



February 3, 2020

FREEDOM OF INFORMATION APPEAL

VIA ELECTRONIC MAIL (foiarequests@uspto.gov)

Office of the General Counsel
United States Patent and Trademark Office
Madison Building East, Room 10B20
600 Dulany Street
Alexandria, VA 22314

Re: Appeal of Final Response on Freedom of Information Act Request No. F-19-00277

Dear Deputy General Counsel:

US Inventor (USI), a not-for-profit § 501(c)(4) corporation, hereby appeals under 5 U.S.C. § 552(a)(6) the Patent and Trademark Office’s final response of November 4, 2019, on Freedom of Information Act (FOIA) Request No. F-19-00277.

I. Background

On September 16, 2019, US Inventor filed a request under the FOIA, 5 U.S.C. § 552 and 37 C.F.R. § 102.4, for the following records from the U.S. Patent & Trademark Office (PTO):

1. Copies of the Performance Appraisal Plans (PAPs) for each PTAB APJ employment grade including Chief APJs for fiscal years 2013, 2016, and 2019. The request included, without limitation, appraisal forms and bonus calculation guidance for all APJ employment grades, and all documents submitted to U.S. Office of Personnel Management (OPM) in order to approve said PAPs including under 5 C.F.R. § 430.209(a).
2. Copies of all documents and guidance documents concerning APJ production expectancies, work product quotas, or docket management goals for all PTAB APJ employment grades in effect as of this request.
3. Copies of any and all employment agreements (collective bargaining or group contracts) between the government and any organization, union, or association representing PTAB APJs. This request is limited to such agreement(s) and any amendments and attachments thereto that are in force as of this request.
4. Copies of all PTAB’s enumerated Standard Operating Procedure (SOP) documents, including but not limited to SOP-8, in effect on 2011 (BPAI), 2014, and 2019.

The request clarified that all documents sought under Requests 1 through 4 above include documents pertaining to ex parte appeals, interferences, and AIA trials. *See* Ex. 1 (the “Request”). The PTO docketed the Request as FOIA Request No. F-19-00277.

In an October 15, 2019 letter, the PTO extended the response time limit by ten additional working days, to October 29, 2019. The PTO explained that the “extension is necessary because of the need to appropriately examine a voluminous amount of records that are subject to the request” and indicated that “[n]o additional extensions are anticipated, and records will be released before October 29, 2019 if possible.” Ex. 2. However, the PTO failed to respond by October 29, and thus has failed to meet its FOIA statutory deadline specified in 5 U.S.C. § 552(a)(6)(B).

In a November 4, 2019 decision, the PTO responded to the Request. *See* Ex. 3. The decision stated that the PTO had identified responsive records and that documents responsive to Request “Items 1 and 4 are released in full;” that as to Request 4, “SOP’s 5 and 6 are not in use at this time nor were they in use in 2011 or 2014;” and as to Request 3, “there are no records responsive to this request” because “PTAB APJ’s are not unionized.” The Decision stated that documents responsive to Request 2 “are withheld in full pursuant to Exemption (b)(2) of the FOIA.” This exemption applies to records that are “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552(b)(2).

Along with its decision, the PTO released records (Production) containing PAP records purported to be responsive to Request 1 (Ex. 3-1), SOP records purported to be responsive to Request 4 (Ex. 3-2), and 21 blank (fully redacted) pages in a PDF file named “Production Expectancies” (Ex. 3-3).

II. The PTO failed to identify and release responsive information within its control.

The Production fails to identify and disclose responsive and releasable information within the PTO’s control. The PTO bears the burden of showing that its search was calculated to uncover *all* relevant documents. *Steinberg v. United States Dep’t of Justice*, 23 F.3d 548, 551 (D.C.Cir.1994) (emphasis added). “An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover *all* relevant documents.’” *Valencia–Lucena v. Coast Guard*, 180 F.3d 321, 325 (D.C.Cir.1999) (citations omitted, emphasis added); see also *Steinberg*, 23 F.3d 548 at 551. The D.C. Circuit Court of Appeals held that agencies are required “to make more than perfunctory searches and, indeed, to follow through on obvious leads to discover requested documents.” *Valencia–Lucena*, 180 F.3d at 325. The PTO “cannot limit its search to only one or more places if there are additional sources that are likely to turn up the information requested.” *Id.* (citations and internal quotes omitted). “As the relevance of some records may be more speculative than others, the proper inquiry is whether the requesting party has established a sufficient predicate to justify searching for a particular type of record.” *Campbell v. United States Dep’t of Justice*, 164 F.3d 20, 28 (D.C.Cir.1998).

As explained below, the Appellant established, and the PTO had, ample predicates and evidence that it has particular responsive records and in any event it should have

“follow[ed] through on obvious leads to discover requested documents.” Appellant’s pertinent original requests are discussed below using the request number designator as used in the original request.

II.1 Request 1

Appellant requested copies of the PAPs for each PTAB APJ employment grade including Chief APJs for fiscal years 2013, 2016, and 2019, “bonus calculation guidance for all APJ employment grades,” and “all documents submitted to OPM in order to approve said PAPs including under 5 C.F.R. § 430.209(a).” The PTO, however, produced only a *single* PAP document for Fiscal Year 2018, for what can be seen as a *single* APJ employment grade – the “Lead Administrative Patent Judge,” and certainly not for APJs, Vice Chief Judge, Deputy Chief Judge or Chief Judge. *See* Ex 3-1. Nor did the PTO identify/release any document that it submitted to OPM for any such PAP approval.

PAPs

The implication that the PTO has no records of its PAP submissions for OPM approval, no PAP documents for all requested years and all employment grades of APJs, is simply not credible. PAPs could not have been entered into verbally with APJs. By law, the PTO must have documentation that binds the agency and the employees for other requested years – not only FY 2018 and not only for Lead Administrative Patent Judges.

The Patent Act at 35 U.S.C. § 3(c) requires that “Officers and employees of the Office shall be subject to the provisions of title 5,” which provision also applies to all APJs. Pursuant to the authority in 5 U.S.C. Chapter 43 and 5307(d), the OPM promulgated Performance Appraisal Regulations, 5 C.F.R. § 430.206, requiring that the PAP appraisal period shall generally be 12 months, § 430.206(a)(2). Moreover; the PAP “shall be provided to employees at the beginning of *each appraisal period* (normally within 30 days),” § 430.206(b)(2); the PAP *must be provided to employees in writing*, § 430.206(b)(3) (emphasis added); and the PTO must *maintain* such PAP records for OPM audits. § 430.209(f). In addition, § 430.209(a) requires that the PTO “submit to OPM for approval a description of its [PAP and] any subsequent changes that modify any element of the agency’s [PAP] system(s).” Therefore, assuming that the PTO complies with OPM’s regulations and does not have a scheme to evade OPM audits, the PTO must have within its control copies of *separate* PAPs for *each* fiscal year and *each* APJ employment grade. Without these records, the PTO cannot administer its employee performance reviews nor enforce performance goals set for its employees. The PTO must also have such *signed* PAPs in the personnel file of *each* PTAB employee.

The PTO did not claim any exemption under the FOIA justifying the withholding of the PAPs for *other* requested years or APJ employment grades *other than* Lead Administrative Patent Judge. The PTO must therefore conduct a proper search and produce *all* responsive records. Releasing only one PAP that is likely to be stored alongside other responsive PAPs that have *not* been produced, demonstrates that the PTO has failed to conduct a search that was “reasonably calculated to uncover *all* relevant documents,” *Valencia*, 180 F.3d at 325

(citations omitted, emphasis added) – not only a subset of the relevant documents. The same is true for the PTO submissions of PAPs to OPM approval because by specifically identifying the category of records which must be maintained under 5 C.F.R. § 430.209(a), Appellant’s Request “has established a sufficient predicate to justify searching for a particular type of record.” *Campbell* 164 F.3d at 28.

Bonus calculation guidance

PTO employees, including APJs often work long hours to achieve outstanding performance and receive monetary bonuses in addition to their salary. In regulating such cash awards to federal employees, 5 C.F.R. § 451.104(h) requires that “granting performance-based cash awards on the basis of a rating of record at the fully successful level ... must make meaningful distinctions based on levels of performance.” Such meaningful distinctions for APJ’s cash awards can only be made if justified by a numeric rating entry and a corresponding percentage of the APJ’s salary to be awarded in cash. A box for such entry is provided in the Performance Recognition section of the PAP. *See* Ex. 3-1, “Section III—Performance Recognition.” However, the PTO released no information on such bonus calculation, pursuant to Request 1.

It should be noted that PTO employee bonus calculation information of the *same type has already been made public*, at least in testimony of PTO officials before Congress. Exhibit 4 includes such public testimony wherein the various bonus awards for patent examiners are described based on numerical performance criteria: Special Achievement Award of 3% of salary, (Ex. 4, Att. 2 at 24); Productivity Gainsharing Award of up to 7% of base salary (*Id.* at 25); Pendency Awards of 0.25%, 0.5%, and 0.75% of salary, *Id.* at 27, 28, 29 respectively; and Supplemental Award of up to additional 1% of salary, *Id.* at 29.

The PTO did not claim any exemption under the FOIA justifying the withholding of the APJ bonus calculation guidance and it should therefore locate and release such information in full. In any event, an exemption under the FOIA from disclosure should not be available to the PTO for the same type of information it has already determined to disclose to the public. This is true particularly for information about the level of bonuses paid by the public to government employees above and beyond their salary.

III. The PTO improperly asserted Exemption (b)(2)

The agency seeking to withhold information bears the burden of showing that an exemption under the FOIA applies. *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm’n*, 216 F.3d 1180, 1190 (D.C.Cir.2000); *Coastal States* 617 F.2d at 861 (The agency invoking a FOIA exemption bears the burden of “establish[ing] [its] right to withhold evidence from the public.”). Mere “conclusory assertions of privilege will not suffice to carry” the agency’s burden. *Id.*; *see Mead Data Central, Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 258 (D.C.Cir.1977) (government must show “by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA”). Moreover, the PTO must construe disclosure exemptions narrowly. *See Milner v. Dep’t of the Navy*, 562 U.S. 562, 565 (2011); *Department of Justice v. Julian*, 486 U.S. 1, 8 (1988). Any “[d]oubts are customarily to

be resolved in favor of openness.” *Irons v. FBI*, 811 F.2d 681, 685 (1st Cir.1987). Thus, the PTO must specifically explain how disclosure of each withheld information segment would “reasonably” be expected to damage the interests protected by the claimed exemption. See, e.g., *Kimberlin v. DOJ*, 139 F.3d 944, 950 (D.C. Cir. 1998); *Pacific Architects & Engineers, Inc. v. Renegotiation Board*, 505 F.2d 383, 385 (D.C. Cir. 1974).

The FOIA also requires the PTO to disclose “[a]ny reasonably segregable portion of a record ... after deletion of the portions which are exempt.” 5 U.S.C. § 552(b). Non-exempt portions of a record may be withheld *only* if they are “inextricably intertwined” with the exempt portions. See *Inner City Press/Cnty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 249 n. 10 (2d Cir.2006); *EPA v. Mink*, 410 U.S. 73, 92 (1973). If the PTO determines that non-exempt portions of a record are not segregable, it *must justify* that determination in detail. See *Mead* 566 F.2d at 261.

Accordingly, to meet its burden, the PTO must (a) identify a specific valid interest it seeks to protect, (b) demonstrate foreseeable harm to such interest in the event of disclosure, and (c) demonstrate that it has taken reasonable steps to segregate and release nonexempt information. The PTO has met none of these obligations with respect to the records for Request 2 it withheld in *their entirety*.

III.1 Request 2

The PTO redacted all 21 responsive pages in their *entirety* with no explanation. Not even original dates, subject matter, titles or page numbers were spared from redaction and there is no way of knowing whether any of the withheld information even falls within the scope of material exempt under (b)(2). The PTO’s decision merely claims that it does. This blanket redaction and its justification was “wholly conclusory, providing no information that would enable [requester] to evaluate the [agency’s] decisions to withhold.” *Davin v. DOJ*, 60 F.3d 1043, 1052 (3d Cir. 1995); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970) (stating that “statutory scheme does not permit a bare claim of confidentiality to immunize agency [records] from scrutiny” in their *entireties*); *Chesapeake Bay Found. v. U.S. Army Corps. of Eng’rs.*, 677 F. Supp. 2d 101, 109 (D.D.C. 2009) (requiring the agency to provide “evidence to support” the claim that it complied with its segregability obligation and refusing “to take on faith” agency’s assertions that it had complied).

The PTO may not, for example, redact segregable material such as subject matter, titles, or dates that are not exempt. *In Def. of Animals v. NIH*, 543 F. Supp. 2d 83, 107-08 (D.D.C. 2008) (ordering agency to segregate and release subject matter of invoices and equipment purchase-related emails even where sub-contractor and vendor names and estimated costs might be properly withheld under FOIA exemptions); *United Am. Fin., Inc. v. Potter*, 531 F. Supp. 2d 29, 44-45 (D.D.C. 2008) (rejecting agency’s conclusory statement that all reasonably segregable material was released because it failed to explain why factual information in an email reporting or summarizing a telephone call, which was otherwise properly exempt under deliberative process privilege, was not reasonably segregable); *ACLU v. FBI*, 429 F. Supp. 2d 179, 193 (D.D.C. 2006) (finding that agency did not establish that

factual portions of email messages were inextricably intertwined with material exempt as deliberative).

Furthermore, blanket redaction cannot be justified by the fact that segregable non-exempt portions may be nonresponsive to Request 2. Where, as here, the PTO identified a record as responsive to a FOIA request, it cannot nonetheless redact particular information within the responsive record on the basis that the particular information is non-responsive to the Request. The D.C. Circuit held that “once an agency identifies a record it deems responsive to a FOIA request, the statute compels disclosure of the responsive record – i.e., as a unit – except insofar as the agency may redact information falling within a statutory exemption.” *Am. Immigration Lawyers, Ass’n v. EOIR*, 830 F.3d 667, 678 (D.C. Cir. 2016).

Finally, as a reason to withhold under Exemption (b)(2) the information in Request 2, the PTO decision (at 2) states that “[t]he information you requested is used to determine employee ratings, performance appraisals (including information related to evaluating performance, taking a performance-based action, or justification for a performance-based merit award or promotion) and used for other personnel-related actions at the USPTO.” But that is precisely the *same type* of information the PTO did *not* withhold in releasing the PAP pursuant to Request 1. For example the PAP specifies the number of APJ’s “decisional units” required for each “production” performance element rating,¹ and “Section II – Performance Summary and Rating” specifies the relative weighting of scores among the four performance elements, and the rating scores required for each performance rating. The PTO cannot validly claim an exemption for the type of information it has already determined to be nonexempt.

In conclusion, the PTO failed to meet its burden showing that Exemption (b)(2) under the FOIA applies to the Request.

IV. The PTO may not charge any fees

As indicated in Section II.1 above, the PTO would need to perform additional searches and processing of identified records. Because the PTO has failed to comply with the FOIA’s time limits set forth in 5 U.S.C. § 552(a)(6)(B) for its November 4, 2019 decision, it is barred from assessing fees in this case. 5 U.S.C. § 552(a)(4)(A)(viii).

¹ See PAP, Production Element, Item 3, Ex. 3-1. (“Outstanding” corresponds to earning no fewer than 100 decisional units; “Commendable” is for earning no fewer than 92 decisional units; a “Fully Successful” Judge will earn no fewer than 84 decisional units; “Marginal” corresponds to earning at least 75 decisional units annually, but fewer than 84; and the “Unacceptable” Judge will earn fewer than 75 decisional units annually.)

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Randy Landreneau", with a long horizontal flourish extending to the right.

