.

Most of the following deficiencies are typically, but not always, characteristic of the employee's work:

- \* Little or no contribution to organizational goals;
- \* Failure to meet work objectives;
- \* Inattention to organizational priorities and administrative requirements;
- \* Poor work habits resulting in missing deadlines, incomplete work products;
- \* Strained work relationships;
- \* Failure to respond to client needs; and/or
- \* Lack of response to supervisor's corrective efforts.

## GENERAL WORK FORCE

The quantity and quality of the employee's work under this element are not adequate for the position. The employee's work products fall short of requirements of the element. They arrive late or often require major revision because they are incomplete or inaccurate in content. The employee fails to apply adequate technical knowledge to complete the work of this element. Either the knowledge applied cannot produce the needed products, or it produces technically inadequate products or results. Lack of adherence to required procedures, instructions, and formats contributes to inadequate work products.

Because the employee's work planning lacks logic or realism, critical work remains incomplete or is unacceptably late. Lack of attention to priorities causes delays or inadequacies in essential work, the employee has concentrated on incidental matters.

The employee's behavior obstructs the successful completion of the work by lack of cooperation with clients, supervisor, and/or co-workers, or loss of credibility due to irresponsible speech or work activities.

In dealing with special projects, the employee either sacrifices essential regular work or fails to complete projects. The employee fails to adapt to changes in priorities, procedures, or program direction and therefore, cannot operate adequately in relation to changing requirements.

The oral and written expression the employee uses in accomplishing the work of this element lacks necessary clarity for successful completion of required tasks. Communication failures interfere with completion of work.

## SUPERVISORY

Most of the following deficiencies are typical, but not always, common, characteristics of the employee's work:

- \* Inadequate guidance to subordinates;
- \* Inattention to work progress; and
- \* Failure to stimulate subordinates to meet goals.

**\*Supervisory standards must be applied to SES and General Work Force supervisors.**

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**Item 1. Performance Element and Objective** (Identify as Critical or Non-critical, and if it being tracked at the department level)

☒ **Critical**    ☐ Non-Critical    ☐ Management-by-Objectives (MBO)

Element: **I. Production**

Objective To achieve assigned expectancy.

**Weighting Factor:** (Weights reflect the amount of time devoted to accomplishing the element and/or its importance. Weight for performance plans must total 100.)  
Enter Weight for this element in the adjacent box:

35

**Item 2. Major Activities** (Identify activities or results that need to be accomplished in support of the performance element.)

The examiner examines assigned patent applications from first action to final disposition within an assigned expectancy (hours per balanced disposal (BD)).

**Item 3. Criteria for Evaluation** (Use generic performance standards printed in Appendix A. Supplemental performance standards may also be specified below.)

An examiner shall be assigned a rating with respect to Production as follows:

110% or above	<b>Outstanding</b>
103% - 109%	<b>Commendable</b>
95% - 102%	<b>Fully Successful</b>
88% - 94%	<b>Marginal*</b>
below 88%	<b>Unacceptable</b>

\*Note: Continued or repetitive performance at this level adversely impacts upon the efficiency of the service under the performance Element.

All percentages shall be rounded off to the nearest whole number (i.e, 109.49% rounds to 109% and 109.50% rounds to 110%).

With respect to this element your goal in the docket to which you have been assigned is listed on the Productivity Attachment. It should be noted that if your GS position factor changes during the fiscal year your evaluation will be based on a composite goal pro-rated for the periods in each GS position factor.

The supplemental performance standards for evaluation of production are follows:

Achievement shall be recognized in terms of percentage achievement of  $\frac{\text{Calculated Production Hours}}{\text{Total Examining Hours}}$ .

Where, Calculated Production Hours = (Balance Disposals (BD) Achieved) × (Adjusted Expectancy for the period) and;  
Total Examining Hours = Total Examining Hours for the period

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When calculating the number of BDs achieved, the higher of the following two calculations shall be used:

**Option 1)**  $BD = \frac{(N+D)}{2}$  where **N** is the number of First Actions on the Merits and **D** is the number of Disposals.

If Option 1 is used, your goal is the "Actual Expectancy (Exp/PF)"

**Option 2)**  $BD = \frac{(Counts)}{2}$  where the number of counts is the sum of the counts earned for actions as shown in the table below. If

Option 2 is used, your goal is the "Adjusted Actual Expectancy (Exp./PF + Adj.)"

	Action by same examiner as previous action						Initial action by different examiner than previous action		
							These values are only available if the immediately previous action is an action on the merits done by the previous examiner.		
	- Regular new, - CON, - DIV, - CIP, or - reissue, in which no RCE has been filed, and - RCEs, other than those listed in items 1-3 in the footnote below.		1st RCE: - Regular new, - CON, - DIV, - CIP, or - reissue, in which one RCE has been filed.		2nd or subsequent RCE: - Regular new, - CON, - DIV, - CIP, or - reissue, in which two or more RCEs have been filed.		- Regular new, - CON, - DIV, - CIP, or -reissue, in which no RCE has been filed.	1st RCE: a -Regular new, - CON, - DIV, - CIP, or - reissue, in which one RCE has been filed.	2nd or subsequent RCE: - Regular new, - CON, - DIV, - CIP, or - reissue, in which two or more RCEs have been filed.
Total credit available = 2.0 counts		Total credit available = 1.75 counts		Total credit available = 1.5 counts		Total credit available for new examiner = 1.5 counts	Total credit available for new examiner = 1.75 counts	Total credit available for new examiner = 1.75 counts	
	Before Final	After Final	Before Final	After Final	Before Final	After Final			
column	A	B	C	D	E	F	G	H	I
Action:	Counts:						Counts:		
Express Abandonment	0.75	0.50	0.75	0.50	0.75	0.50	N/A	N/A	N/A
Restriction	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
FAOM Non-final Rejection	1.25	N/A	1.00*	N/A	0.75*	N/A	N/A	1.00*	1.00*
FAOM Allowance	2.00	N/A	1.75*	N/A	1.50*	N/A	1.50	1.75*	1.75*
FAOM ex parte Quayle	1.50	N/A	1.25*	N/A	1.00*	N/A	1.00	1.25*	1.25*
Ex parte Quayle (not FAOM)	0.25	0.00	0.25	0.00	0.25	0.00	1.00	1.25	1.25
FAOM Final Rejection	1.50	N/A	1.25*	N/A	1.00*	N/A	1.00	1.25*	1.25*
Non-Final Rejection (not FAOM)	0.00	0.00	0.00	0.00	0.00	0.00	0.75	1.00	1.00
Final Rejection	0.25	0.00	0.25	0.00	0.25	0.00	1.00	1.25	1.25
Advisory Action	N/A	0.00	N/A	0.00	N/A	0.00	0.75	1.00	1.00
Allowance	0.75	0.50	0.75	0.50	0.75	0.50	1.50	1.75	1.75
Abandonment for failure to respond	0.75	0.50	0.75	0.50	0.75	0.50	N/A	N/A	N/A
RCE Disposal Credit	N/A	0.50	N/A	0.50	N/A	0.50	N/A	N/A	N/A
Examiner's Answer, Interference, SIR	0.75	0.50	0.75	0.50	0.75	0.50	1.50	1.75	1.75
Interview Summary	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Rule 1.05 Request	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Non-compliant and Non-responsive notices	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

\* This count value applies to 1) any RCE FAOM which exceeds the ceiling control days set forth in the Docket Management element of this PAP; 2) in the first quarter of the fiscal year, the first three non-ceiling RCE FAOMs for which credit is received; and 3) in the second, third, and fourth quarters of the fiscal year, the first four non-ceiling RCE FAOMs for which credit is received.

First Actions on the Merits shall not include first action restriction requirements. However, an examiner will be assigned an appropriate amount of non-examining time for drafting all restriction requirements which do not include an action on the merits and are in compliance with current Office policy.

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**Item 1. Performance Element and Objective** (Identify as Critical or Non-critical, and if it being tracked at the department level)

☒ **Critical**    ☐ Non-Critical    ☐ Management-by-Objectives (MBO)

Element: **II. Quality**

Objective To formulate or recommend appropriate action in the examination of patent applications.

**Weighting Factor:** (Weights reflect the amount of time devoted to accomplishing the element and/or its importance. Weight for performance plans must total 100.  
Enter Weight for this element in the adjacent box.)

**35**

**Item 2. Major Activities** (Identify activities or results that need to be accomplished in support of the performance element.)

With no preliminary instructions, the examiner formulates or recommends appropriate action with respect to major activities 1-19 as set forth in Table 2.

The examiner signs Office actions and/or submits Office actions in final form in accordance with the level of Signatory Authority which has been delegated. (M.P.E.P. 1004) The examiner receives appropriate credit upon submission.

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The examiner will be assigned a rating using the criteria set forth below with respect to the major activities for which the examiner is responsible based on the work product submitted in final form which has been credited for the period under consideration.

Table 2  Quality Major Activities			Evaluation Level									
	Activity Level	Error Category	GS 5	GS 7	GS 9	GS 11	GS 12	GS 13	GS 13/ 14 PSA	GS 14 FSA	GS 15	
1. checking applications for (a) compliance with formal requirements of patent statutes and rules and (b) technological accuracy	Basic	❶	✓	✓	✓	✓	✓	✓	✓	✓	✓	
2. treating disclosure statements and claims of priority	Basic	❶	✓	✓	✓	✓	✓	✓	✓	✓	✓	
3. analyzing disclosure and claims for compliance with 35 USC 112;	Basic	❷		✓	✓	✓	✓	✓	✓	✓	✓	
4. planning field of search;	Basic	❶		✓	✓	✓	✓	✓	✓	✓	✓	
5. conducting search;	Basic	❶		✓	✓	✓	✓	✓	✓	✓	✓	
6. making proper rejections under 35 USC 102 and 103 with supporting rationale, or determining how claim(s) distinguish over the prior art;	Basic	❷		✓	✓	✓	✓	✓	✓	✓	✓	
7. determining whether amendment introduces new matter;	Advance d	❷		✓	✓	✓	✓	✓	✓	✓	✓	
8. appropriately formulating restriction requirements, where application could be restricted	Advance d	❶		✓	✓	✓	✓	✓	✓	✓	✓	
9. determining whether claimed invention is in compliance with 35 USC 101;	Advance d	❷		✓	✓	✓	✓	✓	✓	✓	✓	
10. evaluating/applying case law as necessary;	Legal	*			✓	✓	✓	✓	✓	✓	✓	
11. determining where appropriate line of patentable distinction is maintained between applications and/or patents;	Legal	❶		✓	✓	✓	✓	✓	✓	✓	✓	
12. evaluating sufficiency of affidavits/ declarations;	Legal	*			✓	✓	✓	✓	✓	✓	✓	
13. evaluating sufficiency of reissue oath/declaration;	Legal	❶			✓	✓	✓	✓	✓	✓	✓	
14. promotes compact prosecution by including all reasonable grounds of rejections, objections, and formal requirements; (M.P.E.P. 707.07(g), etc.);	Legal	❶							✓	✓	✓	
15. makes the record, taken as a whole, reasonably clear and complete;	Legal	❶							✓	✓	✓	
16. properly treats all matters of substance in applicant’s response;	Legal	❶						✓	✓	✓		
17. formulates and independently signs final determinations of patentability (final rejections, allowance, examiner answers and advisory actions)	Legal	*								✓	✓	
18. properly closes prosecution: makes no premature final rejection	Legal	❷								✓	✓	
19. properly rejects all rejectable claims in a final rejection; properly allows all claims in an allowance	Legal	❸								✓	✓	

\*Errors for these items will be charged under another major activity.

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**Item 3. Criteria for Evaluation** (Use generic performance standards printed in Appendix A. Supplemental performance standards may also be specified below.)

Clear error under this element will be deemed to have occurred where the examiner's office action(s) or office communication(s):

1. does not reasonably comply with the major activities set forth in table 2, and
2. could not have been permitted at the time and under the circumstances that the action was taken, and
3. is not an honest and legitimate difference of opinion as to what action should have been taken. If the action taken by the examiner is reasonable and the action preferred by the SPE is reasonable, this constitutes an honest and legitimate difference of opinion and the action taken by the examiner is free of clear error.