US INVENTOR

Randy Landreneau
President
17440 Dallas Parkway
Dallas, TX 75287

rlinventor@protonmail.com

727-744-3748

EXHIBIT 1

FOIA Request



VIA ELECTRONIC MAIL FOIARequests@uspto.gov; efoia@uspto.gov

USPTO FOIA Officer
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Re: US Inventor Freedom of Information Act Request on PTAB Operations

Dear FOIA Officer:

US Inventor, a not-for-profit § 501(c)(4) corporation, hereby requests under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and 37 C.F.R. § 102.4, the following records from the U.S. Patent & Trademark Office (PTO):

1. Under the U.S. Office of Personnel Management (OPM) Performance Appraisal Regulations, 5 C.F.R. § 430.206, all Patent Trial and Appeal Board (PTAB) employees, including each Administrative Patent Judge (APJ) must be presented with, and bound by, a Performance Appraisal Plan (PAP) for each year. Please provide copies of the PAPs for each PTAB APJ employment grade including Chief APJs for fiscal years 2013, 2016, and 2019. This request includes, without limitation, appraisal forms and bonus calculation guidance for all APJ employment grades, and all documents submitted to OPM in order to approve said PAPs including under § 430.209(a).
2. Please provide copies of all documents and guidance documents concerning APJ production expectancies, work product quotas, or docket management goals for all PTAB APJ employment grades in effect as of this request.
3. Please provide copies of any and all employment agreements (collective bargaining or group contracts) between the government and any organization, union, or association representing PTAB APJs. This request is limited to such agreement(s) and any amendments and attachments thereto that are in force as of this request.
4. Please provide copies of all BPAI's or PTAB's Standard Operating Procedures (SOP) 1, 5, 6, 7, 8, and 9 in effect in 2011, 2014, and 2019. If any of these SOPs is not in effect today, please provide documents reflecting termination or expiration of that SOP.

For avoidance of doubt, all documents sought under Requests 1 through 4 above include documents pertaining to ex parte appeals, interferences, and AIA trials.

Please provide the requested material above in its native electronic form such as Excel, MS Word or PDF documents, preferably by email to rlinventor@protonmail.com.

Definitions

“Records” are defined at 44 U.S.C. § 3301, and per 5 U.S.C. § 552(f)(2), include “any information that would be an agency record subject to the requirements of [FOIA] when maintained by an agency in any format, including an electronic format.” The terms “and” and “or” shall be construed both conjunctively and disjunctively.

US INVENTOR

Innovators, Inventors, Dreamers, and Builders

Public Interest Fee Waiver

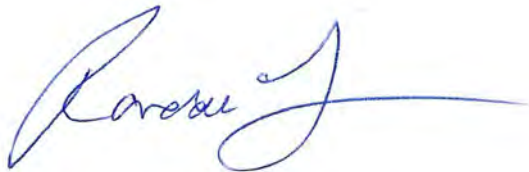
Because records requested herein were identified explicitly and may be readily located without undue search burden, US Inventor anticipates that under 37 C.F.R. § 102.11(d)(4), no fees should be assessed. However, in the event that the PTO intends to assess fees for this request, US Inventor requests a public interest fee waiver because the requested records directly concern and bear upon the government's operations and activities, will be highly informative to the general public regarding the PTO's policies, including on matters directly affecting thousands of patent holders and applicants.

Upon receipt, we will make these records or their analysis publically available on our website at www.usinventor.org for use by journalists, scholars, students, and interested members of the public at no charge, and use the information in reports, newsletters (www.usinventor.org/subscribe), and other public disseminations to advance our educational mission. Therefore, disclosure of the requested information "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester,"¹ a 501(c)(4) corporation.

U.S. Inventor prefers to receive the documents by email, at rlinventor@protonmail.com or some other electronic form that preserves all document integrity.

We may be reached at the address below, if you have any questions.

Respectfully submitted,



US INVENTOR

Randy Landreneau
President
17440 Dallas Parkway
Dallas, TX 75287

rlinventor@protonmail.com
727-744-3748

¹ 5 U.S.C. § 552(a)(4)(A)(iii); 37 C.F.R. § 102.11(k)(1).

EXHIBIT 2

PTO Extension Letter



UNITED STATES PATENT AND TRADEMARK OFFICE

Office of the General Counsel

October 15, 2019

VIA EMAIL

Mr. Randy Landreneau
U.S. Inventor
17440 Dallas Parkway
Dallas, TX 75287

Re: Freedom of Information Act (FOIA) Request No. F-19-00277

Dear Mr. Landreneau:

The USPTO is in receipt of your FOIA request referenced above. This is the Agency's notice to extend the response time limit to your Freedom of Information Act (5 U.S.C. § 552) request for:

1. Under the U.S. Office of Personnel Management (OPM) Performance Appraisal Regulations, 5 C.F.R. § 430.206, all Patent Trial and Appeal Board (PTAB) employees, including each Administrative Patent Judge (APJ) must be presented with, and bound by, a Performance Appraisal Plan (PAP) for each year. Please provide copies of the PAP's for each PTAB APJ employment grade including Chief APJ's for fiscal years, 2013, 2016, and 2019. This request includes without limitations appraisal forms and bonus calculation guidance for all APJ employment grades, and all documents submitted to OPM in order to approve said PAP's including under § 430.209(a).
2. Please provide copies of all documents and guidance documents concerning APJ production expectancies, work product quotas, or docket management goals for all PTAB APJ employment grades in effect as of this request.
3. Please provide copies of any and all employment agreements (collective bargaining or group contracts) between the government and any organization, union, or association representing PTAB APJ's. This request is limited to such agreements and any amendments and attachments thereto that are in force as of this request.
4. Please provide copies of all BPAI's or PTAB's Standard Operating Procedures (SOP) 1, 5, 6, 7, 8, and 9 in effect in 2011, 2014 and 2019. If any of these SOP's is not in effect today, please provide documents reflecting termination or expiration of that SOP.

The request was received on September 16, 2019. The response period for the Agency's initial determination runs through October 15, 2019.

In accordance with 37 C.F.R. § 102.6(c), the response time limit is hereby extended ten additional working days to **October 29, 2019** due to unusual circumstances. This extension is necessary because of the need to appropriately examine a voluminous amount of records that are subject to the request. The Agency's response will promptly follow its review and final assembly of responsive documents. No additional extensions are anticipated, and records will be released before October 29, 2019 if possible.

Sincerely,

A handwritten signature in black ink, appearing to read 'Traci Alexander', with a stylized flourish at the end.

Traci Alexander
USPTO FOIA Specialist
Office of General Law

EXHIBIT 3

PTO Decision



UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF THE GENERAL COUNSEL

November 4, 2019

VIA EMAIL

Mr. Randy Landreneau
U.S. Inventor
17440 Dallas Parkway
Dallas, TX 75287

RE: *Freedom of Information Act (FOIA) Request No. F-19-00277*

Dear Mr. Landreneau:

The United States Patent and Trademark Office (USPTO) FOIA Office has received your e-mail dated September 16, 2019 requesting a copy of the following documents pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552:

1. Copies of the PAP's for each PTAB APJ employment grade for fiscal years 2013, 2016, and 2019.
2. Copies of all documents and guidance documents concerning APJ production expectancies, work product quotas, or docket management goals for all PTAB APJ employment grades in effect as of this request.
3. Copies of any and all employment agreements (collective bargaining or group contracts) between the government and any organization, union, or association representing PTAB APJ's. This request is limited to such agreements and any amendments and attachments thereto that are in force as of this request.
4. Copies of all BPAI's or PTAB's Standard Operating Procedures (SOP) 1, 5, 6, 7, 8, and 9 in effect in 2011, 2014, and 2019.

The USPTO has identified 95 pages of documents that are responsive to your request. A copy of the material is enclosed. Items 1 and 4 are released in full. Please note that SOP's 5 and 6 are not in use at this time nor were they in use in 2011 or 2014. Regarding Item 3, there are no records responsive to this request. PTAB APJ's are not unionized. Documents responsive to Item 2 of the request are withheld in full pursuant to Exemption (b)(2) of the FOIA.

Exemption 2 protects information related solely to the internal personnel rules and practices of an agency. 5 U.S.C. § (b)(2). For this exemption to be applicable, a three-part test must be satisfied. The information must be: (1) related to personnel rules and practices, (2) related solely to those personnel rules and practices, and (3) for an agency's internal use. See Milner v. Dep't of the Navy, 562 U.S. 562 (2011).

In Milner, the Court found that the word "personnel" was used in the exemption to "refer [] to human resources matters," and in common parlance to refer to "the selection, placement, and training of employees and . . . the formulation of policies, procedures, and relations with [or involving] employees or their representatives." Id. at 569. (quoting Webster's Third New International Dictionary 1687 (1966)). The Court concluded that "[a]n agency's 'personnel rules and practices' are its rules and practices dealing with employee relations or human resources," noting that "all the rules and practices referenced in [Exemption (b)(2)] share a critical feature: they concern the conditions of employment in federal agencies—such matters as hiring and firing, work rules and discipline, compensation and benefits." Id. at 571.

The information you requested contains methods to "evaluat[e] [employees'] work performance" and concerns "the selection, placement, and training of employees" and "employee relations or human resources," including "such matters as hiring and firing, work rules and discipline, compensation and benefits." Id. at 569-70. The information relates to hiring, firing, discipline, compensation, benefits, and the like, given their obvious use as a tool to evaluate the job performance of individual employees. The forms relate to "[p]ersonnel management," which the Supreme

Court defined as “the phase of management concerned with the engagement and effective utilization of manpower to obtain optimum efficiency of human resources.” Id. at 569.

The information you requested is used to determine employee ratings, performance appraisals (including information related to evaluating performance, taking a performance-based action, or justification for a performance-based merit award or promotion) and used for other personnel-related actions at the USPTO. Because the information requested is (1) related to personnel rules and practices, (2) related solely to those personnel rules and practices, and (3) for the agency’s internal use, the information is exempt from disclosure under Exemption 2.

You have the right to appeal this initial decision to the Deputy General Counsel, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450. An appeal must be received within 90 calendar days from the date of this letter. See 37 C.F.R. § 102.10(a). The appeal must be in writing. You must include a copy of your original request, this letter, and a statement of the reasons why the information should be made available and why this initial denial is in error. Both the letter and the envelope must be clearly marked “Freedom of Information Appeal.”

You may contact the FOIA Public Liaison at 571-272-9585 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,



Dorothy G. Campbell
USPTO FOIA Officer
Office of General Law

Enclosure

EXHIBIT 3-1

APJ PAP

From: Moore, James T

Sent: Thursday, May 07, 2009 9:57 AM

To: Adams, Donald; Bahr, Jennifer; Barrett, Ken; Barrett, Lee; Barry, Lance; Baumeister, B William; Blankenship, Howard; Boalick, Scott; Colaianni, Michael; Courtenay, St.John; Crawford, Murriel; Dang, Thu A.; Delmendo, Romulo; Dixon, Joe; Easthom, Karl; Fetting, Anton; Fischetti, Joseph; Franklin, Beverly A.; Fredman, Jeffrey; Garris, Bradley; Gaudette, Linda M.; Green, Lora; Grimes, Eric; Hahn, Thomas S.; Hairston, Kenneth; Hanlon, Adriene; Hastings, Karen; Hoff, Marc; Homere, Jean; Horner, Linda; Hughes, James R. (BPAI); Jeffery, John A.; Kerins, John; Kimlin, Edward; Kratz, Peter; Krivak, Carla; Lane, Sally; Lebovitz, Richard; Lee, Jameson; Lorin, Hubert; Lucas, Jay; Mantis-Mercader, Eleni; Martin, John; McCarthy, Steven; McCollum, Melanie; McKelvey, Fred; Medley, Sally; Mills, Demetra; Mohanty, Bibhu; Nagumo, Mark; Nappi, Robert; O'Neill, Mike; Owens, Terry; Pak, Chung; Pate, William; Prats, Frank; Robertson, Jeffrey B.; Ruggiero, Joseph; Saadat, Mahshid; Schafer, Richard; Scheiner, Toni; Silverberg, Fred; Siu, Stephen; Smith, Jeffrey T.; Song, Daniel; Spiegel, Carol; Staicovici, Stefan; Stephens, Debra (BPAI); Thomas, Carolyn D. (BPAI); Thomas, James; Tierney, Michael; Timm, Catherine; Torczon, Richard; Turner, Kevin; Walsh, Stephen; Warren, Charles; Whitehead, Carl; Brown, David E. (BPAI); Chen, Eric; Cocks, Josiah; Deshpande, Kalyan; Dickey, Steven; Droesch, Kristen; Frahm, Eric; Franklin, Erica; Greenhut, Charles N.; Guest, Rae Lynn; Hayes, Michael; Johnson, Jonathan (BPAI); Joyce, Catherine; Katz, Deborah; Kauffman, Phillip; Kim, Michael; Kohut, David M.; Lilling, Adam C.; Meyers, Matthew S.; Mintz, Rodney; Morgan, Jason; Mosby, April; Petravick, Meredith; Pothier, Denise; Rocca, Joseph M.; Saindon, William V.; Sims, Dawn M.; Smith, Jeffrey S. (BPAI); Thomas, Mark A.; Wu, Jingge; Zecher, Michael R.

Cc: MacDonald, Allen; Fleming, Michael R. @ BOAI; Santiago, Amalia

Subject: Policy Clarification on Dissents, Concurrences and Remands

Importance: High

Colleagues:

Please note that, effective immediately, if you would like a dissent, concurrence, or remand to be considered towards your productivity totals, you must submit a request. The form is attached, and may be used retroactively for cases prior to this date. For cases after this date, it must be submitted to your Vice Chief Judge within one week of mailing of the dissent, concurrence, or remand in order to be considered.

Concurrences, dissents, and remands are not normally efficient mechanisms for securing the "just, speedy, and inexpensive" resolution of an appeal before the Board. (Bd. R. 1). As indicated in the PAPs, a productivity credit is not automatically earned for a concurring opinion, dissenting opinion, or remand. Accordingly, justification is required to explain the need to undertake the extra work and occasion the extra delay in order to ensure efficient and proper utilization of our resources. Further, any credit given for a concurring opinion, dissenting opinion, or remand will be commensurate in scope with the justification provided and the scope of the extra work.

Please see Al or Jay if you have any questions.

Thanks,

Jay Moore

Allen MacDonald

Supporting Document to Administrative Patent Judge Performance
Appraisal Plan FY2018

Element 1: Quality

ARC comments are not binding, but instead suggestions that a panel may consider in preparing decisions.

Element 2: Production

Item 2. Supporting information related to Major Activities

Crediting for decisions and orders in AIA trial proceedings is currently undergoing evaluation. Should any changes in methodology in assigning credit to decisions and orders be recommended for implementation during the course of the fiscal year, Judges will be notified well in advance, and provided the opportunity to give comments and feedback on any proposed changes.

In performing the major activities described in the Performance Appraisal Plan, judges will normally seek efficiency gains and utilize available resources to enhance annual production. Such efficiency gains include effective use of collaboration tools, administrative resources, and any additional resources available as a result of other Board programs (e.g., Detailee program).

Item 3. Supporting information related to Criteria for Evaluation

There is no particular ramp up number in productivity for new judges in a probationary period. The new judge should focus on building relationships with their colleagues and basic decision writing concepts. The progress made by a new judge toward hitting the fully successful productivity goal is evaluated on a case-by-case basis based on the individual needs of the

new judge through discussion with that new judge's Lead Judge as a result of feedback from the new judge's mentoring judges and direct observations by the Lead Judge.

Regarding production adjustments for extended medical leave and special projects, judges should keep their Lead Judge informed of an ongoing event, so that the Lead Judge is aware and any appropriate documentation (such as Doctor's notes, etc.) can be gathered as appropriate. Any adjustments in production will be reasonable in view of the individual circumstances. Judges who have a potentially disproportionate amount of APJ2 and APJ3 work as a result of mentoring or docket imbalance should inform their Lead Judge as soon as possible, so that the issue(s) may be addressed.

Judges will be provided the opportunity to explain and justify low decisional units earned and unusual patterns of case mailing.

Element 3: Supporting the Mission of the Board/Leadership

Item 2. Supporting information related to Major Activities

Activities related to the attributes described include:

- Shares efficient processes and methods with other internal stakeholders.
 - leading section, ex parte appeals, or trial meetings
 - preparing or presenting material at section, ex parte appeal, or trial meetings
 - preparing or presenting training or continuing legal education material

- Puts organizational objectives before personal interests.
 - participating in hiring efforts
 - volunteers willingly for organizational activities when opportunities become available.
- Inspires and empowers other internal stakeholders by example and by encouragement to think positively about work related challenges and to seek constructive solutions, to achieve organizational goals and objectives, and to achieve higher levels of performance.
 - mentoring newer judges or patent attorneys
- Contributes significantly to the design and implementation of organizational methods and strategies that maximize internal stakeholder potential and which contribute to organizational objectives.
 - participating on Board committees that further the mission of the Board
 - preparing or presenting training or continuing legal education material
 - development of rules or policies
- Where change is required to better meet organizational objectives, adapts well to change (role model) and helps other internal stakeholders adapt and professionally thrive in a new and changing organizational environment.

Element 4: Internal/External Stakeholder Interactions

Internal stakeholders include Board co-workers (e.g., subordinates, other judges, and superiors), other USPTO employees, and USPTO contractors.

With respect to the circulation and mailing of decisions, it is expected that there may be some circumstances that impact the ability of a judge to advance a matter through the circulation process (such as workload, the impact of vacations for that judge or other judges on the panel, pressing special projects). However, judges should make every effort to respect the time of their colleagues in maintaining an even workflow and to allow other judges a sufficient amount for review taking into account that there may be other pressures on a reviewing judge's time.

Statutory deadline cases should be circulated at least 12 business days in advance of the deadline to the panel and at least 6 business days in advance to ARC. Additionally, reexam and reissue appeals should be handled with special dispatch and reviewed before ex parte appeals.

NEW
 I/A: _____
MR#: _____
IP#: _____

CLASSIFICATION AND PERFORMANCE MANAGEMENT RECORD

- Performance Plan • Performance Appraisal • Performance Recognition • Progress Review • Position Description

Employee's Name: _____ Social Security No.: _____

Position Title: Administrative Patent Judge

Pay Plan, Series, Grade/Step: AD 1222 00

- Organization:
- | | |
|--|---|
| 1. <u>US Department of Commerce</u> | 4. <u>Patent Trial and Appeal Board</u> |
| 2. <u>US Patent & Trademark Office</u> | 5. _____ |
| 3. <u>Office of the Under Secretary & Director</u> | 6. _____ |

Rating Period: 10/1/2017 - 9/30/2018

Covered By: Senior Executive Service Other AD
 General Workforce

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 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
------------------------	------	-------------------------	------

CLASSIFICATION CERTIFICATION	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 standard 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 FIRST LINE SUPERVISOR/RATING OFFICIAL ### Lead Administrative Patent Judge	SIGNATURE	DATE
---	-----------	------

APPROVAL—I agree with the certification of the position description and approve the performance plan.

NAME AND TITLE OF APPROVING OFFICIAL OR SES APPOINTING AUTHORITY *** Vice Chief Administrative Patent Judge	SIGNATURE	DATE
--	-----------	------

EMPLOYEE ACKNOWLEDGEMENT—My signature acknowledges discussion of the position description and receipt of the plan, and does not necessarily signify agreement.	SIGNATURE	DATE
--	-----------	------

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.

SECTION I—PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name	Date	Sheet No. <u>1</u> of <u> </u>
------	------	-----------------------------------

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

Element: Quality

Objective: Ensuring quality decision-making by the Patent Trial and Appeal Board

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 block.*) 35

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

Text limit in field is approximately 1100 characters. If more space is needed use continuation sheet.

Decisions, orders, and other documents (collectively “decisions”) in ex parte appeals of patent applications, reexamination proceeding appeals, post grant reviews, inter partes reviews, covered business method patent proceedings, derivation proceedings, interference proceedings, and other Board proceedings or matters are authored or drafted.

Written decisions demonstrate clear understanding of the facts of each case, the applicable technology at issue, as well as applicable law including legal statutes, regulations, and case law. Decisions are consistent with binding legal authority and written guidance applicable to PTAB proceedings issued by the Director or the Director’s delegate. Written decisions are logically presented, soundly reasoned, have accurate analysis, and are concise. Proper judicial tone is maintained throughout written decisions.

Panel discussions are attended as an active participant. The Judge promptly provides sound and helpful input to improve decisions where appropriate and bring the deliberations and proceedings forward efficiently.

(CONTINUED)

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

Text limit in field is approximately 950 characters. If more space is needed use continuation sheet.

Generic Performance Standards for the General Workforce will apply.

Optional Initial Block			
Employee	Date	Supervisor	Date

**Performance Management Record
Continuation Page – Element 1**

Employee Name:

Performance Element: Quality

Please identify item(s) continued:

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 2. Major Activities (Continued)

Oral arguments are attended and conducted skillfully with proper judicial tone toward all participants.

Surveys, if assigned, are completed. Feedback, including assigned surveys, is provided to the lead judge assessing the work of other Judges or staff, addressing the preparation of opinions, the conduct of oral hearings, judicial demeanor, and other qualities and functions set forth in the elements of the judge performance plan.

Decisions authored by other judges are reviewed and comments are promptly provided as appropriate, offering frank, accurate, and timely feedback on the quality of the decisions. Quality is ensured by avoiding undue delay when performing reviews and providing comments. Decisions in circulation are handled in a prompt and timely manner, and an undue delay in processing may be identified as a failure to provide the required feedback.

Senior management is promptly alerted to substantive, process-related, and professional issues of concern.

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.*)

Text field is limited. If more space is needed use continuation sheet.

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/Minimally Satisfactory (SES) 1-Unacceptable/Unsatisfactory (SES) Enter Rating 1-5 in adjacent block

Text field is limited. If more space is needed use continuation sheet.

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

Text field is limited. If more space is needed use continuation sheet.

Approving Official/Appointing Authority Signature

Date

SECTION I—PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name	Date	Sheet No. <u>1</u> of <u> </u>
------	------	-----------------------------------

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

Element: Production

Objective: Effective and efficient Decision-Making by the Patent Trial and Appeal Board

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 block.*) 35

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

Text field is limited. If more space is needed use continuation sheet.

Decisions, orders, and other documents in ex parte appeals, reexamination proceeding appeals, post grant reviews, inter partes reviews, covered business method patent proceedings, derivation proceedings, interference proceedings, and other Board proceedings are authored and mailed.

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

Text field is limited. If more space is needed use continuation sheet.

In addition to the Generic Performance Standards for the General Workforce, the following Supplemental Standards apply:

Outstanding performance in this element is demonstrated by the Judge making significant efforts toward production needs of the Board. Production will be of an exceptionally high volume, deciding cases in an amount far above the Board's overall rate of production. Exceptionally high volume corresponds to earning no fewer than 100 decisional units annually.

Commendable performance in this element is demonstrated by the Judge making considerable efforts toward production needs of the Board. Production will be of a very high volume, while producing well above the Board's overall rate of production. Very high volume corresponds to earning no fewer than 92 decisional units annually.

(CONTINUED)

Optional Initial Block			
Employee	Date	Supervisor	Date

**Performance Management Record
Continuation Page – Element 2**

Employee Name:

Performance Element: Production

Please identify item(s) continued:

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 3. Criteria for Evaluation (Continued)

The Fully Successful Judge will earn no fewer than 84 decisional units annually. Reasonable efforts are made to manage the Board's production needs.

The Marginal Judge will earn at least 75 decisional units annually (but fewer than 84). Efforts to manage the Board's production needs are minimally acceptable.

The Unacceptable Judge will earn fewer than 75 decisional units annually. Efforts to manage the Board's production needs are well below what is expected.

NOTES:

One mailed decision in an ex parte appeal of a patent application is generally worth 1 decisional unit. One mailed ex parte reexamination proceeding appeal decision is generally worth 2.5 decisional units. One mailed inter partes reexamination proceeding appeal decision is generally worth 4 decisional units.

Decisions and orders in AIA trial proceedings, and decisions and orders in interference proceedings, will be assessed on a case-by-case basis, based on the complexity of the proceeding. Determinations will be made by the Deputy Chief Judge and/or a designee of the Deputy Chief Judge. Please see the PAP Support Document for additional information on AIA Trial crediting.

Decisions prepared with the assistance of Patent Attorneys on behalf of the Judge are generally worth 0.5 decisional units to the Judge.

Judges may request, from their supervisor (Lead Judge), additional decisional units to be awarded for extraordinarily complex decisions in an ex parte appeal of a patent application or an ex parte reexamination appeal. Judges may request, from the Deputy Chief Judge or a designee of the Deputy Chief Judge, additional decisional units for extraordinarily complex decisions in AIA proceedings, appeals of inter partes reexamination applications, and interference proceedings.

The above productivity standards do not apply to new judges who are in their first year of the probationary period. In the first year of the probationary period, new judges must demonstrate increased productivity during their first year at the Board in a manner that clearly indicates that they have the potential to achieve the productivity standards.

Judges who are working a part time schedule will have a production goal that is prorated to correspond to the amount of hours worked relative to that of a judge who is working a full time schedule.

(CONTINUED)

**Performance Management Record
Continuation Page – Element 2**

Employee Name:

Performance Element: Production

Please identify item(s) continued:

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 3. Criteria for Evaluation (Continued)

Production goal adjustments may be made for atypical situations, such as extended medical leave (sick leave used in excess of the total amount of sick leave that can be earned in a fiscal year) or FMLA approved leave (whether annual and/or sick leave is substituted for leave without pay or not). These adjustments will be made on an hour for hour basis based upon the amount of time expected for each decisional unit as APJ1. All calculations will be rounded up or down to the nearest whole number.

Other production goal adjustments may be made in appropriate circumstances, such as significant additional responsibilities, including, but not limited to, assisting the Board with special projects. Special projects that exceed 40 hours may result in a production goal adjustment. Judges must consult with their Lead Judge in advance of the event for which an adjustment is proposed, and in the event of an emergency situation, as soon as practicable.

Production goals may be measured at any time during the appraisal year, at which point the APJ will be expected to have earned that portion of their expected annual decisional units at least equal to the percentage of the rating period that has been completed. Production goals will be established in accordance with any adjustments made as outlined in the preceding paragraphs of this section. Any time a Judge believes that approved leave or other appropriate circumstances will adversely affect the Judge's earning of a specific portion of the annual production goal, the Judge should contact the Lead Judge to request a deferment of the production goal.

For example, if the annual decisional unit requirement to earn a Fully Successful rating is 84 decisional units, and the APJ is being assessed after the first quarter of production, the APJ would be expected to have earned at least 21 decisional units to be assessed as Fully Successful $([84 \text{ decisional units required}] / [12 \text{ months per year}] \times [3 \text{ months in production}] = 21 \text{ decisional units required})$.

If a judge has questions or concerns, the judge should contact their Lead Judge, Vice Chief Judge, or the Deputy Chief Judge or Chief Judge as appropriate.

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.*)

Text field is limited. If more space is needed use continuation sheet.

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/Minimally Satisfactory (SES) 1-Unacceptable/Unsatisfactory (SES) Enter Rating 1-5 in adjacent block

Text field is limited. If more space is needed use continuation sheet.

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

Text field is limited. If more space is needed use continuation sheet.

Approving Official/Appointing Authority Signature

Date

SECTION I—PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name	Date	Sheet No. <u>1</u> of <u> </u>
------	------	-----------------------------------

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

Element: Supporting the Mission of the Board / Leadership

Objective: Assisting in the effective operation of the U.S. Patent and Trademark Office (USPTO) and the Patent Trial and Appeal Board (PTAB) by providing leadership for supporting the missions of the USPTO and PTAB.

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 block.*) 10

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

Text field is limited. If more space is needed use continuation sheet.

Sets a professional example for others to emulate. Inspires and empowers other internal stakeholders by example and by encouragement to think positively about work related challenges and seek constructive solutions to achieve organizational goals and objectives, and to achieve higher levels of performance. Puts organizational objectives ahead of personal interests.

Calm, dignified, judicial demeanor is demonstrated at all times in all professional settings. Respect and courtesy is shown to everyone, including all participants in any Board proceeding and to all Board personnel.

Accurate and thorough understanding of applicable laws and regulations, including binding legal authority and written guidance applicable to PTAB proceedings issued by the Director or the Director's delegate, is demonstrated at all times, in all settings.

(CONTINUED)

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

Text field is limited. If more space is needed use continuation sheet.

In addition to the Generic Performance Standards for the General Workforce, the following Supplemental Standards apply:

OUTSTANDING

This is a level of significant, high quality performance in this element. The impact of the judge's leadership/support of the mission of the USPTO and the Board is significant. The judge significantly improves the work processes for which he or she is responsible and/or for the entire Board. Thoughtful adherence to procedures, as well as suggestions for improvement in these areas, increase the judge's usefulness to the objectives of the Board as a whole.

(CONTINUED)

Optional Initial Block			
Employee	Date	Supervisor	Date

**Performance Management Record
Continuation Page – Element 3**

Employee Name:

Performance Element: Supporting the Mission of the Board / Leadership

Please identify item(s) continued:

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 2. Major Activities (Continued)

Assistance is provided to the USPTO and the Board in various aspects other than producing decisions. This assistance may also include participating in and helping the USPTO and the Board to meet goals set throughout the year and address challenges arising during the year.

Additional attributes that contribute to Leadership include whether the Judge:

- Shares efficient processes and methods with other internal stakeholders.
- Considers organizational objectives before personal interests.
- Inspires and empowers other internal stakeholders by example and by encouragement to think positively about work related challenges and to seek constructive solutions, to achieve organizational goals and objectives, and to achieve higher levels of performance.
- Contributes significantly to the design and implementation of organizational methods and strategies that maximize internal stakeholder potential and contribute to organizational objectives.
- Where change is required to better meet organizational objectives, adapts well to change (role model) and helps other internal stakeholders adapt and professionally thrive in a new and changing organizational environment.

See PAP support document for examples of activities that contribute to this element.

Item 3. Criteria for Evaluation (Continued)

OUTSTANDING (Continued)

In meeting element objectives, the judge handles interpersonal relationships with exceptional skill, anticipating and avoiding potential causes of conflict and actively promoting cooperation with internal and external stakeholders. The judge seeks additional work or special assignments related to this element or provides assistance to other stakeholders. The quality of such leadership work is high and is done on time without disrupting regular work or unduly burdening others. Appropriate problems are brought to management's attention; most problems are dealt with routinely and with exceptional skill.

The judge's oral and written expression related to this element 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.

(CONTINUED)

**Performance Management Record
Continuation Page – Element 3**

Employee Name:

Performance Element: Supporting the Mission of the Board / Leadership

Please identify item(s) continued:

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 3. Criteria for Evaluation (Continued)

COMMENDABLE

This is a level of unusually good performance in this element. The quantity and quality of the judge's leadership/support of the mission of the USPTO and the Board under this element are consistently above average. The knowledge and skill the judge applies to this element are clearly above average, demonstrating problem-solving skill and insight into work methods and techniques. The judge follows required procedures and supervisory guidance so as to take full advantage of existing systems for accomplishing the organization's objectives.