The examiner will be assigned a rating using the criteria set forth below with respect to the major activities for which the examiner is responsible (See Table B) based on the work product submitted in final form which has been credited for the period under consideration.

The examiner shall be assigned a rating with respect to the quality of examination in 3 categories.

Category 1 errors may be charged after several occurrences of the same error when individual mentoring and training has failed to eliminate the problem. After commission of a category 1 error the Agency may rely upon mentoring and training provided during the previous and current fiscal years.

Category 2 and Category 3 errors may be charged after a single occurrence.

In a single action:

- Multiple errors in a single category will be charged as one error.
- If an error can be held in more than one category, it will be charged as an error in the highest category.
- Both a Category 1 and a Category 2 error may be charged in the same action if they are unrelated.
- Both a Category 1 and a Category 3 error may be charged in the same action if they are unrelated.
- Category 2 and Category 3 errors may not be charged in the same action even if the errors are unrelated.

The maximum error rate will be a combined score based on each of the three factors listed below weighted equally:

Category 1 Errors (CAT 1)

All Actions

Category 2 Errors (CAT 2)

All Actions

Category 3 Errors (CAT 3)

Final Rejections plus Allowances

$$\text{Combined Error Score} = \frac{\text{CAT 1} + \text{CAT 2} + \text{CAT 3}}{3}$$

However, if the examiner's error rate in any category is greater than or equal to 7.50%, the overall rating for the element shall be unacceptable.

**Outstanding** – The error rate is 0% - 4.49%. Except for rare occurrences, the examiner complies with indicia 1-3 of the "Indicia of Outstanding or Commendable Performance" as identified below:

**Commendable** – The error rate is 4.50% - 5.49%. In substantially all actions the examiner complies with indicia 1-3 of the "Indicia of Outstanding or Commendable Performance" as identified below:

**Fully Successful** – The error rate is 5.50% - 6.49%.

**Marginal\*** – The error rate is 6.50% - 7.49%.

**Unacceptable** – The error rate is greater than or equal to 7.50%.

Truncation Rule: Truncate to the second decimal. For example, an error rate of 5.49X = 5.49.

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\*Note: Continued or repetitive performance at this level adversely impacts upon the efficiency of the service under this performance element.

**Indicia of Outstanding and Commendable Performance**

1. The examiners' statements of rejection, objection, and response to arguments clearly and concisely present the positions taken or recommended in the resulting Office actions including a thorough substantive explanation to convey those positions to the applicant.
2. The Office actions as well as the file record clearly indicate that the examiner fully complies with the principles of compact prosecution. Note the principle of compact prosecution comprises conducting an initial search which is as complete as possible including consultation with an expert in the art where the examiner lacks such expertise; placing art of record in the application which meets both the concept and the wording of the claims as well as other art which is pertinent to significant though unclaimed features of the disclosed invention; and issuing a first Office action which clearly explains the examiner's position on each essential issue in such detail that absent some unexpected consideration the next Office action may be made final.
3. The record developed by the examiner usually shows an indication of allowable subject matter at the earliest time which is consistent with the file record and prosecution of the application.

Note: No rating shall be reduced more than one level (i.e., Outstanding to Commendable or Commendable to Fully Successful) based upon the determination that the examiner did not meet the indicia above.

Optional Initial Block

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Date

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**SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD**

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**Item 1. Performance Element and Objective** (Identify as Critical or Non-critical, and if it is being tracked at the department level.)

☒ **Critical**    ☐ Non-Critical    ☐ Management-by-Objectives (MBO)

Element: **III. Docket Management**

Objective To conduct examining activities within prescribed timeframes.

**Weighting Factor:** (Weights reflect the amount of time devoted to accomplishing the element and/or its importance. Weight for performance plans must total 100.)

Enter Weight for this element in the adjacent box:

20
----

**Item 2. Major Activities** (Identify activities or results that need to be accomplished in support of the performance element.)

Except where the SPE, Director, or other appropriate authority has waived, excused, or directed otherwise, the examiner:

1) Handles all applications and proceedings awaiting action in accordance with the time period or Special handling instructions prescribed by current Office policy;

2) Forwards all work for processing and/or handling promptly or in accordance with prescribed time period.

See table below for specific categories and time periods:

Cat.	Component (Action Types)	Expected Average Days	Ceiling Control (Days)
1	<b>Amendments</b> response to non-final OA, Appeal Briefs	56	98 <sup>3</sup>
2	<b>Special New<sup>1</sup></b> e.g. PPH, Accelerated Examination, Petitions to Make Special, Track 1, PCT, Reexam, Reissues, etc.	14	28
	<b>Special Amended</b> e.g. PPH, Accelerated Examination, Petitions to Make Special, Board Decisions/Remands	14	28
3	<b>New<sup>2</sup></b> Regular New, Continuations in Part (CIPs), Continuations, Divisionals, RCEs	28	56
4	<b>Expedited</b> e.g. After Finals, Responses under 37 CFR 1.312, PUBs Cases (Printer Rushes)	14	28
5	<b>Returns</b> (Returned by TSS & Reviewer)	14	28

<sup>1</sup> A "qualifying pay period" is one in which the examiner has at least 40 examining hours or the examiner's hourly production goal, whichever is greater.

<sup>2</sup> In these categories additional cases will be identified so the examiner can work ahead provided the oldest case in the component is completed in the pay period.

<sup>3</sup> When an amendment exceeds the 98 day ceiling a -150% score (equivalent to 196 days) will be recorded for the application.

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**SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD**

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**Item 3. Criteria for Evaluation** (Use generic performance standards printed in Appendix A. Supplemental performance standards may also be specified below.)

Evaluation of this element will be based on an overall document management score determined as set forth below. Based on that score, an examiner shall be assigned a rating for this element as follows:

110% or above	<b>Outstanding</b>
103% - 109%	<b>Commendable</b>
95% - 102%	<b>Fully Successful</b>
88% - 94%	<b>Marginal*</b>
below 88%	<b>Unacceptable</b>

\*Continued or repetitive performance at this level adversely impacts upon the efficiency of the service under this performance element.

All percentages shall be rounded to the nearest whole number (i.e, 109.49% rounds to 109% and 109.50% rounds to 110%.)

However, the examiner will not be held responsible for an application that is not ready for examination.

Docket Management performance waivers will be available in the following instances:

1. ≥5 consecutive days away for short day cases\*\*
2. Four or more contiguous weeks (28+ days) absence for reasons that would qualify under FMLA or sick leave (excludes vacations).
3. Details of 50% or more

Additional guidance on waivers can be found in the PAP Guidelines for Docket Management.

\*\*If an examiner is away for five consecutive days or more (excluding AWOL), there will be an adjustment for After Finals, Responses under 37 CFR 1.312, PUBs Cases (Printer Rushes), Petitions/Special Programs Amendments and Corrections unless the application is already past the "Expected Average Days" requirement (set forth in table above) prior to the beginning of the days away.

Examiners planning vacations and other absences may work ahead on new case components in Category 3 of this element. If the examiner completes the oldest case as marked during the pay period the examiner may also submit other cases marked with an asterisk in the same component and receive a "0" day for those cases.

As set forth in detail in the Docket Management section of the PAP Guidelines, patent applications (cases) that exceed the ceiling control number of days will be handled through a Docket Management Plan (DMP). A DMP will be in effect and will remain in effect whenever an examiner has one or more ceiling-exceeded cases. Under a DMP, on a biweekly basis and in accordance with the PAP Guidelines, the examiner's supervisor will assign a number of ceiling-exceeded cases which must be posted for credit by the end of counting for that biweek. If a case assigned per the DMP is not posted for credit by the end of counting for that biweek, that case will count as another entry at the ceiling level towards the examiner's component and composite Docket Management scores for that biweek. Cases not posted for credit by the end of counting for that biweek will count using a varying scale as outlined in the PAP Guidelines and summarized in the table below.

Category	Reaches Ceiling	While on Ceiling Status	Charge to Score at end of PP				
			DMP - PP1 (Days)	DMP - PP2 (Days)	DMP - PP3 (Days)	DMP - PP4 (Days)	DMP ≥ PP5
1	98 Days	Holding - No Clock	112	112	140	154	N+14 Days
2	28 Days	Holding - No Clock	28	28	70	84	N+14 Days
3	56 Days	Holding - No Clock	56	56	98	112	N+14 Days
4	28 Days	Holding - No Clock	28	28	70	84	N+14 Days
5	28 Days	Holding - No Clock	28	28	70	84	N+14 Days

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**SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD**

Name \_\_\_\_\_

Date \_\_\_\_\_

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## Calculating Docket Management Composite Score

The docket management element is based on the actual average number of days between an action being placed on an examiner's docket (See "Start Date" Chart below) until posting for credit or ceiling exceeded. For all components other than category 1, a ceiling exceeded score equal to the Ceiling Control days is entered for the calculation of the actual average. For category 1, a ceiling exceeded score of 196 days is entered for calculation of the actual average.

Cat.	Component (Action Type)	Clock Start Dates
1	Amendments	Start of the bi-week after the application is placed on examiners docket.
2	Special New	A new application is added the bi-week after the previous case was completed.
	Special Amended	Date when application is placed on examiners docket except for board decisions which will start 64 days after board decision date.
3	New	A new application is added the bi-week after the previous case was completed.
4	Expedited	When application is placed on examiners docket.
5	Returns	Date returned to Examiner.

The actual average number of days for a given component (application type) is then compared to the expected average days for that component. There are 6 distinct components, with expected average days ranging from 14-days to 56-days. For each component, a score is calculated using the formula  $((wf_0 - wf_1)/wf_0 + 1) * 100$ , where  $wf_0$  represents expected average days for the component, and  $wf_1$  represents the actual average days for the component. The component scores are weighted based on the number of actions in each component to form a contributing score for that component. The total docket management score is the sum of each of the contributing scores as illustrated in the example below:

Cat.	Component (Action Types)	Expected Average Days $wf_0$	Number of Cases $n_o$	Average Days $wf_1$	Component Score $((wf_0 - wf_1)/wf_0 + 1) * 100$ $CS_1$	Contributing Score $(n_o / \text{Sum}(n_o)) * CS_1$
1	Amendments in response to non-final OA, Appeal Briefs	56	100	24	157.1%	66.9%
2	Special New e.g. PPH, Accelerated Examination, Petitions to Make Special, Track 1, PCT, Reexam, Reissues, etc.	14	12	12	114.3%	5.8%
	Special Amended e.g. PPH, Acceleration Examination, Petitions to Make Special, Board Decisions/Remarks	14	10	12	114.3%	4.9%
3	New Regular New, Continuations, Continuations in Part (CIPs), Divisionals, RCEs	28	52	14	150.0%	33.2%
4	Expedited e.g. After Finals, Responses under 37 CFR 1.312, PUBs Cases (Printer Rushes)	14	57	8	142.9%	34.7%
5	Returns (Returned by TSS & Reviewer) <sup>1</sup>	14	4	8	142.9% (110%)	1.9%
			Sum( $n_o$ ) = 235			
						Overall % Score 147.4%

<sup>1</sup> The TSS returns portion of the returns component score is capped at 20% of the overall docket management score

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Emp. _____	Date _____	Supv. _____	Date _____
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**SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD**

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**Item 1. Performance Element and Objective** (Identify as Critical or Non-critical, and if it is being tracked at the department level.)

☐ Critical ☒ **Non-Critical** ☐ Management-by-Objectives (MBO)

Element: **IV. Stakeholder Interaction**

Objective: To provide appropriate service to stakeholders.

**Weighting Factor:** (Weights reflect the amount of time devoted to accomplishing the element and/or its importance. Weight for performance plans must total 100.)  
Enter Weight for this element in the adjacent box:

**10**

**Item 2. Major Activities** (Identify activities or results that need to be accomplished in support of the performance element.)