The judge works effectively on this element when working with all internal and external stakeholders, creating a highly successful cooperative effort. He or she seeks out additional work or special leadership assignments that enhance accomplishment of this element and pursues them to successful conclusion without disrupting regular work or unduly burdening others. Appropriate problems are brought to management's attention; most problems are dealt with routinely and with above average skill.

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 internal stakeholders of the organization.

FULLY SUCCESSFUL

This is the level of good, sound performance in this element. The quality and quantity of the judge's leadership/ support of the mission of the USPTO and the Board under this element are those of a fully competent employee. Leadership performance represents a level of accomplishment expected of the great majority of judges. Leadership tasks are completed in an accurate, thorough, and timely way. The judge's technical skills and knowledge are applied effectively to specific job tasks. In completing leadership assignments, he or she adheres to procedures and format requirements and follows necessary instructions from supervisors.

The judge's work planning is realistic and results in completion of work by established deadlines without unduly burdening others. Priorities are duly considered in planning and performing assigned responsibilities. In accomplishing leadership objectives, the judge's interpersonal behavior toward all internal and external shareholders promotes attainment of work objectives and poses no significant problems.

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

(CONTINUED)

**Performance Management Record
Continuation Page – Element 3**

Employee Name:**Performance Element:** Supporting the Mission of the Board / Leadership**Please identify item(s) continued:**

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 3. Criteria for Evaluation (Continued)

MARGINAL

This level of performance shows notable deficiencies in relation to leadership and support of the mission of the USPTO and the Board. For example, a judge's own work product is such that it negatively impacts the mission and goals of the Board. Leadership performance represents a level of accomplishment below the level expected for the position, and requires corrective action. The quality, quantity or timeliness of the judge's leadership/ support of the mission of the USPTO and the Board is less than Fully Successful, often jeopardizing attainment of the element's objective.

In accomplishing leadership objectives, the judge's interpersonal behavior toward all internal and external shareholders detracts from attainment of work objectives and poses problems.

It may be the case that much in the judge's performance is useful. However, performance, including work product, is inconsistent in quality and timeliness. Problems caused by deficiencies counterbalance acceptable work and require significant effort by others to bring the work to an acceptable level. These deficiencies cannot be overlooked because 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. The experience of the judge, including time as a judge at the Board, will be taken into account when considering these aspects.

UNSATISFACTORY

This level of performance shows notable and routine deficiencies in relation to leadership and support of the mission of the USPTO and the Board. For example, a judge's own work product is such that it regularly negatively impacts the mission and goals of the Board. Leadership performance represents a level of accomplishment well below the level expected for the position, and routinely requires corrective action. The quality, quantity or timeliness of the judge's leadership/ support of the mission of the USPTO and the Board is less than Marginal, regularly jeopardizing attainment of the element's objective.

The judge's behavior obstructs the successful completion of their own work or work of others, including through lack of cooperation with internal or external stakeholders, or by loss of credibility due to irresponsible speech or work activity.

If the judge participates in any special projects, the judge either sacrifices essential regular work or fails to complete projects on time. The judge fails to adapt to changes in priorities, procedures, or program direction and therefore, cannot operate adequately in relation to changing requirements.

It is rarely the case that much in the judge's performance is useful. Performance, including work product, is routinely poor in quality and timeliness. Problems caused by deficiencies counterbalance the work and require significant effort by other judges to bring the work to an acceptable level. These deficiencies cannot be overlooked because they create adverse consequences for the organization or create burdens for other personnel. When needed as input into another work process, the work is often not finished with such quality, quantity and timeliness that other work can proceed as planned.

Name

Element

Supporting the Mission of the Board /

Sheet

No. 1 of

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.)

Text field is limited. If more space is needed use continuation sheet.

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/Minimally Satisfactory (SES) 1-Unacceptable/Unsatisfactory (SES) Enter Rating 1-5 in adjacent block

Text field is limited. If more space is needed use continuation sheet.

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

Text field is limited. If more space is needed use continuation sheet.

Approving Official/Appointing Authority Signature

Date

SECTION I—PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name	Date	Sheet No. <u>1</u> of <u> </u>
------	------	-----------------------------------

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

Element: Internal/External Stakeholder Interactions

Objective: To ensure responsive assistance to internal and external customers, and the public, to the extent permitted by law and regulation.

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 block.*) 20

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

Text field is limited. If more space is needed use continuation sheet.

Appropriate questions, comments, and requests from internal and external stakeholders and the public are addressed courteously, while ensuring, both in appearance and fact, the independence, and the objective and neutral nature, of the Board. Internal stakeholders include Board co-workers (e.g., subordinates, peers, and superiors), other USPTO employees, and USPTO contractors.

Where questions from external customers and the public are not appropriately answered by the Judge, the questioner is redirected to appropriate Board staff. The Judge is expected to recognize the need for confidentiality, discretion and judgment and apply as appropriate.

Inquiries from internal staff are addressed promptly and courteously, providing needed information or assistance where appropriate.

(CONTINUED)

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

Text field is limited. If more space is needed use continuation sheet.

In addition to the Generic Performance Standards for the General Workforce, the following Supplemental Standards apply:

Outstanding performance in this element includes, as the need arises, rarely without exception, appropriately, promptly, and courteously addressing any questions, comments, or requests from internal and external stakeholders. Outstanding performance may include meeting a frequent need on behalf of the Board in this regard in relation to both internal and external stakeholders. Outstanding performance also includes completing oldest cases, almost always without exception, before newer cases – exceptions are completely justified. Decisions are, almost always without exception, placed in circulation well in advance of deadlines. Exceptional circumstances requiring shortened circulation time occur infrequently and are clearly communicated to reviewing judges well in advance of circulating the decision or order. Interlocutory issues are addressed in a timely manner. End-loading is non-existent or fully justified.

(CONTINUED)

Optional Initial Block			
Employee	Date	Supervisor	Date

**Performance Management Record
Continuation Page – Element 4**

Employee Name:

Performance Element: Internal/External Stakeholder Interactions

Please identify item(s) continued:

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 2. Major Activities (Continued)

Interactions with all stakeholders, internal or external, are highly professional and appropriate to the nature of the Judge's position, and to preserve the dignity of the Board.

Stakeholder interactions may include representing the Board to outside organizations (either visiting the Board or at other locations) or providing presentations to external shareholders generally, for example at public speaking engagements or conferences. Senior management is consulted before communicating outside of the Board. Any requests for public speaking or teaching engagements are cleared through Board management in advance.

Prompt execution of the Board's duties under Title 35 of the United States Code, and prompt execution of any other required duties, is rendered to the public.

Matters are disposed of efficiently, in a timely manner and meeting all deadlines. Older cases are prioritized before newer ones, for all cases that do not have deadlines.

Monthly production generally is consistent throughout the year. Variations in output are minimized to the extent possible. End-loading is avoided, helping ensure regular workloads for peers and the support staff. End-loading (e.g., excessive production at end-of-month, end-of quarter, mid-year, and/or end-of-year to reach the decisional unit goals) may be identified when decisional units earned in a month are at least 2x the median monthly decisional units earned throughout the remainder of the period of review. In relation to ex parte matters, end-loading may also be identified where greater than 75% of monthly decision circulation or mailing routinely occurs during the last week of the month.

Decisions are sent for processing promptly when prepared, routed to panel members promptly when processed, reviewed promptly, and mailed promptly after being approved by the panel, and not withheld unless fully justified. Decisions are not to be held to normalize production between months and/or between fiscal years.

Item 3. Criteria for Evaluation (Continued)

Commendable performance in this element includes, as the need arises, almost always without exception, appropriately, promptly, and courteously addressing any questions, comments, or requests from internal and external stakeholders. Commendable performance may include meeting a regular need on behalf of the Board in this regard in relation to both internal and external stakeholders. Commendable performance also includes the Judge making considerable efforts toward pendency needs of the Board. The oldest cases, almost without exception, are completed before newer cases. Decisions are, almost without exception, placed in circulation well in advance of deadlines. Circumstances requiring shortened circulation time are reasonably justified and are clearly communicated to reviewing judges well in advance. Interlocutory issues are addressed in a timely manner. End loading is virtually non existent or fully justified.

(CONTINUED)

**Performance Management Record
Continuation Page – Element 4**

Employee Name:

Performance Element: Internal/External Stakeholder Interactions

Please identify item(s) continued:

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 3. Criteria for Evaluation (Continued)

The Fully Successful Judge makes reasonable and appropriate efforts to promptly and courteously address questions, comments, or requests from internal and external stakeholders, as the need arises. In addition, reasonable efforts are made to manage the Board's pendency needs. The docket is effectively managed to ensure older cases are worked generally before newer cases. Reasonable efforts are made to place decisions in circulation well in advance of deadlines. Circumstances requiring shortened circulation time are clearly communicated to reviewing judges prior to circulating the decision or order. Interlocutory issues are addressed in a reasonably timely manner. Reasonable efforts are made to circulate and mail decisions throughout the rating period so that end-loading, including end-of-month, end-of-quarter, mid-year, and end-of-year end-loading, is avoided.

The Marginal Judge's efforts to manage the Board's pendency needs are minimally acceptable. Newer cases are addressed before older cases with minimal justification. Evidence may exist that decisions have been delayed at any stage without justification or authorization. Evidence may exist that decisions have been placed in circulation close to statutory deadlines and/or interlocutory issues are not addressed in a reasonably timely manner. Evidence of end loading may exist. Evidence may exist that the Judge does not make reasonable and appropriate efforts to promptly and courteously address questions, comments, or requests from internal and external stakeholders, as the need arises.

The Unacceptable Judge's efforts to manage the Board's pendency needs are well below what is expected. Newer cases are frequently worked before older cases. Decisions may be delayed at any stage without authorization. Decisions frequently are placed in circulation close to deadlines and/or interlocutory issues often are not addressed in a reasonably timely manner. End-loading may be obvious and egregious (for example, 3x or greater decisional units earned in the last month than the median monthly decisional units earned for the remainder of the reviewing period). Evidence exists that the Judge regularly does not make reasonable and appropriate efforts to promptly and courteously address questions, comments, or requests from internal and external stakeholders, as the need arises.

Name

Element
Internal/External Stakeholder

Sheet
No. 1 of _____

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.)

Text field is limited. If more space is needed use continuation sheet.

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/Minimally Satisfactory (SES) 1-Unacceptable/Unsatisfactory (SES) Enter Rating 1-5 in adjacent block

Text field is limited. If more space is needed use continuation sheet.

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

Text field is limited. If more space is needed use continuation sheet.

Approving Official/Appointing Authority Signature

Date

SECTION II—PERFORMANCE SUMMARY AND RATING

Name _____

ITEM 1. INSTRUCTIONS:

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

Performance Element	Critical or Non-critical (C or NC)	Individual Weights (Sum must total 100)	Element Rating (1-5)	Score
Quality	C	35		0
Production	C	35		0
Supporting the Mission of the Board / Leadership	C	10		0
Internal/External Stakeholder Interactions	C	20		0
				0
				0
TOTAL SCORE:				0

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 Lead Administrative Patent Judge	Date
Approving Official's Signature	Title Vice Chief Administrative Patent Judge	Date
Employee's Signature <i>(Indicates appraisal meeting held)</i>	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

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 judgement as to the appropriate rating level 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 the GPS, not 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 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 a 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 handles difficult situations with dignity and effectiveness. The employee encourages independence and risk-taking among subordinates, yet takes responsibility for their actions. Open to the 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 the procedures for meeting them.

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

erating 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 uses 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 work 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 organization 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 costs 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 a decrease in 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 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 hinders 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.

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 a decrease in quality. The work generally is finished within expected timeframes but significant deadlines too often are not met.

The employee's written communication usually considers the nature and complexity of the subject and the intended audience. It conveys the central points of information important to accomplishing the work. However, too often the communication is not focused, contains too much or too little information, and/or is conveyed in a tone that hinders achievement of the purpose of the communication. In communication to coworkers, the listener 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 missed 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 forms 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 by loss of credibility due to irresponsible speech or work activity.

In dealing with special projects, the employee either sacrifices essential regular work or fails to complete the 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 the necessary clarity for successful completion of required tasks. Communication failures interfere with completion of work.

SUPERVISORY*

Most of the following deficiencies are typically, 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.

FINAL PERFORMANCE RATING USING INTERIM RATING(S)

Name: _____

INSTRUCTIONS: This form must be used to assign final summary ratings when interim ratings must be considered in determining the final rating. The form will serve as the certification of the final rating. It must be signed by the rating and approving officials of record and attached to the original CD-516 forms that were completed by the rating and approving officials of record and those completed by interim rating and approving officials. Forward all original forms to the servicing personnel office. A copy must be given to the employee.

A. In the space provided below, compute the final summary rating using the appropriate formula. Use block (1) when computing one interim rating and block (2) when computing two interim ratings. Round off final summary rating to nearest whole number.

NOTE: If the position of record rating contains a non-critical element(s) please refer to Section 6.03a4 of Appendix A, or Section 6.03a7 of Appendix C of DAO 202-430.

(1)

a. Enter interim rating total score and multiply by 1: _____ × 1 = _____

b. Enter position of record rating total score and multiply by 2: _____ × 2 = _____

c. Add the results of a and b: TOTAL = _____

d. Divide total score in c by 3 to reach final summary rating: _____ ÷ 3 = _____

(2)

a. Enter interim rating total score and multiply by 1: _____ × 1 = _____

b. Enter interim rating total score and multiply by 1: _____ × 1 = _____

c. Enter position of record rating total score and multiply by 2: _____ × 2 = _____

d. Add the results of a, b and c: TOTAL = _____

e. Divide total score in d by 4 to reach final summary rating: _____ ÷ 4 = _____

B. FINAL SUMMARY RATING (Check appropriate rating based on either 1d. or 2e. above)

- Outstanding (460-500) Commendable (380-459) Fully Successful (290-379)
- Marginal/Minimally Satisfactory (SES)—must be assigned if employee is given a marginal rating on one or more critical element(s). (200-289)
- Unacceptable/Unsatisfactory (SES)—must be assigned if employee is given an unsatisfactory rating on one or more critical element(s).

C. SIGNATURES

Rating Official (Immediate Supervisor)

Date

Approving Official

Date

Employee (Signature indicates appraisal meeting held)

Date

EMPLOYEE COMMENTS ATTACHED YES

D. GENERAL WORK FORCE EMPLOYEES ONLY:

If rating official wishes to recommend consideration for a performance award or quality step increase at this time, complete CD-326, attach a copy of the rating justification and appraisal (CD-516) and forward through the appropriate channels.

NEW
 I/A: _____
MR#: _____
IP#: _____

CLASSIFICATION AND PERFORMANCE MANAGEMENT RECORD

- Performance Plan • Performance Appraisal • Performance Recognition • Progress Review • Position Description

Employee's Name: _____ Social Security No.: _____

Position Title: Lead Administrative Patent Judge

Pay Plan, Series, Grade/Step: AD 1222 00

- | | |
|--|---|
| Organization: 1. <u>US Department of Commerce</u> | 4. <u>Patent Trial and Appeal Board</u> |
| 2. <u>US Patent & Trademark Office</u> | 5. _____ |
| 3. <u>Office of the Under Secretary & Director</u> | 6. _____ |

Rating Period: 10/1/2017 - 9/30/2018

Covered By: Senior Executive Service Other AD
 General Workforce

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 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
------------------------	------	-------------------------	------

CLASSIFICATION CERTIFICATION	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 standard 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 FIRST LINE SUPERVISOR/RATING OFFICIAL ** Vice Chief Administrative Patent Judge	SIGNATURE	DATE
---	-----------	------

APPROVAL—I agree with the certification of the position description and approve the performance plan.