1. Treat external stakeholders with courtesy and professionalism by:

- a. Returning phone calls from external stakeholders, generally in one business day.
- b. Reviewing email messages generally at least once every workday, and responding, if necessary, by any appropriate means.
- c. Providing normal schedule information via voice mail if working other than a Monday through Friday schedule.
- d. Providing voice mail notice of extended absences of three or more business days.
- e. Directing external stakeholders to appropriate office or person, in accordance with a list provided or posted by Management.
- f. Conducting all interviews and/or other contacts with external stakeholders as scheduled with adequate preparation, and in a courteous manner. Further, no interview and/or other contact is arbitrarily or capriciously refused by the examiner.
- g. Displaying proper decorum in official communications (e.g., Office action or interview summary) to external stakeholders.

2. Providing search consultation and other assistance to the public and peers.

**Item 3. Criteria for Evaluation** (Use generic performance standards printed in Appendix A. Supplemental performance standards may also be specified below.)

Ratings will be based on demonstrated behavior of the following criteria:

**Outstanding** - All major activities identified are routinely performed in a timely and courteous manner and, except for rare exceptions, the employee demonstrates all of the identified indicia.

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**SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD****Name****Date****Sheet No.**11 of 11

**Commendable** - All major activities identified are routinely performed in a timely and courteous manner and the employee demonstrates all of the identified indicia in substantially all circumstances.

Indicia:

- Routinely uses interview practice to facilitate compact prosecution
- Is accessible and responsive regardless of physical location
- Provides appropriate information to address stakeholder inquiries
- Responds to internal stakeholders in a timely manner
- Responds appropriately to requests for personal interviews in a timely manner
- Is always well prepared for interviews

**Fully Successful** - All major activities identified are normally performed in a timely and courteous manner.

**Marginal** - Demonstrates some contribution to the element. However, a significant number of documented deficiencies in at least one of the major activities have been identified to the examiner.

**Unacceptable** - Performance is not adequate for the position, failing to meet the Marginal level. Numerous instances of documented deficiency in at least one of the major activities have been identified to the examiner.

"Business Day" - shall refer to each Monday through Friday except Federal holidays. Business hours shall run from 8:30 A.M. to 5:00 P.M. Eastern Time.

"Work Day" - is defined as a normal Monday through Friday and when the examiner is working for a substantial portion of the day. Such excludes holidays, days in which adjusted work dismissal occurs, day in which "the employees is not expected to work" (or Agency is closed), and days in which employees are excused from duty early.

Optional Initial Block

Emp.

Date

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Date

## I. Production

Name:

**Item 4. Progress Reviews** (Indicate progress toward accomplishing this element, the need for any adjustments to the plan, or areas where performance needs to be improved)

Employee's Initials	Date	Employee's Initials	Date
Supervisor's Initials	Date	Supervisor's Initials	Date

**Item 5. Element Rating & Justification** (support rating in space below)

5- Outstanding    4- Commendable    3- Fully Successful    2- Marginal    1- Unacceptable

Enter Rating  
1-5 in adjacent  
block

**Item 5.a. Approving/Appointing Authority Comments and Signature** (Required only if approving/appointing authority changes rating official's element rating in Item 5.)

Approving/Appointing Authority Signature

Date

II. Quality

Name:

**Item 4. Progress Reviews (Indicate progress toward accomplishing this element, the need for any adjustments to the plan, or areas where performance needs to be improved)**

Employee's Initials	Date	Employee's Initials	Date
Supervisor's Initials	Date	Supervisor's Initials	Date

**Item 5. Element Rating & Justification (support rating in space below)**

5- Outstanding    4- Commendable    3- Fully Successful    2- Marginal    1- Unacceptable

Enter Rating  
1-5 in adjacent  
block

**Item 5.a. Approving/Appointing Authority Comments and Signature (Required only if approving/appointing authority changes rating official's element rating in Item 5.)**

**Approving/Appointing Authority Signature**

**Date**

Item 4. Progress Reviews (Indicate progress toward accomplishing this element, the need for any adjustments to the plan, or areas where performance needs to be improved)

Employee's Initials	Date	Employee's Initials	Date
Supervisor's Initials	Date	Supervisor's Initials	Date

Item 5. Element Rating & Justification (support rating in space below)

5- Outstanding    4- Commendable    3- Fully Successful    2- Marginal    1- Unacceptable

Enter Rating  
1-5 in adjacent  
block

Item 5.a. Approving/Appointing Authority Comments and Signature (Required only if approving/appointing authority changes rating official's element rating in Item 5.

Approving/Appointing Authority Signature

Date



Item 4. Progress Reviews (Indicate progress toward accomplishing this element, the need for any adjustments to the plan, or areas where performance needs to be improved)

Employee's Initials	Date	Employee's Initials	Date
Supervisor's Initials	Date	Supervisor's Initials	Date

Item 5. Element Rating & Justification (support rating in space below)

5- Outstanding    4- Commendable    3- Fully Successful    2- Marginal    1- Unacceptable

Enter Rating  
1-5 in adjacent  
block

Item 5.a. Approving/Appointing Authority Comments and Signature (Required only if approving/appointing authority changes rating official's element rating in Item 5.

Approving/Appointing Authority Signature

Date

## SECTION II - PERFORMANCE SUMMARY AND RATING

Name: \_\_\_\_\_

### ITEM 1. Instructions

1. List each element in the performance plan; indicate whether it is critical/non-critical and what weight has been assigned to it.
2. Assign a rating level for each element: (5) Outstanding (4) Commendable (3) Fully Successful (2) Marginal/Minimally Satisfactory (1) Unacceptable/Unsatisfactory (SES)
3. Score each element by multiplying the weight by the rating level.
4. After each element has been scored, compute the total score by summing all individual scores. Total score can range from 100 to 500.

Performance Element	Critical or Non-critical (C or NC)	MBO	Individual Weights (Sum must total 100)	Element Rating (1-5)	Score
I. Production	C		35%	0	0
II. Quality	C		35%	0	0
III. Docket Management	C		20%	0	0
IV. Stakeholder Interaction	NC		10%	0	0
			100%	<b>TOTAL SCORE</b>	<b>0</b>

For SES: Turn to reverse side and continue with Item 3.

### ITEM 2. PERFORMANCE RATING

(Based on total score *except that if any critical element is less than fully successful the rating can be no higher than the lowest critical element rating*)

☐ Outstanding  
(460-500)

☐ Commendable  
(380-459)

☐ Fully Successful  
(290-379)

☐ Marginal  
(200-289)

☐ Unacceptable  
(100-199)

Rating Official's Signature	Title	Date:
Approving Official's Signature	Title	Date:
Employee's Signature (Indicates appraisal meeting held)	Employee Comments Attached <input type="checkbox"/> Yes <input type="checkbox"/> No	Date:

### Section III. - PERFORMANCE RECOGNITION (General Workforce only)

☐ Performance Award: \$ \_\_\_\_\_ ( \_\_\_\_\_%) **For performance awards:** Has employee been promoted during the appraisal cycle? ☐ Yes ☐ No

☐ QSI (Outstanding rating required) Appropriation No: \_\_\_\_\_

Rating Official's Signature	Title	Date:
Approving Official's Signature	Title	Date:
Final Approving Authority's Signature		Date:
Payment Authorized by Personnel Office		Date:

## Position Description – GS-14FSA

PD 40-17--  
GS-1224-14  
Full Signatory Authority  
Art of Bachelors Level with  
Designated Complexities

### **FACTOR I, Nature and Extent of Performance of Examining Functions:**

Incumbent independently performs "Basic", "Advanced", and "Legal" patent examining functions (e.g., the application of legal precedents, the determination of double-patenting situations, the evaluation of petitions to the Commissioner and affidavits of patentable relevance, etc.) with no preliminary instructions from the supervisor. References used to determine whether or not the claimed invention is new and patentable are rarely, if ever, reviewed. All official Patent Office actions, including the substantive evaluation in terms of both statutory and precedent law of the legal sufficiency of evidence submitted by the applicant, are presented to the supervisor in final form for approval, except as modified in Factor II below.

Incumbent's determinations are reviewed, if at all, for conformance with Patent Office policy only upon final allowance or rejection of an application. This review normally is restricted to such matters as may determine (1) the extent to which the Patent Office will assist or advise inventors, or (2) the nature and extent of evidence required to warrant reopening the examination of a case which has been previously rejected.

### **FACTOR II, Contact and Commitment Authority:**

Incumbent, having been officially delegated FULL SIGNATORY AUTHORITY, makes and effects wholly independent determinations with respect to any Patent Office action -- either his/her own or that of another -- including actions which result in the final allowance or rejection of an application.

### **FACTOR III, Technological Complexity of Art:**

Art of Bachelors Level with designated complexities. Incumbent is recognized as examining in art of considerable technical difficulty. This difficulty arises, and is indicated below, either from the nature of the systems examined or from the requirements of the examination process itself. In this respect, the incumbent's own area of examination has been found to be complicated by either of the following:

(\_\_\_\_) A. Multiple systems:

The system for which a patent is sought is composed of two or more sub-systems, each of which is based on the fundamentals of different technological disciplines.

(\_\_\_\_) B. Complex systems:

The system is substantially dynamic rather than static in nature and is composed of a network of components, the voluminous interrelationships of which are expressed in concepts involving either a very high level of abstraction or requiring such detail that numerous pages of drawings and specification become necessary.

-- OR by two or more of the elements below:

(\_\_\_\_) A. Highly competitive art:

The art is a very active one in which, owing to the commercial importance of the subject matter, the cases are vigorously contested by eminent counsel -- both as to ex parte and inter partes matters -- resulting in extended prosecution and the consideration of numerous special scientific and legal papers.

(\_\_\_\_) B. Very broad fields of search:

The art requires fields of search which are widely divergent and which present numerous problems in the consideration of analogous art, the necessity of evaluating extremely fine technical distinctions, the great number of permutations and combinations, and the practical requirement of limiting the areas searched to those likely to produce the best results.

(\_\_\_\_) C. Variety of subject matter:

The art embraces subject matter, which requires for its comprehension and application a mastery of the scientific or technical concepts basic to more than one discipline.

**FACTOR LEVELS AND POINTS CREDITED:**

Factor	Level	Points
1	A	45
2	F	15
3	B	5
	Total Points	65
	Grade	14

## Position Description – GS-14FSA Generalist

PD 40-18--  
GS-1224-14  
Full Signatory Authority  
Art of Bachelors Level with  
Designated Complexities  
Generalist

### **FACTOR I, Nature and Extent of Performance of Examining Functions:**

Incumbent independently performs "Basic", "Advanced", and "Legal" patent examining functions (e.g., the application of legal precedents, the determination of double-patenting situations, the evaluation of petitions to the Commissioner and affidavits of patentable relevance, etc.) with no preliminary instructions from the supervisor. References used to determine whether or not the claimed invention is new and patentable are rarely, if ever, reviewed. All official Patent Office actions, including the substantive evaluation in terms of both statutory and precedent law of the legal sufficiency of evidence submitted by the applicant, are presented to the supervisor in final form for approval, except as modified in Factor II below.

Incumbent's determinations are reviewed, if at all, for conformance with Patent Office policy only upon final allowance or rejection of an application. This review normally is restricted to such matters as may determine (1) the extent to which the Patent Office will assist or advise inventors, or (2) the nature and extent of evidence required to warrant reopening the examination of a case, which has been previously rejected.

### **FACTOR II, Contact and Commitment Authority:**

Incumbent, having been officially delegated FULL SIGNATORY AUTHORITY, makes and effects wholly independent determinations with respect to any Patent Office action -- either his/her own or that of another -- including actions which result in the final allowance or rejection of an application.

### **FACTOR III, Technological Complexity of Art:**

Art of Bachelors Level with designated complexities. Incumbent is recognized as examining in art of technical difficulty. This difficulty arises, and is indicated below, either from the nature of the systems examined or from the requirements of the examination process itself. In this respect, the incumbent's own area of examination has been found to be complicated by either of the following:

(\_\_\_\_) A. Multiple systems:

The system for which a patent is sought is composed of two or more sub-systems, each of which is based on the fundamentals of different technological disciplines.

(\_\_\_\_) B. Complex systems:

The system is substantially dynamic rather than static in nature and is composed of a network of components, the voluminous interrelationships of which are expressed in concepts involving either a very high level of abstraction or requiring such detail that numerous pages of drawings and specification become necessary.

-- OR by two or more of the elements below:

(\_\_\_\_) A. Highly competitive art:

The art is a very active one in which, owing to the commercial importance of the subject matter, the cases are vigorously contested by eminent counsel -- both as to ex parte and inter partes matters -- resulting in extended prosecution and the consideration of numerous special scientific and legal papers.

(\_\_\_\_) B. Very broad fields of search:

The art requires fields of search which are widely divergent and which present numerous problems in the consideration of analogous art, the necessity of evaluating extremely fine technical distinctions, the great number of permutations and combinations, and the practical requirement of limiting the areas searched to those likely to produce the best results.

(\_\_\_\_) C. Variety of subject matter:

The art embraces subject matter which requires for its comprehension and application a mastery of the scientific or technical concepts basic to more than one discipline.

**ADDITIONAL CREDIT, GENERALIST:**

The incumbent has been granted official recognition as Generalist on the basis of evidence which demonstrates that: (a) He/she possesses clearly unique and extraordinary personal qualifications, capacities and recognized professional stature in his/her assigned area of technology; (b) the subject-matter area upon which the incumbent's recognition rests normally equates in terms of technological complexity to no less than Level B of Factor III and normally embraces all arts (i.e., from 10 to 15 man-year dockets) over which his/her organizational unit has jurisdiction; (c) the incumbent is, on a regular and recurring basis, utilized as an acknowledged "troubleshooter" both within his/her assigned organization unit as well as outside that unit; and (d) the incumbent has demonstrated a foundation in patent examining functions at least the equivalent of that described at Level B of Factor I.

**FACTOR LEVELS AND POINTS CREDITED:**

Factor	Level	Points
1	A	45
2	F	15
3	B	5
Extra Credit	G	5
	Total Points	70
	Grade	14

## Position Description – GS-14FSA Senior

PD 40-12--  
GS-1224-14  
Full Signatory Authority  
Art of Bachelors Level with  
Designated Complexities  
Senior Examiner

### **FACTOR I, Nature and Extent of Performance of Examining Functions:**

Incumbent independently performs "Basic", "Advanced", and "Legal" patent examining functions (e.g., the application of legal precedents, the determination of double-patenting situations, the evaluation of petitions to the Commissioner and affidavits of patentable relevance, etc.) with no preliminary instructions from the supervisor. References used to determine whether or not the claimed invention is new and patentable are rarely, if ever, reviewed. All official Patent Office actions, including the substantive evaluation in terms of both statutory and precedent law of the legal sufficiency of evidence submitted by the applicant, are presented to the supervisor in final form for approval, except as modified in Factor II below.

Incumbent's determinations are reviewed, if at all, for conformance with Patent Office policy only upon final allowance or rejection of an application. This review normally is restricted to such matters as may determine (1) the extent to which the Patent Office will assist or advise inventors, or (2) the nature and extent of evidence required to warrant reopening the examination of a case which has been previously rejected.

### **FACTOR II, Contact and Commitment Authority:**

Incumbent, having been officially delegated FULL SIGNATORY AUTHORITY, makes and effects wholly independent determinations with respect to any Patent Office action -- either his/her own or that of another -- including actions which result in the final allowance or rejection of an application.

### **FACTOR III, Technological Complexity of Art:**

Art of Bachelors Level with designated complexities. Incumbent is recognized as examining in art of technical difficulty. This difficulty arises, and is indicated below, either from the nature of the systems examined or from the requirements of the examination process itself. In this respect, the incumbent's own area of examination has been found to be complicated by either of the following:

(\_\_\_\_) A. Multiple systems:

The system for which a patent is sought is composed of two or more sub-systems, each of which is based on the fundamentals of different technological disciplines.

(\_\_\_\_) B. Complex systems:

The system is substantially dynamic rather than static in nature and is composed of a network of components, the voluminous interrelationships of which are expressed in concepts involving either a very high level of abstraction or requiring such detail that pages of drawings and specification become necessary.

-- OR by two or more of the elements below:

(\_\_\_\_) A. Highly competitive art:

The art is a very active one in which, owing to the commercial importance of the subject matter, the cases are vigorously contested by eminent counsel -- both as to ex parte and inter partes matters -- resulting in extended prosecution and the consideration of numerous special scientific and legal papers.

(\_\_\_\_) B. Very broad fields of search:

The art requires fields of search which are widely divergent and which present numerous problems in the consideration of analogous art, the necessity of evaluating extremely fine distinctions, the great number of permutations and combinations, and the practical requirement of limiting the areas searched to those likely to produce the best results.

(\_\_\_\_) C. Variety of subject matter:

The art embraces subject matter which requires for its comprehension and application a mastery of the scientific or technical concepts basic to more than one discipline.

#### **ADDITIONAL CREDIT, SENIOR EXAMINER:**

The incumbent has been granted official recognition as senior Examiner on the basis of evidence which demonstrates that: (a) He/she possesses clearly unique and extraordinary personal qualifications, capacities and recognized professional stature in his/her assigned area of technology; (b) the subject-matter area upon which the incumbent's recognition rests normally equates in terms of technological complexity to no less than Level B of Factor III and comprises a significant portion (i.e., at least a two man-year docket) of the total subject matter in the art to which he/she is assigned; (c) the incumbent normally spend no less than 50% of his/her time working in the cited area of expertness; and (d) the incumbent has demonstrated a foundation in patent examining functions at least the equivalent of that described at Level B of Factor I.

#### **FACTOR LEVELS AND POINTS CREDITED:**

Factor	Level	Points
1	A	45
2	F	15
3	B	5
Extra Credit	G	5
	Total Points	70
	Grade	14



## Position Description – GS-14FSA Master

PD 40-19--  
GS-1224-14  
Full Signatory Authority  
Art of Masters Level

### **FACTOR I, Nature and Extent of Performance of Examining Functions:**

Incumbent independently performs "Basic", "Advanced", and "Legal" patent examining functions (e.g., the application of legal precedents, the determination of double-patenting situations, the evaluation of petitions to the Commissioner and affidavits of patentable relevance, etc.) with no preliminary instructions from the supervisor. References used to determine whether or not the claimed invention is new and patentable are rarely, if ever, reviewed. All official Patent Office actions, including the substantive evaluation in terms of both statutory and precedent law of the legal sufficiency of evidence submitted by the applicant, are presented to the supervisor in final form for approval, except as modified in Factor II below.

Incumbent's determinations are reviewed, if at all, for conformance with Patent Office policy only upon final allowance or rejection of an application. This review normally is restricted to such matters as may determine (1) the extent to which the Patent Office will assist or advise inventors, or (2) the nature and extent of evidence required to warrant reopening the examination of a case which has been previously rejected.

### **FACTOR II, Contact and Commitment Authority:**

Incumbent, having been officially delegated FULL SIGNATORY AUTHORITY, makes and effects wholly independent determinations with respect to any Patent Office action -- either his/her own or that of another -- including action which result in the final allowance or rejection of an application.

### **FACTOR III, Technological Complexity of Art:**

Art of Master Level. The incumbent's assignments in the art are such that they present technological problems of a highly advanced level of difficulty requiring the incumbent to have a mastery of the concepts involved in examining applications in the art.

The incumbent's mastery of the concepts required for performing assignments at this highly advanced level of technological complexity is evidenced by official recognition that (a) the technological subject matter encompassed by his/her docket embraces a significant number and diversity of concepts which, on the basis of prerequisites, cannot normally be acquired through an undergraduate education; (b) the incumbent has demonstrated through his/her work and the testimony of his/her supervisors, that he/she has thoroughly mastered and actual employs such concepts in his/her examination of applications; and (c) such concepts arise in a significant number of cases on which the incumbent works at least 25% of his/her time.

**FACTOR LEVELS AND POINTS CREDITED:**

Factor	Level	Points
1	A	45
2	F	15
3	A	10
	Total Points	70
	Grade	14

# Attachment 2



## **Measuring and Rewarding Examiner Performance at the U.S. Patent and Trademark Office**

Robert D. Budens  
Patent Office Professional Association  
November 2014

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## **Performance Appraisal Plan (PAP)**

- Examiners are rated on:
  - Production
  - Quality
  - Docket Management
  - Stakeholder Interaction

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	<h2 style="text-align: center;">Performance Appraisal Plan (PAP)</h2>
	<ul style="list-style-type: none"> <li>▪ Production, Quality and Docket Management are considered “Critical Elements” of the PAP.</li> <li>▪ An End-of-Year rating of “Marginal” or “Unacceptable” in a critical element means that the examiner’s overall yearly performance rating can be no higher than Marginal or Unacceptable and the examiner could be subject to disciplinary action.</li> </ul> <p style="text-align: right;">3</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Productivity</h2>
	<ul style="list-style-type: none"> <li>■ Each Examiner’s “Expectancy” (Production Goal) Is Determined by: <ul style="list-style-type: none"> <li>– The Examiner’s Position Factor based on GS grade, signatory authority level and extra credit items (e.g. Senior or Expert status).</li> <li>– Complexity of technologies on the examiner’s docket (Hours/Production Unit, Hrs/PU).</li> </ul> </li> </ul> <p style="text-align: right;">4</p>

	<b>Performance Appraisal Plan Productivity</b>	
	<u>Grade</u>	<u>Position Factor</u>
	GS-5	0.55
	GS-7	0.7
	GS-9	0.8
	GS-11	0.9
	GS-12	1.0
	Certification Exam Required For Promotion above GS-12	
	GS-13	1.15
	GS-13, Partial Sig	1.25
	GS-14, Full Sig	1.35
	GS-15, Senior	1.40
	GS-15, Expert	1.50

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	<b>Performance Appraisal Plan Productivity</b>	
	<ul style="list-style-type: none"> <li>■ Each patent application has a total of two work credits (counts) available.</li> <li>■ Examiners receive different amounts of work credit for completed work depending on the type of application and the type of examiner office action.</li> <li>■ PAP Production Element sets forth the work credit for each particular action.</li> </ul>	

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	<h2>Performance Appraisal Plan Productivity</h2>
	<ul style="list-style-type: none"> <li>■ Note that examiners <b>DO NOT</b> receive production credit for all the work they do. They only receive production credit for First Actions, Final Rejections and Disposals.</li> </ul>

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	<h2>Performance Appraisal Plan Productivity</h2>
	<ul style="list-style-type: none"> <li>■ Examiners perform many activities that take time but do not count toward biweekly production credit including: <ul style="list-style-type: none"> <li>– Helping Public and Peers.</li> <li>– Filling out Time and Attendance records (WebT&amp;A).</li> <li>– After Final Advisory Actions.</li> <li>– Telephone Restriction Practice.</li> <li>– 2<sup>nd</sup> &amp; Subsequent Non-Final Actions.</li> <li>– Printer Inquiries.</li> </ul> </li> </ul>

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	<h2 style="text-align: center;">Performance Appraisal Plan Productivity</h2>
	<ul style="list-style-type: none"> <li>■ Examiners perform many activities that take time but do not count toward biweekly production credit including (con't): <ul style="list-style-type: none"> <li>– Preparing for Pre-Appeal and Appeal Conferences.</li> <li>– Classification of Applications.</li> <li>– Researching and initiating application transfer requests.</li> <li>– Explaining examiner actions to supervisors.</li> <li>– Computer Downtime.</li> </ul> </li> </ul> <div style="text-align: right;">9</div>

	<h2 style="text-align: center;">Performance Appraisal Plan Productivity</h2>
	<ul style="list-style-type: none"> <li>■ Production Unit = Balanced Disposal (i.e. the time to complete prosecution of patent application, start to finish).</li> <li>■ Production Unit = <math>(N+F+D)/2</math> where: <ul style="list-style-type: none"> <li>N = Credits for First Actions (FAOM).</li> <li>F = Credits for Final Rejections.</li> <li>D = Credits for Allowances, Abandonments, Interferences, Examiner's Answers on Appeal.</li> </ul> </li> </ul> <div style="text-align: right;">10</div>



## Performance Appraisal Plan Productivity

### Samples of Technology Complexity at GS-12 & GS-14

<u>Technology</u>	<u>GS-12 Hrs/PU</u>	<u>GS-12 Hrs/PU*</u>	<u>GS-14 Hrs/PU*</u>
Mech. Engineering	18.0	20.5	15.8
Organic Chemistry	18.4	20.9	16.1
Chem. Engineering	19.5	22.0	16.9
Material Handling	20.5	23.0	17.7
Electrical/Optical	22.5	25.0	19.2
Communications	24.0	26.5	20.3
Biotechnology	25.9	28.4	21.7
Computer Networks	31.6	34.1	25.9
Business Methods	31.6	34.1	25.9

- Adjusted to include 2.5 Hour Count System Initiatives (CSI) Increase in time added to each examiner's individual expectancy. <sup>11</sup>

## Performance Appraisal Plan Productivity

### Examiner Production Calculation:

Expectancy = (GS-12 Complexity ÷ Position Factor) + 2.5\*

Expected PUs = Examining Hours ÷ Expectancy

% Achievement of Goal (Production) =

(Achieved PUs ÷ Expected PUs) X 100

\*2.5 hours additional time from Count System Initiatives.