NAME AND TITLE OF APPROVING OFFICIAL OR SES APPOINTING AUTHORITY SCOTT R. BOALICK Deputy Chief Administrative Patent Judge	SIGNATURE	DATE
--	-----------	------

EMPLOYEE ACKNOWLEDGEMENT —My signature acknowledges discussion of the position description and receipt of the plan, and does not necessarily signify agreement.	SIGNATURE	DATE
--	-----------	------

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.

SECTION I—PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name	Date	Sheet No. <u>1</u> of <u> </u>
------	------	-----------------------------------

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

Element: Quality

Objective: Ensuring quality decision-making by the Patent Trial and Appeal Board

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 block.*) 30

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

Text limit in field is approximately 1100 characters. If more space is needed use continuation sheet.

Decisions, orders, and other documents (collectively “decisions”) in ex parte appeals of patent applications, reexamination proceeding appeals, post grant reviews, inter partes reviews, covered business method patent proceedings, derivation proceedings, interference proceedings, and other Board proceedings or matters are authored or drafted.

Written decisions demonstrate clear understanding of the facts of each case, the applicable technology at issue, as well as applicable law including legal statutes, regulations, and case law. Decisions are consistent with binding legal authority and written guidance applicable to PTAB proceedings issued by the Director or the Director’s delegate. Written decisions are logically presented, soundly reasoned, have accurate analysis, and are concise. Proper judicial tone is maintained throughout written decisions.

Panel discussions are attended as an active participant. The Judge promptly provides sound and helpful input to improve decisions where appropriate and bring the deliberations and proceedings forward efficiently.

(CONTINUED)

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

Text limit in field is approximately 950 characters. If more space is needed use continuation sheet.

Generic Performance Standards for the General Workforce will apply.

Optional Initial Block			
Employee	Date	Supervisor	Date

**Performance Management Record
Continuation Page – Element 1**

Employee Name:

Performance Element: Quality

Please identify item(s) continued:

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 2. Major Activities (Continued)

Oral arguments are attended and conducted skillfully with proper judicial tone toward all participants.

Surveys, if assigned, are completed. Feedback, including assigned surveys, is provided to the lead judge assessing the work of other Judges or staff, addressing the preparation of opinions, the conduct of oral hearings, judicial demeanor, and other qualities and functions set forth in the elements of the judge performance plan.

Decisions authored by other judges are reviewed and comments are promptly provided as appropriate, offering frank, accurate, and timely feedback on the quality of the decisions. Quality is ensured by avoiding undue delay when performing reviews and providing comments. Decisions in circulation are handled in a prompt and timely manner, and an undue delay in processing may be identified as a failure to provide the required feedback.

Senior management is promptly alerted to substantive, process related, and professional issues of concern.

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.)

Text field is limited. If more space is needed use continuation sheet.

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/Minimally Satisfactory (SES) 1-Unacceptable/Unsatisfactory (SES) Enter Rating 1-5 in adjacent block

Text field is limited. If more space is needed use continuation sheet.

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

Text field is limited. If more space is needed use continuation sheet.

Approving Official/Appointing Authority Signature

Date

SECTION I—PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name	Date	Sheet No. <u>1</u> of <u> </u>
------	------	-----------------------------------

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

Element: Production

Objective: Effective and efficient Decision-Making by the Patent Trial and Appeal Board

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 block.*)

20

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

Text field is limited. If more space is needed use continuation sheet.

Decisions, orders, and other documents in ex parte appeals, reexamination proceeding appeals, post grant reviews, inter partes reviews, covered business method patent proceedings, derivation proceedings, interference proceedings, and other Board proceedings are authored and mailed.

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

Text field is limited. If more space is needed use continuation sheet.

In addition to the Generic Performance Standards for the General Workforce, the following Supplemental Standards apply:

Outstanding performance in this element is demonstrated by the Lead Judge making significant efforts toward production needs of the Board. Production will be of an exceptionally high volume, deciding cases in an amount far above the Board's overall rate of production. Exceptionally high volume corresponds to earning no fewer than 50 decisional units annually.

Commendable performance in this element is demonstrated by the Lead Judge making considerable efforts toward production needs of the Board. Production will be of a very high volume, while producing well above the Board's overall rate of production. Very high volume corresponds to earning no fewer than 46 decisional units annually.

(CONTINUED)

Optional Initial Block			
Employee	Date	Supervisor	Date

**Performance Management Record
Continuation Page – Element 2**

Employee Name:

Performance Element: Production

Please identify item(s) continued:

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 3. Criteria for Evaluation (Continued)

The Fully Successful Lead Judge will earn no fewer than 42 decisional units annually. Reasonable efforts are made to manage the Board's production needs.

The Marginal Lead Judge will earn at least 37 decisional units annually (but fewer than 42). Efforts to manage the Board's production needs are minimally acceptable.

The Unacceptable Lead Judge will earn fewer than 37 decisional units annually. Efforts to manage the Board's production needs are well below what is expected.

NOTES:

One mailed decision in an ex parte appeal of a patent application is generally worth 1 decisional unit. One mailed ex parte reexamination proceeding appeal decision is generally worth 2.5 decisional units. One mailed inter partes reexamination proceeding appeal decision is generally worth 4 decisional units.

Decisions and orders in AIA trial proceedings, and decisions and orders in interference proceedings, will be assessed on a case-by-case basis, based on the complexity of the proceeding. Determinations will be made by the Deputy Chief Judge and/or a designee of the Deputy Chief Judge. Please see the PAP Support Document for additional information on AIA Trial crediting.

Decisions prepared with the assistance of Patent Attorneys on behalf of the Lead Judge are generally worth 0.5 decisional units to the Lead Judge.

Lead Judges may request, from their supervisor (Vice Chief Judge), additional decisional units to be awarded for extraordinarily complex decisions in an ex parte appeal of a patent application or an ex parte reexamination appeal. Lead Judges may request, from the Deputy Chief Judge or a designee of the Deputy Chief Judge, additional decisional units for extraordinarily complex decisions in AIA proceedings, appeals of inter partes reexamination applications, and interference proceedings.

The above productivity standards do not apply to new Lead Judges who are in their first year of the probationary period. In the first year of the probationary period, new Lead Judges must demonstrate increased productivity during their first year at the Board in a manner that clearly indicates that they have the potential to achieve the productivity standards.

Lead Judges who are working a part time schedule will have a production goal that is prorated to correspond to the amount of hours worked relative to that of a Lead Judge who is working a full time schedule.

(CONTINUED)

**Performance Management Record
Continuation Page – Element 2**

Employee Name:

Performance Element: Production

Please identify item(s) continued:

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 3. Criteria for Evaluation (Continued)

Production goal adjustments may be made for atypical situations, such as extended medical leave (sick leave used in excess of the total amount of sick leave that can be earned in a fiscal year) or FMLA approved leave (whether annual and/or sick leave is substituted for leave without pay or not). These adjustments will be made on an hour for hour basis based upon the amount of time expected for each decisional unit as APJ1. All calculations will be rounded up or down to the nearest whole number.

Other adjustments may be made in appropriate circumstances, such as significant additional responsibilities, including, but not limited to, assisting the Board with special projects. Lead Judges must consult with their Vice Chief Judge in advance of the event for which an adjustment is proposed, and in the event of an emergency situation, as soon as practicable.

Production goals may be measured at any time during the appraisal year, at which point the Lead Judge will be expected to have earned that portion of their expected annual decisional units at least equal to the percentage of the rating period that has been completed. Production goals will be established in accordance with any adjustments made as outlined in the preceding paragraphs of this section. Any time a Lead Judge believes that approved leave or other appropriate circumstances will adversely affect the Lead Judge's earning of a specific portion of the annual production goal, the Lead Judge should contact the Vice Chief Judge to request a deferment of the production goal.

For example, if the annual decisional unit requirement to earn a Fully Successful rating is 42 decisional units, and the Lead Judge is being assessed after the first quarter of production, the Lead Judge would be expected to have earned at least 10.5 decisional units to be assessed as Fully Successful $([42 \text{ decisional units required}] / [12 \text{ months per year}] \times [3 \text{ months in production}] = 10.5 \text{ decisional units required})$.

If a Lead Judge has questions or concerns, the Lead Judge should contact their Vice Chief Judge or the Deputy Chief Judge or Chief Judge as appropriate.

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.*)

Text field is limited. If more space is needed use continuation sheet.

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/Minimally Satisfactory (SES) 1-Unacceptable/Unsatisfactory (SES) Enter Rating 1-5 in adjacent block

Text field is limited. If more space is needed use continuation sheet.

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

Text field is limited. If more space is needed use continuation sheet.

Approving Official/Appointing Authority Signature

Date

SECTION I—PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name	Date	Sheet No. <u>1</u> of <u> </u>
------	------	-----------------------------------

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

Element: Supporting the Mission of the Board / Leadership

Objective: Assisting in the effective operation of the U.S. Patent and Trademark Office (USPTO) and the Patent Trial and Appeal Board (PTAB) by providing leadership for supporting the missions of the USPTO and PTAB.

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 block.*) 30

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

Text field is limited. If more space is needed use continuation sheet.

Sets a professional example for others to emulate. Inspires and empowers other internal stakeholders by example and by encouragement to think positively about work related challenges and seek constructive solutions to achieve organizational goals and objectives, and to achieve higher levels of performance. Puts organizational objectives ahead of personal interests.

Calm, dignified, judicial demeanor is demonstrated at all times in all professional settings. Respect and courtesy is shown to everyone, including all participants in any Board proceeding and to all Board personnel.

Accurate and thorough understanding of applicable laws and regulations, including binding legal authority and written guidance applicable to PTAB proceedings issued by the Director or the Director's delegate, is demonstrated at all times, in all settings.

(CONTINUED)

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

Text field is limited. If more space is needed use continuation sheet.

In addition to the Generic Performance Standards for the General Workforce, the following Supplemental Standards apply:

OUTSTANDING

This is a level of significant, high quality performance in this element. The impact of the Lead Judge's leadership/support of the mission of the USPTO and the Board is significant. The Lead Judge significantly improves the work processes for which he or she is responsible and/or for the entire Board. Thoughtful adherence to procedures, as well as suggestions for improvement in these areas, increase the Lead Judge's usefulness to the objectives of the Board as a whole.

(CONTINUED)

Optional Initial Block			
Employee	Date	Supervisor	Date

**Performance Management Record
Continuation Page – Element 3**

Employee Name:**Performance Element:** Supporting the Mission of the Board / Leadership**Please identify item(s) continued:**

**(i.e., Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 2. Major Activities (Continued)

Assistance is provided to the USPTO and the Board in various aspects other than producing decisions. This assistance may also include participating in and helping the USPTO and the Board to meet goals set throughout the year and address challenges arising during the year.

Participates as APJ2 and APJ3 on a sufficient number of panels with the judges supervised by the Lead Judge in order to obtain an adequate basis to evaluate those judges' quality according to the criteria set forth in the quality element of the judge performance plan. Reviews a sufficient number of pre-circulation draft opinions of the judges supervised by the Lead Judge in order to obtain an adequate basis to evaluate those judges' quality according to the criteria set forth in the quality element of the judge performance plan. Requests input from other Lead Judges, mentoring judges, senior judges, and other judges serving on panels with the judge being evaluated by the Lead Judge.

Additional attributes that contribute to Leadership include whether the Lead Judge:

- Shares efficient processes and methods with other internal stakeholders.
- Considers organizational objectives before personal interests.
- Inspires and empowers other internal stakeholders by example and by encouragement to think positively about work related challenges and to seek constructive solutions, to achieve organizational goals and objectives, and to achieve higher levels of performance.
- Contributes significantly to the design and implementation of organizational methods and strategies that maximize internal stakeholder potential and contribute to organizational objectives.
- Where change is required to better meet organizational objectives, adapts well to change (role model) and helps other internal stakeholders adapt and professionally thrive in a new and changing organizational environment.

Resources are managed to accomplish the USPTO's Strategic Goals and PTAB objectives. PTAB priorities are communicated to Judges, staff, administrators, and others as needed.

Cooperation, teamwork, and flexibility are emphasized to employees to improve staff efficiencies, ability to react to changing requirements, and overall quality of PTAB deliverables.

Employees are coached to realize their potential, using individual development plans or training programs to increase staff productivity and to produce high quality products and materials.

Employee performance is managed through continuous feedback on performance, performance appraisals, and resolution of performance deficiencies. Recognition programs (i.e., monetary (if available), non-monetary or honor awards) are utilized to acknowledge employee performance.

Employment actions such as selections and promotions are managed, and are consistent with Merit Systems Principals, equal opportunity and diversity principles, and do not violate Prohibited Personnel Practices. Employee grievances and allegations of discrimination receive a prompt response with the goal of resolution at the lowest organizational level.

Office complies with legal and reporting obligations, the Privacy Act, and other applicable statutes, including the requirement of governmental and suppliers of data to the Board to ensure the confidentiality of Personally Identifiable Information (PII).

Staff and resources are used effectively to complete assignments and meet the responsibilities of the Office.

Office performance is consistent with Board standards and performance plans/evaluations.

Performance management system benchmarks are complied with (i.e., Performance plans are in place by October 31 for the new Fiscal Year (FY); mid-year progress reviews are conducted by April 30; and performance appraisal ratings are completed by October 31 for the previous FY) for current employees. New performance plans are in place within 30 days of starting (for new employees) or changing positions (for current employees).

Lead Judges will provide real time feedback (positive and negative) to judges they supervise, as well as a midyear update on progress and end of year performance review consistent with the major activities of each element of the judge PAP. Lead judges will identify trends for training opportunities.

See PAP support document for examples of activities that contribute to this element.

**Performance Management Record
Continuation Page – Element 3**

Employee Name:**Performance Element:** Supporting the Mission of the Board / Leadership**Please identify item(s) continued:**

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 3. Criteria for Evaluation (Continued)

OUTSTANDING (Continued)

In meeting element objectives, the Lead Judge handles interpersonal relationships with exceptional skill, anticipating and avoiding potential causes of conflict and actively promoting cooperation with internal and external stakeholders.

The Lead Judge seeks additional work or special assignments related to this element or provides assistance to other stakeholders. The quality of such leadership work is high and is done on time without disrupting regular work or unduly burdening others. Appropriate problems are brought to management's attention; most problems are dealt with routinely and with exceptional skill.

The Lead Judge's oral and written expression related to this element 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.

COMMENDABLE

This is a level of unusually good performance in this element. The quantity and quality of the Lead Judge's leadership/support of the mission of the USPTO and the Board under this element are consistently above average. The knowledge and skill the Lead Judge applies to this element are clearly above average, demonstrating problem-solving skill and insight into work methods and techniques. The Lead Judge follows required procedures and supervisory guidance so as to take full advantage of existing systems for accomplishing the organization's objectives.

The Lead Judge works effectively on this element when working with all internal and external stakeholders, creating a highly successful cooperative effort. He or she seeks out additional work or special leadership assignments that enhance accomplishment of this element and pursues them to successful conclusion without disrupting regular work or unduly burdening others. Appropriate problems are brought to management's attention; most problems are dealt with routinely and with above average skill.

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 internal stakeholders of the organization.

FULLY SUCCESSFUL

This is the level of good, sound performance in this element. The quality and quantity of the Lead Judge's leadership/ support of the mission of the USPTO and the Board under this element are those of a fully competent employee. Leadership performance represents a level of accomplishment expected of the great majority of Lead Judges. Leadership tasks are completed in an accurate, thorough, and timely way. The Lead Judge's technical skills and knowledge are applied effectively to specific job tasks. In completing leadership assignments, he or she adheres to procedures and format requirements and follows necessary instructions from supervisors.

The Lead Judge's work planning is realistic and results in completion of work by established deadlines without unduly burdening others. Priorities are duly considered in planning and performing assigned responsibilities.

In accomplishing leadership objectives, the Lead Judge's interpersonal behavior toward all internal and external shareholders promotes attainment of work objectives and poses no significant problems.

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

(CONTINUED)

**Performance Management Record
Continuation Page – Element 3**

Employee Name:**Performance Element:** Supporting the Mission of the Board / Leadership**Please identify item(s) continued:**

(i.e, **Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification**)

Item 3. Criteria for Evaluation (Continued)

MARGINAL

This level of performance shows notable deficiencies in relation to leadership and support of the mission of the USPTO and the Board. For example, a Lead Judge's own work product is such that it negatively impacts the mission and goals of the Board. Leadership performance represents a level of accomplishment below the level expected for the position, and requires corrective action. The quality, quantity or timeliness of the Lead Judge's leadership/ support of the mission of the USPTO and the Board is less than Fully Successful, often jeopardizing attainment of the element's objective.

In accomplishing leadership objectives, the Lead Judge's interpersonal behavior toward all internal and external shareholders detracts from attainment of work objectives and poses problems.

It may be the case that much in the Lead Judge's performance is useful. However, performance, including work product, is inconsistent in quality and timeliness. Problems caused by deficiencies counterbalance acceptable work and require significant effort by others to bring the work to an acceptable level. These deficiencies cannot be overlooked because 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. The experience of the Lead Judge, including time as a Lead Judge at the Board, will be taken into account when considering these aspects.

UNSATISFACTORY

This level of performance shows notable and routine deficiencies in relation to leadership and support of the mission of the USPTO and the Board. For example, a Lead Judge's own work product is such that it regularly negatively impacts the mission and goals of the Board. Leadership performance represents a level of accomplishment well below the level expected for the position, and routinely requires corrective action. The quality, quantity or timeliness of the Lead Judge's leadership/ support of the mission of the USPTO and the Board is less than Marginal, regularly jeopardizing attainment of the element's objective.

The Lead Judge's behavior obstructs the successful completion of their own work or work of others, including through lack of cooperation with internal or external stakeholders, or by loss of credibility due to irresponsible speech or work activity.

If the Lead Judge participates in any special projects, the Lead Judge either sacrifices essential regular work or fails to complete projects on time. The Lead Judge fails to adapt to changes in priorities, procedures, or program direction and therefore, cannot operate adequately in relation to changing requirements.

It is rarely the case that much in the Lead Judge's performance is useful. Performance, including work product, is routinely poor in quality and timeliness. Problems caused by deficiencies counterbalance the work and require significant effort by other judges to bring the work to an acceptable level. These deficiencies cannot be overlooked because they create adverse consequences for the organization or create burdens for other personnel. When needed as input into another work process, the work is often not finished with such quality, quantity and timeliness that other work can proceed as planned.

Name

Element

Supporting the Mission of the Board /

Sheet

No. 1 of

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.)

Text field is limited. If more space is needed use continuation sheet.

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/Minimally Satisfactory (SES) 1-Unacceptable/Unsatisfactory (SES) Enter Rating 1-5 in adjacent block

Text field is limited. If more space is needed use continuation sheet.

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

Text field is limited. If more space is needed use continuation sheet.

Approving Official/Appointing Authority Signature

Date

SECTION I—PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name	Date	Sheet No. <u>1</u> of <u> </u>
------	------	-----------------------------------

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

Element: Internal/External Stakeholder Interactions

Objective: To ensure responsive assistance to internal and external customers, and the public, to the extent permitted by law and regulation.

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 block.*) 20

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

Text field is limited. If more space is needed use continuation sheet.

Appropriate questions, comments, and requests from internal and external stakeholders and the public are addressed courteously, while ensuring, both in appearance and fact, the independence, and the objective and neutral nature, of the Board. Internal stakeholders include Board co-workers (e.g., subordinates, peers, and superiors), other USPTO employees, and USPTO contractors.

Where questions from external customers and the public are not appropriately answered by the Lead Judge, the questioner is redirected to appropriate Board staff. The Lead Judge is expected to recognize the need for confidentiality, discretion and judgment and apply as appropriate.

Inquiries from internal staff are addressed promptly and courteously, providing needed information or assistance where appropriate.

(CONTINUED)

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

Text field is limited. If more space is needed use continuation sheet.

In addition to the Generic Performance Standards for the General Workforce, the following Supplemental Standards apply:

Outstanding performance in this element includes, as the need arises, rarely without exception, appropriately, promptly, and courteously addressing any questions, comments, or requests from internal and external stakeholders. Outstanding performance may include meeting a frequent need on behalf of the Board in this regard in relation to both internal and external stakeholders. Outstanding performance also includes completing oldest cases, almost always without exception, before newer cases – exceptions are completely justified. Decisions are, almost always without exception, placed in circulation well in advance of deadlines. Exceptional circumstances requiring shortened circulation time occur infrequently and are clearly communicated to reviewing judges well in advance of circulating the decision or order. Interlocutory issues are addressed in a timely manner. End-loading is non-existent or fully justified.

(CONTINUED)

Optional Initial Block			
Employee	Date	Supervisor	Date

**Performance Management Record
Continuation Page – Element 4**

Employee Name:

Performance Element: Internal/External Stakeholder Interactions

Please identify item(s) continued:

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 2. Major Activities (Continued)

Interactions with all stakeholders, internal or external, are highly professional and appropriate to the nature of the Lead Judge's position, and to preserve the dignity of the Board.

Stakeholder interactions may include representing the Board to outside organizations (either visiting the Board or at other locations) or providing presentations to external shareholders generally, for example at public speaking engagements or conferences. Senior management is consulted before communicating outside of the Board. Any requests for public speaking or teaching engagements are cleared through Board management in advance.

Prompt execution of the Board's duties under Title 35 of the United States Code, and prompt execution of any other required duties, is rendered to the public.

Matters are disposed of efficiently, in a timely manner and meeting all deadlines. Older cases are prioritized before newer ones, for all cases that do not have deadlines.

Monthly production generally is consistent throughout the year. Variations in output are minimized to the extent possible. End-loading is avoided, helping ensure regular workloads for peers and the support staff. End-loading (e.g., excessive production at end-of-month, end-of quarter, mid-year, and/or end-of-year to reach the decisional unit goals) may be identified when decisional units earned in a month are at least 2x the median monthly decisional units earned throughout the remainder of the period of review. In relation to ex parte matters, end-loading may also be identified where greater than 75% of monthly decision circulation or mailing routinely occurs during the last week of the month.

Decisions are sent for processing promptly when prepared, routed to panel members promptly when processed, reviewed promptly, and mailed promptly after being approved by the panel, and not withheld unless fully justified. Decisions are not to be held to normalize production between months and/or between fiscal years.

Item 3. Criteria for Evaluation (Continued)

Commendable performance in this element includes, as the need arises, almost always without exception, appropriately, promptly, and courteously addressing any questions, comments, or requests from internal and external stakeholders. Commendable performance may include meeting a regular need on behalf of the Board in this regard in relation to both internal and external stakeholders. Commendable performance also includes the Lead Judge making considerable efforts toward pendency needs of the Board. The oldest cases, almost without exception, are completed before newer cases. Decisions are, almost without exception, placed in circulation well in advance of deadlines. Circumstances requiring shortened circulation time are reasonably justified and are clearly communicated to reviewing judges well in advance. Interlocutory issues are addressed in a timely manner. End loading is virtually non existent or fully justified.

(CONTINUED)

**Performance Management Record
Continuation Page – Element 4**

Employee Name:

Performance Element: Internal/External Stakeholder Interactions

Please identify item(s) continued:

**(i.e, Item 2. Major Activities, Item 3. Criteria for Evaluation Item, 4. Progress Reviews,
Item 5. Element Rating & Justification)**

Item 3. Criteria for Evaluation (Continued)

The Fully Successful Lead Judge makes reasonable and appropriate efforts to promptly and courteously address questions, comments, or requests from internal and external stakeholders, as the need arises. In addition, reasonable efforts are made to manage the Board's pendency needs. The docket is effectively managed to ensure older cases are worked generally before newer cases. Reasonable efforts are made to place decisions in circulation well in advance of deadlines. Circumstances requiring shortened circulation time are clearly communicated to reviewing judges prior to circulating the decision or order. Interlocutory issues are addressed in a reasonably timely manner. Reasonable efforts are made to circulate and mail decisions throughout the rating period so that end-loading, including end-of-month, end-of-quarter, mid-year, and end-of-year end-loading, is avoided.

The Marginal Lead Judge's efforts to manage the Board's pendency needs are minimally acceptable. Newer cases are addressed before older cases with minimal justification. Evidence may exist that decisions have been delayed at any stage without justification or authorization. Evidence may exist that decisions have been placed in circulation close to statutory deadlines and/or interlocutory issues are not addressed in a reasonably timely manner. Evidence of end loading may exist. Evidence may exist that the Lead Judge does not make reasonable and appropriate efforts to promptly and courteously address questions, comments, or requests from internal and external stakeholders, as the need arises.

The Unacceptable Lead Judge's efforts to manage the Board's pendency needs are well below what is expected. Newer cases are frequently worked before older cases. Decisions may be delayed at any stage without authorization. Decisions frequently are placed in circulation close to deadlines and/or interlocutory issues often are not addressed in a reasonably timely manner. End-loading may be obvious and egregious (for example, 3x or greater decisional units earned in the last month than the median monthly decisional units earned for the remainder of the reviewing period). Evidence exists that the Lead Judge regularly does not make reasonable and appropriate efforts to promptly and courteously address questions, comments, or requests from internal and external stakeholders, as the need arises.

Name

Element
Internal/External Stakeholder

Sheet
No. 1 of _____

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.)

Text field is limited. If more space is needed use continuation sheet.

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/Minimally Satisfactory (SES) 1-Unacceptable/Unsatisfactory (SES) Enter Rating 1-5 in adjacent block

Text field is limited. If more space is needed use continuation sheet.

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

Text field is limited. If more space is needed use continuation sheet.

Approving Official/Appointing Authority Signature

Date

SECTION II—PERFORMANCE SUMMARY AND RATING

Name _____

ITEM 1. INSTRUCTIONS:

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

Performance Element	Critical or Non-critical (C or NC)	Individual Weights (Sum must total 100)	Element Rating (1-5)	Score
Quality	C	30		0
Production	C	20		0
Supporting the Mission of the Board / Leadership	C	30		0
Internal/External Stakeholder Interactions	C	20		0
				0
				0
TOTAL SCORE:				0

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 Vice Chief Administrative Patent Judge	Date
Approving Official's Signature	Title Deputy Chief Administrative Patent Judge	Date
Employee's Signature <i>(Indicates appraisal meeting held)</i>	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

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 judgement as to the appropriate rating level 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 the GPS, not 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 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 a 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 handles difficult situations with dignity and effectiveness. The employee encourages independence and risk-taking among subordinates, yet takes responsibility for their actions. Open to the 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 the procedures for meeting them.

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

erating 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 uses 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 work 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 organization 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 costs 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 a decrease in 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 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 hinders 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.

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 a decrease in quality. The work generally is finished within expected timeframes but significant deadlines too often are not met.

The employee's written communication usually considers the nature and complexity of the subject and the intended audience. It conveys the central points of information important to accomplishing the work. However, too often the communication is not focused, contains too much or too little information, and/or is conveyed in a tone that hinders achievement of the purpose of the communication. In communication to coworkers, the listener 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 missed 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 forms 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 by loss of credibility due to irresponsible speech or work activity.

In dealing with special projects, the employee either sacrifices essential regular work or fails to complete the 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 the necessary clarity for successful completion of required tasks. Communication failures interfere with completion of work.

SUPERVISORY*

Most of the following deficiencies are typically, 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.

FINAL PERFORMANCE RATING USING INTERIM RATING(S)

Name: _____

INSTRUCTIONS: This form must be used to assign final summary ratings when interim ratings must be considered in determining the final rating. The form will serve as the certification of the final rating. It must be signed by the rating and approving officials of record and attached to the original CD-516 forms that were completed by the rating and approving officials of record and those completed by interim rating and approving officials. Forward all original forms to the servicing personnel office. A copy must be given to the employee.

A. In the space provided below, compute the final summary rating using the appropriate formula. Use block (1) when computing one interim rating and block (2) when computing two interim ratings. Round off final summary rating to nearest whole number.

NOTE: If the position of record rating contains a non-critical element(s) please refer to Section 6.03a4 of Appendix A, or Section 6.03a7 of Appendix C of DAO 202-430.

(1)

a. Enter interim rating total score and multiply by 1: _____ × 1 = _____

b. Enter position of record rating total score and multiply by 2: _____ × 2 = _____

c. Add the results of a and b: TOTAL = _____

d. Divide total score in c by 3 to reach final summary rating: _____ ÷ 3 = _____

(2)

a. Enter interim rating total score and multiply by 1: _____ × 1 = _____

b. Enter interim rating total score and multiply by 1: _____ × 1 = _____

c. Enter position of record rating total score and multiply by 2: _____ × 2 = _____

d. Add the results of a, b and c: TOTAL = _____

e. Divide total score in d by 4 to reach final summary rating: _____ ÷ 4 = _____

B. FINAL SUMMARY RATING (Check appropriate rating based on either 1d. or 2e. above)

- Outstanding (460-500) Commendable (380-459) Fully Successful (290-379)
- Marginal/Minimally Satisfactory (SES)—must be assigned if employee is given a marginal rating on one or more critical element(s). (200-289)
- Unacceptable/Unsatisfactory (SES)—must be assigned if employee is given an unsatisfactory rating on one or more critical element(s).

C. SIGNATURES

Rating Official (Immediate Supervisor)

Date

Approving Official

Date

Employee (Signature indicates appraisal meeting held)

Date

EMPLOYEE COMMENTS ATTACHED YES

D. GENERAL WORK FORCE EMPLOYEES ONLY:

If rating official wishes to recommend consideration for a performance award or quality step increase at this time, complete CD-326, attach a copy of the rating justification and appraisal (CD-516) and forward through the appropriate channels.

EXHIBIT 3-2

PTAB SOPs

Michael Fleming

Digitally signed by Michael
Fleming
DN: cn=Michael Fleming,
c=US, o=Board of Patent
Appeals and Interferences,
ou=Chief Administrative
Patent Judge
Date: 2009.02.12 19:40:58
-05'00'

MEMORANDUM

February 12, 2009

TO: Vice Chief Administrative Patent Judge
Administrative Patent Judges

FROM: MICHAEL R. FLEMING
Chief Administrative Patent Judge

SUBJECT: Standard Operating Procedure 1 (Revision 13)
Assignment of judges to merits panels, motions panels, and expanded panels

The attached document supersedes Board of Patent Appeals and Interferences' Standard Operating Procedure 1 (Revision 12) dated August 10, 2005, on the same subject matter.

Attachment

BOARD OF PATENT APPEALS AND INTERFERENCES

STANDARD OPERATING PROCEDURE 1 (REVISION 13)

ASSIGNMENT OF JUDGES TO MERITS PANELS, MOTIONS PANELS, AND EXPANDED PANELS

The following applies to the assignment of Administrative Patent Judges (judges) to merits panels,¹ motions panels,² and expanded panels³ in appeals and interferences.

Except as provided in section IV.C. of this Standard Operating Procedure (SOP), assignments (designations under 35 U.S.C. § 6) of judges to panels of the Board of Patent Appeals and Interferences (Board) are made by the administrative personnel of the Board, under the direction of the Chief Administrative Patent Judge (Chief Judge). The Director's authority under 35 U.S.C. § 6 to designate panels has been delegated to the Chief Judge. *See Manual of Patent Examining Procedure* § 1002.02(f) (8th ed., rev.2, May 2004).