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	<h2 style="text-align: center;">Performance Appraisal Plan Productivity</h2>
	<p style="text-align: center;"><b>Sample Production Calculation</b></p> <p>GS-14 Primary Examiner in Biotechnology (25.9 Hrs/PU) w/64 Hrs of examining time and 3 PUs completed:</p> <p>Expectancy = (GS-12 Complexity/Position Factor) + 2.5 =  (25.9 Hrs/PU/1.35 GS-14 PF) + 2.5 = 21.7 Hrs/PU</p> <p>Expected PUs = Examining Hours/Expectancy =  64 Ex. Hrs/21.7 Hrs/PU = 2.95 Expected PUs</p> <p>% Production = (Achieved Pus/Expected PUs) X 100 =  3 PUs Achieved/2.95 PUs Expected X 100 = 102%</p> <p style="text-align: right;">13</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Productivity</h2>										
	<p>■ <b>Productivity Rating:</b></p> <table style="margin-left: 40px;"> <tr> <td>– Outstanding</td><td>110% and above</td></tr> <tr> <td>– Commendable</td><td>103% - 109%</td></tr> <tr> <td>– Fully Successful</td><td>95% - 102%</td></tr> <tr> <td>– Marginal</td><td>88% - 94%</td></tr> <tr> <td>– Unacceptable</td><td>Below 88%</td></tr> </table> <p style="text-align: right;">14</p>	– Outstanding	110% and above	– Commendable	103% - 109%	– Fully Successful	95% - 102%	– Marginal	88% - 94%	– Unacceptable	Below 88%
– Outstanding	110% and above										
– Commendable	103% - 109%										
– Fully Successful	95% - 102%										
– Marginal	88% - 94%										
– Unacceptable	Below 88%										

	<h2>Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ Quality measurement is divided into three distinct categories of major activities: <ul style="list-style-type: none"> <li>– Category 1: basic patent examining duties.</li> <li>– Category 2 – patent examining duties requiring analysis of application compliance with patent statutes and making proper rejections.</li> <li>– Category 3 – determining patentability or non-patentability of patent claims.</li> </ul> </li> </ul> <p>15</p>

	<h2>Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ Category 1 Activities: <ul style="list-style-type: none"> <li>– Checking applications for compliance with formal requirements of patent statutes and rules and for technological accuracy.</li> <li>– Treating Information Disclosure Statements (IDS) and claims for priority.</li> <li>– Planning and conducting prior art searches.</li> <li>– Formulating proper restriction requirements when application can be restricted.</li> </ul> </li> </ul> <p>16</p>

	<h2>Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ Category 1 Activities (con't): <ul style="list-style-type: none"> <li>– Determining where appropriate line of patentable distinction is maintained between applications and/or patents.</li> <li>– Evaluate sufficiency of reissue oath/declaration.</li> <li>– Promote “Compact Prosecution” by including all reasonable grounds of rejection, objections and formal requirements.</li> <li>– Makes the record, as a whole, reasonably clear and complete.</li> </ul> </li> </ul> <p>17</p>

	<h2>Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ Category 1 Activities (con't): <ul style="list-style-type: none"> <li>– Properly treat all matters of substance in Applicant Responses.</li> </ul> </li> <li>■ Not all examiners are responsible for all Category 1 activities. Some lower-graded examiners may only be responsible for Category 1 activities after prior instruction.</li> </ul> <p>18</p>

	<h2>Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ Category 2 Activities: <ul style="list-style-type: none"> <li>– Analyzing application disclosure and claims for compliance with 35 USC 112.</li> <li>– Making proper rejections under 35 USC 102 and 103 with supporting rationale, or determining how claim(s) distinguish over the prior art.</li> <li>– Determine whether Applicant's amendment(s) introduce new matter to the application.</li> <li>– Determining whether claimed invention is in compliance with 35 USC 101.</li> </ul> </li> </ul> <p style="text-align: right;">19</p>

	<h2>Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ Category 2 Activities (con't): <ul style="list-style-type: none"> <li>– Properly closes prosecution and does not make a premature final rejection.</li> </ul> </li> <li>■ Examiners GS-11 and above are responsible for most Category 2 activities. Examiners GS-13 and above are responsible for all Category 2 activities except for closing prosecution/final rejections. Lower-graded examiners have limited responsibility for a few Category 2 activities after prior instruction.</li> </ul> <p style="text-align: right;">20</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ Category 3 Activities: <ul style="list-style-type: none"> <li>– Properly rejects all rejectable claims in a final rejection.</li> <li>– Properly allows all patentable claims in an allowance.</li> </ul> </li> <li>■ Only Primary Examiners are responsible for Category 3 Activities and for Category 2 activity of closing prosecution/final rejection.</li> </ul>

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	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ Quality Performance is measured using the “Clear Error” standard. Clear Error occurs when the examiner’s action: <ul style="list-style-type: none"> <li>– does not reasonably comply with the major activities of the Quality Element; and</li> <li>– could not have been permitted at the time and under the circumstances that the action was taken; and</li> <li>– is not an honest and legitimate difference of opinion between the examiner and a reviewer as to what action should have been taken.</li> </ul> </li> </ul>

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	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ NOTE: If an action taken by an examiner is reasonable and the action preferred by the supervisor or reviewer is reasonable, the examiner's action represents an honest and legitimate difference of opinion and the action taken by the examiner is free of Clear Error. The examiner may be asked to change his/her action to that preferred by the supervisor, but the examiner has not committed Clear Error.</li> </ul> <div style="text-align: right;">23</div>

	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ Quality Combined Error Score*: <ul style="list-style-type: none"> <li>– CAT1 = Category 1 Errors/Total Actions Done</li> <li>– CAT2 = Category 2 Errors/Total Actions Done</li> <li>– CAT3 = Category 3 Errors/(Finals + Allowances)</li> <li>– Combined Error Score = <math display="block">\frac{(CAT1 + CAT2 + CAT3)}{3}</math> </li> </ul> </li> </ul> <p>*If an examiner's error rate in any Category is greater than or equal to 7.50%, the overall Quality rating will be Unacceptable.</p> <div style="text-align: right;">24</div>

	<h2>Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ The Quality rating is based on the Combined Error Score and compliance with three Indicia of Outstanding or Commendable Performance.</li> <li>■ Quality Indicia: <ul style="list-style-type: none"> <li>– Examiner's statement of rejection, objection, and response to arguments clearly and concisely present the positions taken or recommended in the resulting Office actions including a thorough substantive explanation to convey those positions to the applicant.</li> </ul> </li> </ul>

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	<h2>Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ Quality Indicia (con't): <ul style="list-style-type: none"> <li>– The Office actions as well as the file record clearly indicate that the examiner fully complies with the principles of compact prosecution.</li> <li>– The record developed by the examiner usually shows an indication of allowable subject matter at the earliest time which is consistent with the file record and prosecution of the application.</li> </ul> </li> </ul>

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	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> <li>■ Quality Element Rating: <ul style="list-style-type: none"> <li>– Outstanding: Error rate is 0% - 4.49% and, except for rare occurrences, the examiner complies with all three Indicia.</li> <li>– Commendable: : Error rate is 4.50% - 5.49% and in substantially all actions the examiner complies with all three Indicia.</li> <li>– Fully Successful: The error rate is 5.50% - 6.49%.</li> <li>– Marginal: The error rate is 6.50% - 7.49%.</li> <li>– Unacceptable: The error rate is 7.50% or greater.</li> </ul> </li> </ul> <p style="text-align: right;">27</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Docket Management</h2>
	<ul style="list-style-type: none"> <li>■ Unless otherwise directed by management, examiners are required to: <ul style="list-style-type: none"> <li>– Handle all applications and proceedings awaiting action in accordance with the time period or Special handling instructions prescribed by current policy.</li> <li>– Forward all work for processing and/or handling promptly or in accordance with prescribed time periods.</li> </ul> </li> <li>■ Docket Management (DM) separates each type of application and/or action (component) into different categories. Each category may have several different types of component applications/actions included in the category.</li> </ul> <p style="text-align: right;">28</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Docket Management</h2>
	<ul style="list-style-type: none"> <li>■ Each category has a particular “Expected Average Days” time period which is determined to be at the 100% performance level.</li> <li>■ Each category also has a particular “Ceiling Control Days” time period which is determined to be at the unacceptable level of performance.</li> <li>■ If examiner moves an application sooner than the “Expected Average Days” time period, then DM performance for that application would exceed 100%. If later than the Expected Average Days, performance would be less than 100%.</li> </ul> <p style="text-align: right;">29</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Docket Management</h2>
	<ul style="list-style-type: none"> <li>■ Components in Each Docket Management Category: <ul style="list-style-type: none"> <li>– Category 1: Amendments.</li> <li>– Category 2: Special New and Special Amended applications (e.g., Accelerated prosecution, Patent Prosecution Highway, Petition to make special, Track 1, Reissue, etc.).</li> <li>– Category 3: New Applications (e.g., Regular New Applications, Continuations, Continuations-in-Part, Divisionals, RCEs).</li> </ul> </li> </ul> <p style="text-align: right;">30</p>

## Performance Appraisal Plan Docket Management

### ■ Docket Management Categories.

- Category 4: Expedited (e.g., After Final Amendments, Rule 1.312 Amendments, Printer Rushes, etc.).
- Category 5: Returns (Actions returned for corrections by either Technical Support Staff (TSS) or supervisor/reviewer).

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## Performance Appraisal Plan Docket Management

<u>Category</u>	<u>Action Type</u>	<u>Average Days</u>	<u>Ceiling Control</u>
1	Amendments	56	98
2	Special New	14	28
2	Special Amended	14	28
3	New Applications	28	56
4	Expedited	14	28
5	Returns	14	28

DM clocks generally start counting when the application is placed on the examiner's docket and stop when the examiner submits the application for work credit.

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## Performance Appraisal Plan Docket Management

- Component Applications in some DM categories occur much more frequently on examiner dockets than do applications in other categories.
- Example: Amendments and New applications are more numerous on examiners' dockets than are Rule 1.312 Amendments.
- Component DM scores are weighted based on the number of actions in each component to form a contributing score. Contributing scores are added together to determine the Overall DM Score.

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## Performance Appraisal Plan Docket Management

- Docket Management Rating
  - Outstanding: 110% or above
  - Commendable: 103% to 109%
  - Fully Successful: 95% to 102%
  - Marginal: 88% to 94%
  - Unacceptable: Below 88%

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	<h2>Performance Appraisal Plan Docket Management</h2>
	<ul style="list-style-type: none"><li>■ DM time periods may only be paused or reset in a few limited circumstances.</li><li>■ To allow examiners to plan ahead for vacations or other absences or to earn awards, examiners may work ahead on certain cases that are "asterisk" cases (generally the next four oldest cases in the category). For example, when the examiner completes his/her oldest new case, then the examiner may choose to work on additional new cases with asterisks for additional DM credit.</li></ul> <p>35</p>



	<h2>Performance Appraisal Plan Stakeholder Interaction</h2>
	<ul style="list-style-type: none"><li>■ All examiners are responsible for performance under the Stakeholder Interaction Element.</li><li>■ Major Activities:<ul style="list-style-type: none"><li>– Courteous &amp; Professional Treatment of External Stakeholders by:<ul style="list-style-type: none"><li>■ Generally returning phone calls in 1 business day.</li><li>■ Generally reviewing/responding to emails every day.</li><li>■ Providing work schedule information to customers via voice mail.</li></ul></li></ul></li></ul> <p>36</p>

	<h2>Performance Appraisal Plan Stakeholder Interaction</h2>
	<ul style="list-style-type: none"><li>– Courteous &amp; Professional Treatment of External Stakeholders by generally (con't):<ul style="list-style-type: none"><li>■ Providing voice mail notice of extended absences (3 or more business days).</li><li>■ Directing callers to correct office or person.</li><li>■ Conducting all interviews and/or other contacts with external stakeholders as scheduled, with adequate preparation and courtesy.</li><li>■ No interview and/or other contact is arbitrarily or capriciously refused.</li></ul></li></ul> <p>37</p>



	<h2>Performance Appraisal Plan Stakeholder Interaction</h2>
	<ul style="list-style-type: none"><li>– Courteous &amp; Professional Treatment of External Stakeholders by generally (con't):<ul style="list-style-type: none"><li>■ Use proper decorum in official communications.</li></ul></li><li>– Provide search consultation and other assistance to the public and peers.</li></ul> <p>38</p>

	<h2>Performance Appraisal Plan Stakeholder Interaction</h2>
	<ul style="list-style-type: none"><li>■ Examiner performance is also measured against a defined set of indicia of performance:<ul style="list-style-type: none"><li>– Routinely uses interview practice to facilitate compact prosecution.</li><li>– Examiner is accessible and responsive regardless of physical location (teleworking).</li><li>– Provides appropriate information to address stakeholder inquiries.</li></ul></li></ul> <p>39</p>



	<h2>Performance Appraisal Plan Stakeholder Interaction</h2>
	<ul style="list-style-type: none"><li>■ Performance Indicia (con't):<ul style="list-style-type: none"><li>– Responds to internal stakeholders in a timely manner.</li><li>– Responds appropriately to requests for personal interviews in a timely manner.</li><li>– Examiner is always well prepared for interviews.</li></ul></li></ul> <p>40</p>

	<h2>Performance Appraisal Plan Stakeholder Interaction</h2>
	<ul style="list-style-type: none"> <li>■ Rating is based on demonstrated behavior relative to the Major Activities and Performance Indicia. <ul style="list-style-type: none"> <li>– Outstanding: All major activities identified are routinely performed in a timely and courteous manner and, except for rare exceptions, the employee demonstrates all of the identified indicia.</li> </ul> </li> </ul>

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	<h2>Performance Appraisal Plan Stakeholder Interaction</h2>
	<ul style="list-style-type: none"> <li>■ Stakeholder Interaction Rating (con't). <ul style="list-style-type: none"> <li>– Commendable: All major activities identified are routinely performed in a timely and courteous manner and the employee demonstrates all of the identified indicia in substantially all circumstances.</li> <li>– Fully Successful: All major activities identified are normally performed in a timely and courteous manner.</li> </ul> </li> </ul>

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## Performance Appraisal Plan Stakeholder Interaction

- Stakeholder Interaction Rating (con't).
  - Marginal: Demonstrates some contribution to the element. However, a significant number of documented deficiencies in at least one of the major activities have been identified to the examiner.
  - Unacceptable: Performance is not adequate for the position, failing to meet the Marginal level. Numerous instances of documented deficiency in at least one of the major activities have been identified to the examiner.

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## Performance Appraisal Plan Tracking Performance

- Examiner performance is measured bi-weekly, quarterly and yearly.
- Examiners are at risk for performance-based disciplinary action at the end of every quarter and at the end of fiscal year.
- The USPTO generates numerous different reports to measure examiner and agency performance.
- Every bi-week, examiners receive reports on their achievement towards their production and docket management goals. Examples of two reports are on the next slides.

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# PALM Production Report

PALM3205_EPSV2_PRL		U. S. PATENT AND TRADEMARK OFFICE		RPN DATE: 10/04/14		PAGE: 1 OF 2	
EXAMINER PRODUCTION SYSTEM TRANSACTION AND COUNT CREDIT ANALYSIS							
GAD: PP:2014-26		ENDING: 9/30/2014		STEP: 03		NO. OF EFFECTIVE QSI: 0	
EMPLOYEE NUMBER:		POSITION FACTOR: 1.35		PP EXPECTANCY (GS-12): 30.7		ADJUSTED PP EXPECTANCY (GS-14): 22.74 + 2.50 = 25.24	
CORRE CTION	APPL NUMBER	6 ACTION NO	COUNT NO	COUNT TYPE	TRANSACTION TYPE	CLASS/ SUBCLASS	DATE OF AMND.
11		2	0.75	2 RCE INTER DISP	Aband. for Failure to Respond to O. A.	726/033000	05/01/14
12		1	1.25	1 RCE FACM	Add FACM 1.25 Count	380/201000	
12		1	1.00	1 RCE FACM	Non-Final Rejection	380/201000	
12		0	-1.00	1 RCE FACM	Subtract FACM 1.00 Count	380/201000	
12		0	-1.00	1 RCE FACM	Subtract FACM 1.00 Count	726/027000	
12		1	1.00	1 RCE FACM	Non-Final Rejection	726/027000	
12		1	1.25	1 RCE FACM	Add FACM 1.25 Count	726/027000	
12		1	1.75	1 RCE ALL	Allowability Notice	726/011000	
12		0	-1.00	1 RCE FACM	Subtract FACM 1.00 Count	726/011000	
12		1	1.25	1 RCE FACM	Add FACM 1.25 Count	726/011000	
12		4	0.00	No Credit	Final Rejection	726/019000	
13		3	0.00	No Credit	Advisory Action (PTOL-303)	726/024000	
TIME							
LEAVE	PP	QTR	FTR	STATISTICAL ANALYSIS			
EXCUSED ABSENCE	0.00	0.00	81.00	PERCENT OF EXPECTANCY	127	116	115
HOLIDAY	0.00	20.00	88.00	PERCENT OF EXPECTANCY QSI EQUIV.	127	116	115
OTHER	65.00	324.00	1086.50	TOTAL EXAM HOURS	52.00	235.00	946.50
DETAIL	0.00	0.00	0.00	CALCULATED PRODUCTION HOURS	66.26	271.64	1086.87
NON-ASSIGN	0.00	0.00	0.00	PERCENT NEW OF TOTAL ACTIONS	60.00	40.00	59.05
REGULAR EXM HRS	52.00	235.00	870.50	PERCENT ALLOWED OF DISPOSALS	50.00	53.85	50.94
OVERTIME EXM HRS	0.00	0.00	76.00	PERCENT REG EXAM HOURS	44.44	40.59	40.75
TOTAL EXAM HOURS	52.00	235.00	946.50	EXPECTANCY (GS-12)	30.70	30.74	30.74
				HOURS PER P.U. USING FACM/PCT	19.81	21.86	22.01
				HOURS PER FACM/PCT	5.78	9.79	9.86
				PRODUCTION UNITS USING FACM/INTER/DISP	2.63	10.75	43.00
				HOURS PER DISPOSAL/IVER	24.00	18.08	17.86
				ACTIONS PER DISPOSAL/IVER	2.50	1.92	1.98
FIRST ACTIONS							
ELECTIONS/RESTRICTIONS	PP	QTR	FTR				
REJECTIONS (INCLUDING FINAL)	0	0	0				
ALLOWANCES	2	6	26				
OTHER	1	4	15				
TOTAL 1ST ACTIONS	3	10	41				
TOTAL FACM	9	24	96	Docket Management Overall PAP Score			
FULL PCT SEARCH	0	0	0	136.19			
HALF PCT SEARCH	0	0	0	117.19			
				135.98			
CONFIDENTIAL DATA - PRIVACY ACT PROVISIONS MUST BE FOLLOWED							

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# Docket Management Report

DM Workflow Planner						Options	
Generated CPC DMR Nov 9 11:18:13 2014						Display Mode:	
FY 2014 - Q 4 [FY 2014 PP 20 to FY 2014 PP 26]						Awards	
Category 1	56	50	110.71	[+]	6	22.9	map
Category 2	14	13.5	103.57	[+]	2	7.14	Interval
Category 3	28	20.4	127.14	[+]	10	43.84	Current FY
Category 4	14	11	121.43	[+]	4	16.74	Current PP
Returns	14	3.714	110.0	[+]	7	26.55	[FY 2013 PP 3 - QTR 1]
CPC Adjustment	CPC hours: 30					2.5	Calculate award summary:
Score						119.69	Must be in Awards display mode (Awards) to enable this section.
FY 2014 - Q 3 [FY 2014 PP 14 to FY 2014 PP 19]						Show data from FY-QTR:	
Category 1	56	34	139.29	[+]	5	25.79	FY 2014
Category 2	14			[+]	0	0	View Account Status
Category 3	28	12.545	155.19	[+]	11	63.12	
Category 4	14	5.429	161.22	[+]	7	41.79	
Returns	14	4.75	110.0	[+]	4	16.29	
CPC Adjustment	CPC hours: 60					7.5	
Score						154.62	
FY 2014 - Q 2 [FY 2014 PP 7 to FY 2014 PP 13]							
Category 1	56	40.833	127.08	[+]	12	47.65	
Category 2	14	7.667	145.24	[+]	3	13.61	
Category 3	28	10.556	162.3	[+]	9	45.64	
Category 4	14	3.667	173.81	[+]	3	16.29	
Returns	14	2.2	110.0	[+]	5	17.18	
CPC Adjustment	CPC hours: 24					2.5	
Score						142.9	
FY 2014 - Q 1 [FY 2014 PP 1 to FY 2014 PP 6]							
Category 1	56	35.75	136.16	[+]	4	17.56	
Category 2	14	4.667	164.67	[+]	3	16.12	
Category 3	28	10.286	163.27	[+]	7	36.86	
Category 4	14	3.5	175	[+]	4	22.50	
Returns	14	2.692	110.0	[+]	13	46.12	
CPC Adjustment	CPC hours: 18					0	
Score						139.27	
FY 2014 - Q 1							
Overall CPC Adjustment						3.125	
Overall Score						139.1	
Total number of 2.5% CPC DM adjustments made this year: 5							

View Production and Award Calculator

Projections disabled. Projections are only enabled for the current quarter, biweek, and fiscal year.

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## Rewarding Performance

- The USPTO provides three types of examiner performance award incentives for production or docket management:
  - Special Achievement Award.
  - Productivity Gainsharing Award.
  - Pendency Award.
- Examiner performance awards represent the best return on investment (“bang for the buck”) of any program at the USPTO.

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## Rewarding Performance

- Special Achievement Award (SAA)
  - Requires an average of 110% Production over any 4 consecutive quarters and fully successful performance in other critical elements.
  - 3% of annual salary.
  - Requires minimum 700 hours of examining time for pro-rated minimum award, 1400 examining hours for maximum award.

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## Rewarding Performance

### ■ Productivity Gainsharing Award

- Based on Fiscal Year Production Goal Achievement.
- Requires minimum 700 hours of examining time for pro-rated minimum award, 1400 examining hours for maximum award.