This SOP creates internal norms for the administration of the Board. It does not create any legally enforceable rights. The procedures described in this SOP, as they pertain to determinations and comments made by the Chief Judge and any other judge, are considered part of the deliberative process.

I. Administrative Divisions of the Board

A. The Chief Judge and Vice Chief Administrative Patent Judge (Vice Chief Judge) are *ex officio* members of all administrative divisions and may administer interferences or otherwise participate in rendering panel decisions.

B. The judges of the Board are assigned to a division based on technical or legal discipline.

II. Designation of Merits Panels

A. In general, the Chief Judge will designate judges as the merits panel to decide *ex parte* appeals based upon their legal and technical expertise.

B. In general, the Chief Judge will designate judges as merits panels to decide *ex parte* and *inter partes* reexamination appeals.

C. In general, the Chief Judge will designate a judge or judges, as appropriate, for all matters for interferences.

¹ Three-judge panels designated to decide appeals and enter final decisions in interferences.

² Three-judge panels designated to enter interlocutory orders where a panel is appropriate, including, e.g., requests for reconsideration of non-final decisions in interferences.

³ Panels consisting of more than three judges.

III. Expanded Panels

From time to time it may be necessary to expand a merits or motions panel. The following applies to the use of expanded panels.

A. Reasons for expanding a panel include:

1. An issue of exceptional importance, such as where serious questions have been raised about the continuing viability of an apparently applicable prior precedential opinion of the Board.
2. Conflicting decisions by different panels of the Board.
3. A substantial difference of opinion among judges on a significant issue pending before the Board.
4. A written request from the Commissioner for Patents or the Commissioner's delegate identifying a particular appeal as one containing an issue of first impression, which written request shall become part of the administrative record. This request may be made in advance of decision by the Board or in connection with a request for rehearing.
5. A written request from the Commissioner for Patents or the Commissioner's delegate identifying a particular appeal as one presenting an issue governed by a prior decision of the Board,
 - a) representing that the Commissioner for Patents has determined that it would not be in the public interest to follow the prior decision, and
 - b) asking the Board to reconsider and overrule the prior decision,which written request shall become part of the administrative record. This request may be made in advance of decision by the Board or in connection with a request for rehearing.

B. Generally, an odd number of judges will be designated to decide cases in which an expanded panel is to be used. The Chief Judge will determine when an expanded panel is to be designated.

C. A judge, a merits panel, or a motions panel may suggest to the Chief Judge the need for the designation of an expanded panel. Likewise, the Patent Examining Operation, an applicant or patent owner in an appeal, or a party in an interference may suggest the need for an expanded panel.

D. When an expanded panel is designated after a case initially has been assigned to a three-judge panel but before a decision is entered by the merits panel, the judges initially designated shall be designated, if available, as part of the expanded panel.

E. When an expanded panel is designated after entry of a decision by a merits panel but before consideration of a request for rehearing of the decision of the merits panel, the judges

on the merits panel shall, if available, be designated as part of the expanded panel. The expanded panel shall decide the rehearing on its merits.

F. Generally, expanded panels will include the Chief Judge, a Vice Chief Judge, and additional judges to be assigned by the Chief Judge. The selection of the additional judges shall be based on the technical or legal expertise of the judges.

G. When the Chief Judge is disqualified, recused, or otherwise unable to sit, judges shall be assigned by a Vice Chief Judge and a Vice Chief Judge shall preside.

H. When the Chief Judge and all Vice Chief Judges are disqualified, recused, or otherwise unable to sit, the judges shall be assigned by the Board's senior management staff and the most senior judge shall preside.

I. In an appropriate circumstance, the Chief Judge may designate an expanded panel consisting of any number of judges, including an expanded panel consisting of all judges, to decide a case.

J. The Chief Judge may require a decision by an expanded panel of seven (7) or more judges to be circulated to each judge of the Board *prior* to entry of the decision. Within two weeks, each judge *not* designated on the panel may comment on the decision. Comments shall be in writing (for purposes of this SOP, comments "in writing" include comments transmitted by e-mail) and shall be presented to each member of the expanded panel, with a copy to the Chief Judge and Vice Chief Judge.

IV. Assignment of Cases to Judges

A. A panel designation will be provided for each appeal and interference.

B. A judge assigned to handle an interference should arrange for a substitute judge to act on the case in the absence (i.e., leave, etc.) of the judge assigned to the interference.

C. Except where a party requests and agrees to entry of a *pro forma* adverse judgment under 37 CFR § 41.127(b), whenever a decision in an interference proceeding requires entry by a panel of judges, the judge to whom the interference is assigned shall have the lead Trial Division judge request an assignment of a panel.

D. The judges designated on a merits panel, motions panel, or expanded panel shall not be changed without authority of the Chief Judge or the Vice Chief Judge. When satisfied that there is good reason to change the panel already designated, the Chief Judge or Vice Chief Judge will approve a revised designation after making whatever changes are determined to be appropriate or will direct senior management staff to enter a revised designation. From time to time, the Chief Judge may authorize Board administrative personnel to alter the panel already designated.

E. A reasonable effort should be made to preserve the roles of judges assigned as the Number 1, Number 2, and Number 3 judges in *ex parte* appeals. However, when the judge assigned the role of Number 1 is of the opinion that it would be in the interest of efficient administration of the Board, the judge assigned the role of Number 1 is authorized to change the roles of judges assigned the roles of Number 2 and Number 3. An instance in which it would be appropriate to change the roles is when the judge assigned the role of Number 2 is on leave for more than a brief period of time. Another appropriate instance in which to change the roles is when after conference with the other judges assigned to the appeal, the judge initially assigned the role of Number 1 is not part of the majority, one of the judges initially assigned the roles of Number 2 and Number 3 will author the majority opinion. Any member of a panel may request that the conference include all members of the panel.

BOARD OF PATENT APPEALS AND INTERFERENCES

STANDARD OPERATING PROCEDURE 7

**DESIGNATION OF BOARD DECISIONS/ORDERS AS
INFORMATIVE**

This Standard Operating Procedure (SOP) describes the process by which decisions/orders of the Board of Patent Appeals and Interferences (Board) are designated as informative opinions in accordance with the Notice of the Chief Administrative Patent Judge of December 27, 2006, 1314 Off. Gaz. Pat. & Tm. Office 4 (Jan. 23, 2007).

The purpose of an informative opinion is to illustrate norms of Board decision-making for the public, the patent examining corps, and future Board panels. *Id.* Informative opinions are not binding on the Board. Informative opinions will be posted at:

http://www.uspto.gov/web/offices/dcom/bpai/informative_opinions.html

The process for designating a decision/order as an informative opinion is exclusively an internal process that takes place after a decision/order has been mailed by the Board. The Chief Administrative Patent Judge (CAPJ) makes the final determination as to whether a decision/order is to be designated as an informative opinion.

This SOP creates internal operating procedures for the Board and does not create any legally enforceable rights.

I. Review Committee

A. In seeking to make an informed determination, the CAPJ may form an advisory Review Committee to recommend whether a decision/order is appropriate for designation as an informative opinion.

B. The Review Committee is a committee of Board personnel designated by the CAPJ.

C. The CAPJ will designate a Point of Contact (POC) for the Review Committee to facilitate the evaluation process.

D. The POC serves as a liaison to the Review Committee and not as a member of the Review Committee.

II. Procedure For Identifying Candidate Decisions/Orders To Be Designated as Informative Opinions

A. Any APJ may nominate a decision/order to be designated as an informative opinion by submitting the decision/order and a written statement to his/her Lead Administrative Patent Judge (LAPJ) stating the reasons why a particular decision/order should be designated as an informative opinion.

B. After internal considerations within the discipline team, the Lead APJ will decide whether to recommend the decision/order to be designated as an informative opinion.

C. The CAPJ, Vice CAPJ, or a LAPJ can submit a decision/order to the Review Committee via the POC for consideration as an informative opinion.

III. Procedure For Designating Decisions/Orders As Informative Opinions

A. The Review Committee will review the appropriate submission, including the decision/order and any comments from the LAPJ or APJ who submitted the decision/order.

B. The Review Committee members will individually submit their recommendations to the POC on whether designation of the decision/order as an informative opinion is appropriate.

C. The POC will collect the recommendations of the Review Committee members and forward them to the CAPJ.

D. The CAPJ will make the final determination as to whether a decision/order is to be designated as an informative opinion.

E. If the CAPJ's determination is to designate a decision/order as an informative opinion, the decision/order will be posted at:

http://www.uspto.gov/web/offices/dcom/bpai/informative_opinions.html

BOARD OF PATENT APPEALS AND INTERFERENCES

STANDARD OPERATING PROCEDURE 8

ASSIGNMENT OF JUDGES TO EX PARTE MERITS PANELS

This Standard Operating Procedure (SOP) describes the process by which judges are assigned to merits panels in *ex parte* appeals by the Chief Judge's designee(s).

This Standard Operating Procedure creates internal norms for the administration of the Board of Patent Appeals and Interferences (Board) and complements Standard Operating Procedure 1 (SOP 1), *Assignment of judges to merits panels, motions panels, and expanded panels*. It does not create any legally enforceable rights.

I. Chief Judge's Authority to Delegate

The Director's authority under 35 U.S.C. § 6 to designate panels has been delegated to the Chief Judge. *See Manual of Patent Examining Procedure* § 1002.02(f) (8th ed., rev.6, September 2007).

II. Chief Judge's Designee(s)

A. At the discretion of the Chief Judge, at least one employee, hereinafter designee, may be delegated the task of assigning merits panels (designations under 35 U.S.C. § 6) to *ex parte* appeals at such times as the Chief Judge deems appropriate.

B. Employees selected to serve as designees will be notified of their selection by the Chief Judge.

C. The delegation to a designee of the task of assigning merits panels is a temporary delegation and is for a time period within the discretion of the Chief Judge.

D. Designee(s) will become familiar with the guidance of SOP 1.

E. Designee(s) will follow the assignment guidance provided by the Working Document accompanying this SOP.

F. At all times, the Chief Judge has the discretion to limit or expand the scope of a designee's delegation.

III. Discipline Reviewer

A. The Chief Judge has the discretion of appointing at least one employee to review ex parte appeals in a discipline to facilitate the assignment process, at such times as the Chief Judge deems appropriate.

B. Employees selected to serve as discipline reviewers will be notified of their selection by the Chief Judge.

C. The appointment to serve as a discipline reviewer is temporary and is for a time period within the discretion of the Chief Judge.

D. Discipline reviewers are to become familiar with the issues of interest to the Chief Judge.

E. Designee(s) are to follow the assignment guidance provided by the accompanying Working Document.

F. At all times, the Chief Judge has the discretion to limit or expand the scope of the tasks to be performed by a discipline reviewer.

**PATENT TRIAL AND APPEAL BOARD
STANDARD OPERATING PROCEDURE 9**

**Procedure for Decisions Remanded from the Federal Circuit for
Further Proceedings**

This Standard Operating Procedure (SOP) addresses the procedure for handling all decisions on cases remanded from the Court of Appeals for the Federal Circuit (Federal Circuit) to the Patent Trial and Appeal Board (Board) for further proceedings. This SOP creates internal norms for the administration of the Board to promote consistency. It also provides guidance to the parties, the public, and the Board regarding Board decisions remanded from the Federal Circuit. This SOP does not create any legally enforceable rights. The procedures described in this SOP are part of the Board’s deliberative process.

The Board has established a goal to issue decisions on remanded cases within six months of the Board’s receipt of the Federal Circuit’s mandate. The mandate makes the judgment of the Federal Circuit final and releases jurisdiction of the remanded case to the Board.

The Chief Administrative Patent Judge (Chief Judge) and the Deputy Chief Administrative Patent Judge (Deputy Chief Judge) believe that identifying and discussing potential issues soon after the Federal Circuit’s opinion will facilitate timely issuance of decisions on remand. Thus, the Chief Judge and/or the Deputy Chief Judge will discuss each remanded case with the panel before the issuance of the mandate, and before the panel expends substantial effort on the case. The Chief Judge and Deputy Chief Judge request that the panel schedule a meeting within thirty days of receiving notice of the Federal Circuit’s decision.¹ The panel

¹ Please note that this meeting is expected to occur *before* the mandate issues from the Federal Circuit. Under Rule 41(b) of the Federal Rules of Appellate Procedure, a mandate “must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later.” Because there is a 30-day period under Fed. Cir. R. 40(e) for filing a rehearing petition, the mandate usually issues **37 days** after judgment if no party seeks rehearing or a stay of the mandate. However, in cases in which the Director

may arrange for the meeting by contacting the Chief Judge's or Deputy Chief Judge's administrative assistant.

The Chief Judge and/or Deputy Chief Judge may assign delegate(s) to meet with the panel in lieu of, or in addition to, the Chief Judge and Deputy Chief Judge. The Chief Judge may also elect to expand the panel assigned to the remanded case in accordance with SOP 1. The Chief Judge, however, expects panel expansion to be a rare occurrence.

Panels should be prepared to discuss the issues presented by the Federal Circuit's decision, as well as the expected procedure for preparing a remand decision. Specific guidance for panels regarding preparing for remand meetings can be found in **Appendix 1** to this SOP. Given the early timing of the meeting in the remand process, the meeting is not intended to address the likely substantive outcome.

The parties should expect the remand process to vary somewhat depending on the type of case and the issues presented. **Appendix 2** to this SOP provides guidance to parties on remand procedures, plus illustrative examples from recent cases. Notably, certain scenarios may necessitate an extension of the six-month goal for issuing a remand decision.

has intervened, Rule 40 of the Federal Rules of Appellate Procedure allows for 45 days for any party to petition for rehearing. Thus, when no party petitions, the mandate will issue **52 days** after judgment in those cases.

PATENT TRIAL AND APPEAL BOARD
STANDARD OPERATING PROCEDURE 9

APPENDIX 1

**Guidance for Panels in Preparing for Remand Meetings with the Chief Judge
and/or Deputy Chief Judge**

This Appendix to SOP 9 provides guidance to panels in preparing for the remand meetings discussed in SOP 9. The Chief Judge and Deputy Chief Judge expect that a remand meeting will occur in every remanded case. As noted in SOP 9, the Chief Judge or Deputy Chief Judge may assign delegate(s) to meet with the panel in lieu of, or in addition to, the Chief Judge and Deputy Chief Judge. The Chief Judge also may elect to expand the panel assigned to the remanded case for the specific reasons articulated in SOP 1 (e.g., to address an issue of importance).

The topics to be discussed at a remand meeting depend on the facts and circumstances of each case. In preparing for the meeting the panel should consider the following general topics, if relevant to their particular remand. The panel is welcome—although not required—to provide to the meeting participants a short (e.g., not to exceed two pages), informal summary addressing these and/or other issues in advance of the meeting. The likely substantive outcome need not be determined or discussed at this early stage.

Potential Topics for Remand Meetings

The **procedural history**, including the procedural history prior to the appeal to Federal Circuit, as well as the outcome and rationale of the Federal Circuit decision, as well as the procedural history of any related appeals.

The **issues on remand**, including any specific procedural instructions from the Federal Circuit and the substantive issues the panel may need to address.

Any contemplated **procedures for the proceedings on remand**, including whether the panel anticipates additional briefing from the parties, an additional oral hearing, and/or reopening the record to permit introduction of additional evidence.

The panel should consider whether to recommend that the Chief Judge expand the panel, taking into account the factors expressed in SOP 1.

Any possible **policy considerations**, including whether the Federal Circuit's decision highlights any novel, evolving, or contentious issues of law or policy (i.e., issues not limited to the particular case) or raises any issues of particular importance to the Office or the patent community. The panel should contemplate whether a decision on remand, which involves such an issue, might be considered for precedential designation.