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## Rewarding Performance

### Productivity Gainsharing Award (con't)

Goal Achievement\*   Award (% of Base Salary)

110 – 114%	2%
115 – 119%	3%
120 – 124%	4%
125 – 129%	5%
130 – 134%	6%
135% or more	7%

\*Requires at least Fully Successful performance in all other critical elements. 50

## Rewarding Performance

### ■ Pendency Award

- Based on examiner performance in docket management element.
- Pendency Awards are paid quarterly with an annual Supplemental Award for sustained high performance over four consecutive quarters (mid-year to mid-year).

51

## Rewarding Performance

### ■ Eligibility for Pendency Award:

- Most recent Rating of Record Fully Successful or better.
- Completed one full year at USPTO before first day of the award quarter under consideration.
- Have a "Returns" category score in the DM element of at least 100%.
- Meet Pendency Award Criteria.

52

## Rewarding Performance

- Entry-Level Tier Award
  - 110% overall DM score (excluding returns).
  - No Ceiling Exceeded applications in any DM category.
  - 0.25% of current annual salary.

53

## Rewarding Performance

- Tier 1 Award
  - 120% overall DM score (excluding returns).
  - No DM component score under 100%.
  - Complete predetermined amount of oldest/asterisk new applications depending on number of biweeks in quarter, part-time status, and Hrs/PU.
  - No Ceiling Exceeded applications in any DM category.

54

## Rewarding Performance

- Tier 1 Award Criteria

- No more than one application of any DM type going Ceiling Exceeded in the quarter.
- Pays 0.5% of current annual salary.

55

## Rewarding Performance

- Tier 2 Award Criteria

- 140% overall DM score (excluding returns).
- No DM component score under 120%.
- Complete predetermined amount of oldest/asterisk new applications depending on: Number of biweeks in quarter, part-time status, and Hrs/PU.

56

## Rewarding Performance

- Tier 2 Award Criteria
  - No more than one application of any DM type going Ceiling Exceeded in the quarter.
  - Pays 0.75% of current annual salary.

57

## Rewarding Performance

- Supplemental Award
  - Tier 1: additional 0.5% of current salary for four consecutive quarters of Tier 1 performance or better.
  - Tier 2: additional 1.0% of current salary for four consecutive quarters of Tier 2 performance or better.
  - No Supplemental Award for Entry Level Tier.

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	<h2 style="text-align: center;">Conclusion</h2>
	<ul style="list-style-type: none"> <li>■ USPTO managers constantly monitor virtually every aspect of examiner performance down to six minute intervals.</li> <li>■ The PAP together with other USPTO policies as well as relevant labor agreements provide managers with sufficient tools to identify any poor performers and take corrective action as needed.</li> </ul> <div style="text-align: right;">59</div>

	<h2 style="text-align: center;">Conclusion</h2>
	<ul style="list-style-type: none"> <li>■ Examiners direct efforts to Agency goals as set forth in, and measured by the PAP.</li> <li>■ Examiners respond to performance incentives with increased performance to further assist the USPTO in achieving its mission.</li> </ul> <div style="text-align: right;">60</div>

# Attachment 3

A Report by a Panel of the

**NATIONAL ACADEMY OF PUBLIC ADMINISTRATION**

for the U.S. Congress and the U.S. Patent and Trademark Office



# US Patent and Trademark Office: Transforming to Meet the Challenges of the 21st Century

August 2005

NATIONAL ACADEMY OF  
PUBLIC ADMINISTRATION

particularly in measuring performance in two-quarter award periods and establishing additional intervals for production awards, higher possible awards for top performers, and separate awards for quality and for assisting SPEs with training. Consistent with Paul Light's definition of the "robust" organization,<sup>184</sup> USPTO needs to follow through with its vision, uses its money where it is consistent with changing mission needs and priorities, and set clear goals for high performance.

As a management entity, USPTO has not done what many other federal organizations have done to spur innovation through, for example, competition for pilot program seed money or recognition of innovation from outside parties, such as the 18-year old Innovation in American Government Award, sponsored by Harvard University.

### **Recommendations: USPTO Awards System**

**The Academy Panel recommends that USPTO:**

- **Update the production and quality standards and awards.**
- **Examine historical data on production and quality to ensure new proposals, to be negotiated with POPA, mesh with agency priorities and reflect current best practices.**
- **Create a group award to spur innovation in work processes and overcome the "production loner" concept.**
- **Establish a competitive innovation fund to provide seed money for organizational elements seeking to pilot work process simplification, ways to reduce pendency, or improve quality.**
- **Tie special act awards and SES bonuses to effective innovation.**

If USPTO is to develop a "culture of success," its award system needs to be consistent across the staffing spectrum, flexible, and reflective of shared agency priorities. While not subject to collective bargaining, incentives for SES managers need to be aligned with those of the patent workforce. Recognizing executives and employees who have contributed to USPTO as successful change agents sends the signal that change is welcome and expected.

### **USPTO EMPLOYEE RELATIONS**

If an organization's ability to move people and respond to changing mission needs is important in attaining a "robust" state of health, then its relationships with individual employees and the organizations that represent them are an important barometer (See Chapter 5 for further discussion of USPTO labor-management relations). For USPTO, this is particularly true when

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<sup>184</sup> Light, Paul, C., The Four Pillars of High Performance, McGraw- Hill, 2005, P. 130.

labor-management relations limit the organization's ability to adapt; when individual performance and conduct-related actions directly or indirectly lead to the departure of the employee or decrease their productivity—potentially adding to USPTO pendency; or when the organization expends an increasing or disproportionate amount of resources to resolve employee problems.

While USPTO has grown dramatically over the past several decades and it is logical to expect a proportional multiplier effect in the number of employee relations cases, for the most part the increase has exceeded the rate of population growth. Until FY 1983, the agency had less than 100 employee relations cases per year. The rate spiked in the mid-1990s, reaching a new high of over 500 cases, dropped down for three years and then spiked again to over 500 in FY 2000. Since then, the rate has continued to climb, with the number of cases now at an all-time high of 928 in FY 2005. These recent increases are not proportional to the agency's growth. In FY 2002, the population grew about 5.5 percent, but the employee relations cases grew by 20 percent. In FY 2003 and 2004, the population varied by less than 1 percent, but the agency employee relations cases increased by 12 percent and 14.5 percent respectively.

### **Employee Performance**

Data for FYs 1999 through 2004 show that, in addition to increased attrition, the agency has taken an increased number of performance-based actions against its employees, and it is this class of employee relations cases that have contributed most to the overall increasing caseload. Some management officials have linked this rise in actions to the onset in 2000 of liberalized time scheduling, known to many in the federal sector as maxiflex, but known in USPTO as Increased Flexitime Program (IFP). IFP gave PEs wide latitude to schedule their work over a seven-day week, with no specific schedule required and no advance notice to supervisors. The labor contract management proposed in March 2005 contains a proposal to require advance notice to the supervisor of a specific schedule for the coming week.

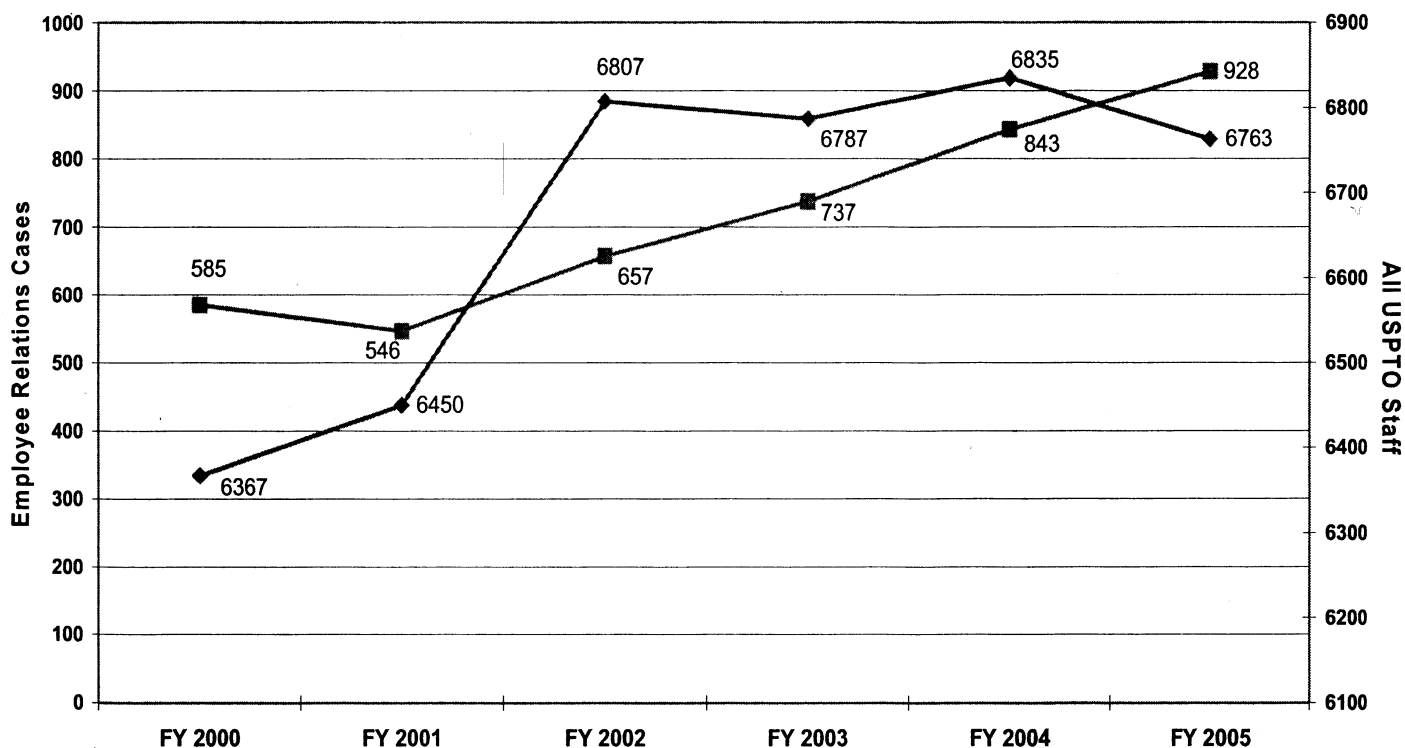
As a result of past practice, USPTO is required to give its employees an oral warning prior to a written warning. This is not required by federal regulations for most other civil servants, who receive a written warning before management proceeds to removal or other adverse action. USPTO patent examiners who fail their production goals for a quarter therefore have an additional quarter during which they can correct their performance before an adverse action proceeds.

An employee might therefore receive a confirmed oral warning that they had not met production goals for the period January through March, continue to fail in quarter two, April through June, receive a written warning in July, then improve in quarter three and thereby avoid adverse action. USPTO could therefore see decreased production for three months longer than other federal entities.

USPTO informed POPA, in March 2005 that, as part of their contract proposal, the agency is proposing to eliminate this additional oral warning. This management proposal—along with the rest of the term contract—will be subject to negotiation and, given the history of labor management relations, is not likely to be implemented for at least a few years.

Figure 4-3 shows growth in the USPTO workforce between FYs 2000 and 2005 (from 6,367 to 6,763) and the concurrent increase in employee relations actions (from 585 to 928). For the most part, the increase in the number of cases exceeded the population growth. For example, the population grew about 5.5 percent in FY 2002, but employee relations cases grew by 20 percent. In FY 2003 and FY 2004, the population changed by less than 1 percent, yet the cases increased by 12 percent and 14.5 percent respectively. Most cases are in patents, which is where most of USPTO's workforce is.

**Figure 4-3**  
**Growth in USPTO Workforce and Employee Relations Actions**  
**FYs 2000-2005**



To summarize some of the PE employee relations issues facing agency management:

- Oral warnings for the patent corps have jumped to 329 in FY 2004, up from 70 in FY 1999, 101 in 2000, 132 in 2001, 171 in 2002, and 252 in 2003. In FY 2005, as of February 2005, USPTO gave 163 warnings.
- Written warnings—the second stage—have increased as well, with 48 in FY 2004, up from 36 in 2003, 41 in 2002, 35 in 2001, 19 in 2000. In FY 2005, as of February 2005, there were 31 written warnings.
- Probationary discharges within the first year of employment have remained more stable, with 22 in 2004, 36 in 2003, 31 in 2002, 24 in 2001, and 27 in 2000. In FY 2005, as of February 2005, there were 5 probationary discharges.
- Removals—the most procedurally demanding process—were 17 in 2004, 24 in 2003, 10 in 2002, 18 in 2001, and 12 in 2000. In FY 2005, as of February 2005, there have been 6 removals.
- Denials of within-grade—the federal longevity increase—also rose in number with 56 in 2004, 51 in 2003, 22 in 2002, 36 in 2001, and 11 in 2000. In FY 2005, as of February 2005, there were 21 denials of WIGs.

*Almost 10% from USPTO*

The probationary discharge number is a critical one in that removing a probationary employee is easier for management and less costly than if the person is removed after they have served in excess of one year, when the employee has redress they do not have prior to the one-year mark. From FY 1999 through the start of FY 2005, USPTO had 183 probationary discharges or 5.7 percent of its 3,216 POPA bargaining unit hires. By contrast, OPM conducted a study of new hires in FY 2001 and FY 2002 and found that of the government's 145,000 new hires, just over 3 percent (fewer than 5,000) were terminated during probation.

Removal rates for POPA bargaining unit members have ranged from a low of .27 percent in FY 2002 to a high of .65 percent in FY 2003. As a point of comparison, the entire Centers for Disease Control, including their non-professional population, had a removal rate for FY 2002 of .09 percent. A Cato Institute study of removal for performance across non-defense federal agencies showed that in 2001 the government fired only 210 workers or .02 percent (1 in 5000). The State Department has fired only six employees for poor performance from 1984 through 2001.<sup>185</sup> JPO rarely removes an employee for performance.

The distribution of employee relations cases across USPTO is skewed for performance-based cases, the vast majority of which are related to production failure. While the POPA workforce

<sup>185</sup> "Federal Government Should Increase Firing Rate," Cato Institute Tax & Budget Bulletin, No. 10, November 2002, p. 1.

comprises 58 percent of the total USPTO population, the bargaining unit has, since 2001 through 2005, accounted for almost 90 percent of the agency's performance cases.<sup>186</sup>

### **Employee Conduct**

Conduct-related cases are much more proportional, with 52 percent of the cases in October - February 2005 attributable to POPA bargaining unit members.

Conduct cases<sup>187</sup> have, however, also been rising in the patent corps:

- 140 in 2001
- 175 in 2002
- 173 in 2003
- 200 in 2004

In FY 2005, as of February, there have been 40 conduct-related cases.

### **Conclusions: USPTO Employee Relations**

USPTO management follow-through on employee relations cases shows a commitment to reducing pendency through production and is the logical, if negative, corollary to an incentive system based on quantifiable measures. As a PBO, the agency is, by design, focused on measuring performance, and within this new organizational construct, management may be more inclined to take action with respect to performance issues. USPTO has been able to take these sustainable performance-based actions against some patent corps employees because the employees are subject to PAPs that contain specific and quantifiable production goals. Performance accountability outside of patent operations is substantially less quantifiable.<sup>188</sup>

The Panel understands that the liberalization of workday flexibilities in 2000 contributed to the volume of employee relations cases and that the agency has taken steps in its March 2005 contract proposals to try to impose additional workplace structure. This added flexibility, is not, however, the root cause of the increase in employee relations cases as much as a symptom. Added workforce flexibility should not necessarily translate into workforce problems.

The fact that the number of patent corps employee relations cases has been spiraling should cause UPSTO management to question whether there is something wrong in their recruitment

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<sup>186</sup> Performance-based actions can be based on failure to meet one or more elements of a PAP; for a patent examiner typical critical elements are production, workflow, patentability, patent examining functions, and action taken. The most common cause for a performance-based action is failure to meet production criteria.

<sup>187</sup> Some examples of conduct violations are the wide-ranging "conduct unbecoming a federal official," to the more specific, such as making false statements, sleeping on the job, criminal activity (theft, assault, forgery, destruction of evidence, misappropriation of funds), misuse of government equipment, violent behavior, misuse of position (such as for personal financial gain or for the gain of a related individual), or other violations of the agency's published standards of conduct. Agencies typically publish a table of offenses and a range of possible disciplinary measures appropriate for each offense.

<sup>188</sup> Employees outside of Patent Operations considered here are the employees of the Chief Financial Officer, the Chief Information Officer, the Office of the Under Secretary, and the Office of General Counsel.



plan or in the workplace. While the work force understands the system and finds it reassuring to know the requirements up front, USPTO's relationship with its primary union has limited the organization's ability to change even these quantifiable standards to reflect the evolving nature of the work and the impacts of technology on work processes. An organization that is frozen in time is not an agile organization and not likely an employer of choice for the most highly productive. An organization locked into performance requirements is not likely to be a model of "continuous improvement." When an organization expends an increasing or disproportionate amount of resources to resolve employee problems, as has USPTO over the last several years, the lost resources—dollars and people and organizational energy—are going to unproductive ends and contributing to decreased efficiency and increased pendency.

Lastly, given the SPE workload and the ever-increasing number of new hires they must train, USPTO needs to institutionalize the way it brings new hires into the agency and into the "world of work." Mentors outside the supervisory chain can help guide the new hires, give them career advancement tips, work process advice to speed their production and increase their quality, and perhaps most importantly, listen to their concerns and give them feedback outside the official loop. Employees who have multiple sources of feedback and a seasoned confidante are more productive contributors.

#### **Recommendations: USPTO Employee Relations**

**USPTO has some actions underway that the Academy Panel believes to be consistent with sound management practices:**

- **The certification and recertification programs for patent staff**
- **Systems to measure casework and the automated tracking system to follow up with those who fail to meet quarterly production goals**
- **Management's March 2005 proposals to negotiate requirements for more workday structure**

**In addition, the Panel recommends that USPTO:**

- **Analyze data from mandatory exit surveys to understand recruiting pitfalls that result in hiring individuals not well-suited to patent examination work.**
- **Provide resources to managers who make hiring decisions, such as:**
  - **recruiting sources that have historically produced accepted job offers and provided successful employees**
  - **points to consider when hiring to ensure a good match between employee and USPTO**
  - **examples of pitfalls and best practices so as to learn from others' experiences.**

- **Establish a mentor program, with a requirement that all new hires have a mentor outside their supervisory chain.**

A strong OHR can resurrect this program, match new hires with available mentors, provide training to mentors and those mentored, supply tools, such as Individual Development Plan guides and training resources, and monitor pair progress. While a mentoring program is yet one more initiative competing for scarce USPTO resources, such coordination and consultation would be a logical fit should the agency implement its draft enterprise training initiative, which is slated to include a USPTO Development Center and e-learning project.

Many federal agencies use formal mentoring programs to develop and maintain a well-trained and versatile workforce. For example, the Department of Energy (DOE) has a structured mentoring program that began with a 1995 pilot program and is now supported by an Internet-based *Mentoring Program Guide*. Recognizing that mentoring can divert time and money from other job training programs and that some agencies lack sufficient top-level mentors for the “face-to-face” variety, OPM began, in January 2004, to offer online “e-mentoring,” available through OPM’s multi-agency Web portal, GoLearn.gov. Portal users—numbering about 20,000 annually—find experts in their fields in minutes.

A survey conducted in 2004 shows that senior-level executives recognize the value of mentors. Although 60 percent of women and 72 percent of men did not have a mentor, more than half of the respondents said a mentor helped them succeed.<sup>189</sup> While a mentor cannot and should not replace supervisory guidance or technology specific orientation, a mentor can help a new employee feel more connected to the larger organization, provide longer term and broader perspective on day-to-day challenges, and provide the employee with a sounding board and additional source of feedback. Orientation to the program, including written guidance and a defined set of boundaries, should ensure that all parties involved understand the parameters of the program and maximize its usefulness to the agency and employee. Establishment of such a program also sends a signal to employees that they are valued for more than today’s production; an agency that is willing to invest in its employees typically gets a return-on-investment, particularly improved retention and improved morale as employees look beyond this week’s paycheck and focus on their personal development and a lifetime career.

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<sup>189</sup> Lisagor, Megan, “E-mentoring: A tool for federal workers,” January 24, 2005, <http://www.few.com/fcw/articles/2005/0124/mgt-mentor-01-24-05.asp>.

# Attachment 4

## Work Credit Abuse

Work credit abuse (a.k.a. mortgaging) is an act of misconduct, which occurs when an employee knowingly posts for credit for work which is substantively incomplete, either through the absence of rejections, or the presence of rejections that are inappropriate, for production gain, docket management gain or both (e.g. to receive an award, to avoid a performance warning, etc.). The standard for determining misconduct is a preponderance of the evidence; i.e., whether it is more likely true than not, the employee committed work credit abuse.

The determination as to whether or not mortgaging has occurred is fact-based and is initially made at the TC level by the SPE, in consultation with the Group Director and optionally the TC ER Liaison. SPEs should therefore be careful not to confuse work credit abuse with poor quality work under the PAP, considering the Quality Major Activities for which the examiner is responsible. Managers should address concerns about possible work credit abuse through oral discussion and mentoring, when those concerns arise, in order to lessen the likelihood of repeat or escalating occurrences. Before proceeding down the conduct path and potential disciplinary action, SPEs should consider the known facts and the context in which the examiner's action occurred. For example:

1. What is the nature of the work product; i.e., was there a *bona fide* attempt to complete the work?
2. Was there a 'gain' involved for the employee, and if so, what is the nature of the 'gain'?
3. Were the actions called into question auto-counted?
4. What level (if any) of signatory authority does the employee have?
5. How many applications are involved?
6. Were there known problems with automated systems that could be relevant to the situation?
7. When discovered, did the examiner bring the problem to the attention of the SPE?

Examples of work credit abuse may include, but are not limited to:

1. Posting for credit blank office actions;
2. Posting for credit office actions with only trivial issues generically expressed or addressed, with no substantive objections or rejections;
3. Posting for credit office actions that contain only rejections that can be written with a cursory review of the claims (e.g. simple §112, 2<sup>nd</sup> paragraphs) where the search history reflects that only a limited superficial search was conducted;
4. Posting for credit an office action including only a superficial "shotgun"-style rejection (e.g. "claims 1-50 are rejected") where the rejection reflects that there was no *bona fide* attempt to complete the office action prior to posting for credit;
5. Posting for credit office actions that contain only text copied from a previous Office action such as wherein:
  - the pending claims don't correspond to those in the cut and pasted Office action;
  - the claims were substantively amended and the art applied is no longer properly applicable (as in the case when a previous action was copied); or
  - the action is being made final with no address of applicant's response to the previous Office action.
6. Posting for credit complete Office actions that are from a different application which are not applicable to the application at hand.
7. Posting for credit an action with an omission resulting in a return by TSS (e.g., missing 1449), where the Office action is subsequently significantly rewritten prior to mailing.
8. Office actions that contain only the claims to be mapped.

When the determination of misconduct has been made, these and additional inquiries again form part of the Douglas factor analysis that will determine the degree of penalty proposed. For work credit abuse situations, the range of penalty proposed for a first occurrence will generally fall within counseling to a 14-day suspension; however, the specifics of the case may warrant a penalty outside of that range. If the employee's behavior is egregious, oral discussion or mentoring only may not be effective or appropriate. The specifics of each case should be considered carefully. Employee Relations assists managers in conducting the Douglas Factor analysis, and in recommending penalties consistent with progressive discipline. SPEs should fully explain the facts, in their patent examining context, to the Employee Relations Specialist.

The Douglas Factors include:

- (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- (3) the employee's past disciplinary record;
- (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) consistency of the penalty with any applicable agency table of penalties;
- (8) the notoriety of the offense or its impact upon the reputation of the agency;
- (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- (10) potential for the employee's rehabilitation;
- (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.