PATENT TRIAL AND APPEAL BOARD
STANDARD OPERATING PROCEDURE 9

APPENDIX 2

Guidance for Parties Regarding Remand Procedures

This Appendix to SOP 9 provides guidance to the parties on procedural issues. The procedure and pace of a remand following a Federal Circuit decision will vary depending on the type of case, the legal and factual issues involved, the specific instructions from the Federal Circuit, the recommendations of the parties, and any other particularities of the case. Considerations guiding remand procedures and common remand scenarios based on a non-exhaustive sample of remanded cases are discussed below.

Parties in remanded **trial cases** are to contact the Board within **ten (10)** business days after the mandate issues to arrange a teleconference with the panel. Before the teleconference, the Parties shall meet and confer in a reasonable and good faith attempt to propose a procedure on remand. Parties are encouraged to seek agreement, if possible, on remand procedures including, but not limited to: (1) whether additional briefing is necessary; (2) subject matter limitations on briefing; (3) length of briefing; (4) whether the parties should file briefs concurrently or sequentially; (5) if briefs are filed sequentially, which party should open the briefing; (6) whether a second brief from either party should be permitted; (7) the briefing schedule; (8) whether either party should be permitted to supplement the evidentiary record; (9) limitations, if any, on the type of additional evidence that will be submitted; (10) the schedule for submitting additional evidence, if any; and (11) any other relevant procedural issues. Teleconferences with the panel should take place within the first month after the mandate.

Considerations Guiding Remand Procedures in Trials

Although the panel shall consider procedures proposed by the parties, the panel ultimately will decide the procedures to be followed on remand. For example, the panel will decide whether to permit additional briefing and additional evidence (testimonial and documentary) or hold additional hearings following a remand.

The panel will consider the scope of the remand, as determined from the reasoning and instructions provided by the Federal Circuit, as well as “the effect . . . on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete proceedings.” *See* 35 U.S.C. §§ 316(b), 326(b) (setting forth considerations for prescribing regulations under the AIA). Although no statutory time limit exists for completion of a re-opened proceeding following remand, the Board recognizes that delays caused by re-opening the record after remand may be inconsistent with the Board’s stated goal of issuing a remand decision within 6 months from the mandate. The panel also will consider the time and expense involved that permitting additional briefing and new evidence will add to the proceeding. This approach is consistent with the expression of Board policy in 37 C.F.R. § 42.1(b): “This part shall be construed to secure the just, speedy, and inexpensive resolution of every proceeding.”

Additional briefing

In deciding whether to allow additional briefing by the parties, the panel will take into account whether the parties already have had an adequate opportunity to address the issues raised by the remand. For example, a new or revised claim construction not previously considered may lead the panel to seek additional briefing from the parties. *See Microsoft Corp. v. Proxyconn, Inc.*, Case No. IPR2012-00026 (Paper 77) (PTAB Sept. 1, 2015). A change in the law usually would justify additional briefing to ensure that the parties’ positions under the changed authority are presented and considered. Additional briefing, when permitted, will normally be limited to the specific issues raised by the remand. *See Proxyconn, supra*; *see also Dell Inc., v. Acceleron, LLC*, Case No. IPR2013-00440 (Paper 46) (PTAB May 26, 2016).

Additional evidence

In most cases, it will not be necessary to re-open the evidentiary record to new testimonial or documentary evidence. A party seeking to re-open the evidentiary record should be prepared to demonstrate why the evidence already before the Board is inadequate and show good cause why additional evidence is necessary. The panel will take into account whether the parties have already had

an adequate opportunity to address the issues raised by the remand with the evidence already of record. The panel will also consider whether additional briefing is sufficient without the submission of additional evidence.

The panel will also consider how much additional time will be necessary to develop a new evidentiary record. For example, opening the record to new documentary evidence may require additional briefing to establish a proper foundation for the evidence and resolve any objections. *See SAS Inst., Inc. v. ComplementSoft, LLC*, Case No. IPR2013-00226 (Paper 55) (PTAB Jan. 18, 2017). The Board's discovery rules govern testimonial evidence and cross-examination. *See id.*

Additional Oral Argument

In most cases, an additional oral hearing will not be authorized. Normally, the existing record and previous oral argument will be sufficient. However, in those situations where new evidence is permitted, the panel may authorize additional oral argument.

*Default Trial Procedures for Common Remand Scenarios**

The chart below reflects the likelihood of the Board permitting additional briefing, evidence, or oral argument for various types of issues addressed on remand. The circumstances of any particular case may justify different outcomes.

Remand Scenario	Additional Briefing	Additional Evidence	Oral Argument
Erroneous Claim Interpretation	Yes, unless the claim interpretation to be applied on remand was proposed by one of the parties and the effect thereof has been fully briefed	No, unless evidence of record is insufficient to afford due process	No
Failure to Consider the Evidence	Yes, unless the evidence was fully briefed on the record	No	No
Inadequate Explanation by the Board	No, unless the briefing on the issues is inadequate for the Board to have made a decision in the first instance	No	No
Erroneous Application of Law	Yes, unless the law was fully briefed on the record but not reflected in Board decision	No	No
Lack of Due Process/Denial of APA rights	Yes	Yes, for parties whose rights have been violated, unless additional briefing on evidence of record is sufficient to afford due process	Yes, if necessary to afford due process
Improper Consideration of the Arguments	Yes, unless argument is fully briefed in the record	No	No

*These particular remand scenarios are provided for exemplary guidance only and do not reflect all scenarios that have been or may result from remands by the Federal Circuit.

Considerations Guiding Remand Procedures in Ex Parte and Reexamination Appeals

In ex parte appeals and reexamination appeals, reversals at the Federal Circuit are considered to be remanded cases to the PTO for further action. Either the Board or the examiner will take up remanded cases depending upon (1) whether the Federal Circuit directed a particular part of the Office to act upon remand, (2) whether the outstanding rejections can be further addressed by the Board either with further explanation of a finding of fact or conclusion of law or with a new ground of rejection based on further findings of fact or reasoning based on the current record, and/or (3) whether a reversal requires a need for further prior art searching by the examiner and/or issuance of a patent or reexamination certificate. Although expected to be a rare occurrence, the Board may ask the appellant or parties to provide further briefing on a matter of law or fact raised by the Federal Circuit. For example, in the case of intervening Federal Circuit law, the Board may seek appellant's or the parties' positions on the application of such law to the particular facts already of record. Additional evidence is only permitted upon reopening of prosecution before the examiner.

Default Appeals Procedures for Common Remand Scenarios

These procedures are default and circumstances not contemplated may necessitate a different procedure.

Remand Scenario	Prosecution/Reexamination Reopened
Erroneous Claim Interpretation	No, unless alternative claim interpretation renders the present rejection(s) moot
Failure to Consider the Evidence	No, unless the evidence of record is deemed entirely insufficient to support the present rejection(s)
Inadequate Explanation	No – the Board provides additional explanation or reverses on the present record
Erroneous Application of Law	No, unless the correct application of the law renders the present rejection(s) moot
Lack of Due Process/Denial of APA rights	Yes – typically in the form of a new ground of rejection
Improper Consideration of the Arguments	No – arguments that were not sufficiently briefed before the Board are deemed waived

Specific Examples of Common Remand Scenarios

1. Remand for erroneous claim interpretation

In **trials**, some panels have permitted additional briefing on remand limited to the Federal Circuit's claim interpretation. New evidence was not permitted in those cases. *See, e.g., Microsoft Corp. v. Proxyconn, Inc.*, Case Nos. IPR2012-00026, IPR2013-00109 (Paper 77) (PTAB Sept. 1, 2015) (after remand due to unreasonably broad claim interpretation, the Board authorized simultaneous briefing, but not new evidence or the use of prior art not previously considered in the Board's final written decision); *Straight Path IP Grp., Inc. v. Sipnet EU S.R.O.*, Case No. IPR2013-00246 (Paper 70) (PTAB Mar. 29, 2016) (after a remand finding error in the Board's claim interpretation, the Board authorized briefing directed to the impact of the decision on the trial proceeding, but did not authorize new evidence or new argument); *PPC Broadband, Inc. v. Corning Optical Commc'ns RF, LLC*, Case No. IPR2013-00342 (Paper 55) (PTAB Aug. 4, 2016) (after remand due to unreasonably broad claim interpretation, the Board denied requests for additional briefing where the requests addressed new issues not related to claim interpretation).

In **ex parte and reexamination appeals**, the Board has taken up the case and issued a new Decision on Appeal where the record is clear upon remand. *See, e.g.,* Application No. 11/610,411 (after remand for consideration of PTO policy on "configured to" claim language, the Board issued an affirmance decision); Reexamination Control Nos. 90/008,326, 90/011,287 (after remand for consideration of District Court's alternative claim construction of the same patent, the Board maintained its claim interpretation under the PTO's broadest reasonable interpretation standard); Reexamination Control No. 90/012,366 (the Board entered a new ground of rejection based on prior art already of record in light of alternative claim interpretation); Reexamination Control Nos. 95/001,305, 95/001,548, 95/001,939 (the Board considered the rejection anew in light of the Federal Circuit's claim interpretation and entered a new ground of rejection based on new reasoning in light of the new claim interpretation).

However, cases have been taken up by or have been remanded to the examiner for further consideration in situations where a new claim interpretation

renders moot all maintained rejections before the Board, or upon specific order by the Federal Circuit. *See, e.g.*, Application No. 12/392,192 (for an anticipation rejection rendered moot by the Federal Circuit’s claim interpretation, the Board remanded to the examiner for additional findings directed to the new claim interpretation); Reexamination Control No. 90/012,364 (the Board remanded to the examiner for consideration of claim interpretation under a different standard after the patent had expired); Reexamination Control Nos. 95/001,715, 95/001,716 (administrative remand to the examiner because the Federal Circuit “directed the examiner to reevaluate the prior art based on the court’s claim construction”); Reexamination Control No. 95/002,169 (after reversal at Federal Circuit for “unreasonably broad” claim interpretation, examiner issued Reexamination Certificate); Application No. 10/906,508 (after remand for failing to give patentable weight to the preamble, the Board remanded to the examiner for further action).

2. Remand for a failure to properly consider the evidence

In **trials**, the Board has authorized additional briefing related to the evidence, but not the admission of new evidence. *See, e.g., Ariosa Diagnostics v. Verinata Health, Inc.*, Case No. IPR2013-00276, IPR2013-00277 (Paper 49) (PTAB Jan. 13, 2016) (after remand for failure to sufficiently consider a piece of evidence, the Board permitted additional briefing about that evidence, but did not allow admission of additional evidence).

However, where the Board was able to further consider briefing and evidence already of record, the Board did not allow further briefing. *See PPC Broadband, Inc. v. Corning Optical Commc’ns RF, LLC*, Case No. IPR2013-00340 (Paper 85) (PTAB Aug. 4, 2016) (after remand for failure to make factual findings regarding certain limitations, the Board denied requests for additional briefing and evidence and decided the issues on remand based on the arguments and evidence already of record).

In **ex parte and reexamination appeals**, when evidence is lacking in the record or the Examiner made insufficient factual findings based on the evidence, cases have been taken up by or have been remanded to the examiner for further consideration. *See, e.g.*, Reexamination Control Nos. 95/001,166, 95/000,166,

95/001,122, 95/001,401 (after reversal based on lack of supporting evidence, the examiner took action directly to issue Reexamination Certificate); Application No. 09/874,423 (after reversal for insufficient evidence to support the Board's findings, the Board administratively remanded to the examiner for further consideration); Application No. 10/529,984 (after remand for insufficient evidence, the examiner took action in issuing a new rejection); Application No. 11/645,067 (after remand for insufficient evidence to support rejection, the Board administratively remanded the case to the examiner for reconsideration of anticipation rejection); Application 12/762,841 (after remand for failure to consider overlooked amendments and evidence, the Board administratively remanded to the examiner for a first consideration).

However, the Board has considered sufficiently examined and briefed, yet overlooked, evidence on remand, and has considered the evidence of record again when specifically instructed by the Federal Circuit's decision to do so. *See, e.g.*, Reexamination Control Nos. 95/000,326, 95/000,378 (the Board issued a new decision with further detailed explanation after Federal Circuit's remand for failure to consider the general knowledge of the skilled artisan); Reexamination Control No. 95/001,134 (after Federal Circuit's determination that substantial evidence did not support the Board's findings of a lack of nexus and that the secondary consideration evidence was not commensurate in scope with the claims, the Board entered a new ground of rejection with further explanation); Reexamination Control No. 95/000,067 (after Federal Circuit's remand for relying on facts without considering the facts in light of the Board's new claim interpretation, the Board included additional fact finding from the record consistent with the Board's interpretation); Application No. 10/529,984 (after remand for failure to properly consider specific factual findings, the Board issued a decision discussing the particular findings and reversing the rejection); Application No. 10/991,878 (after vacating the Board's decision for failure to identify evidence supporting its findings and remanding for the Board to "consider whether the evidence of record is sufficient to maintain the Examiner's rejection," the Board issued a decision reversing the rejection for lack of evidence).

3. Remand for the Board's failure to adequately explain its reasoning

In **trials**, some panels have authorized limited additional briefing, but not new evidence. *See, e.g., Cutsforth, Inc. v. MotivePower, Inc.*, Case No. IPR2013-00274 (Paper 37) (PTAB Mar. 31, 2016) (after remand for failure to adequately describe its reasoning for its obviousness determination, the Board authorized additional briefing limited to design choice as a reason to modify the art); *In re Warsaw Orthopedic, Inc.*, Case Nos. IPR2013-00206, IPR2013-00208 (Paper 73) (PTAB Nov. 16, 2016) (after remand for failure to explain how the prior art discloses a claim limitation, the Board authorized additional briefing but not new evidence).

In **ex parte and reexamination appeals**, the Board has added further explanation without remanding to the examiner when the record is sufficient to do so. *See, e.g., Reexamination Control No. 95/000,443* (after remand for consideration of what reason, if any, to combine prior art, the Board reconsidered its obviousness decision on the record already present).

4. Remand for erroneous application of the law

In **trials**, a remand has warranted additional briefing and a supplemental motion to amend. *See, e.g., Veritas Techs. LLC v. Veeam Software Corp.*, Case No. IPR2014-00090 (Papers 40, 42) (PTAB Jan. 27, 2017) (after remand for improperly denying a motion to amend, the Board authorized Patent Owner to refile its motion to amend (and supporting arguments) as a supplemental motion, Petitioner to file a supplemental opposition, and Patent Owner to file a supplemental reply).

In **ex parte and reexamination appeals**, the examiner has taken up cases or the Board has remanded cases to the examiner for further consideration where the Federal Circuit's decision renders moot all the rejections before the Board. *See, e.g., Reexamination Control Nos. 95/000,072, 95/001,001, 95/000,153* (after reversal due to the Board's error in obviousness determination, the examiner took action directly to issue a Reexamination Certificate); *Reexamination Control No. 95/001,469* (after remand to consider original claims after a patent expired with pending claim amendments, the Board entered an administrative remand to the examiner to consider the original patent claims in light of the evidence of record);

Application No. 11/578,646 (after vacating the rejection and remanding for insufficient legal reasoning in an obviousness determination, the Board remanded to the examiner for reconsideration in light of Federal Circuit's decision); Application No. 10/868,312 (after vacating the rejection and remanding for error in applying the printed matter doctrine, the Board remanded to the examiner for reconsideration in light of Federal Circuit's decision); Application No. 12/825,505 (after reversal of obviousness rejection, the Board administratively remanded to the examiner for further consideration).

However, the Board has addressed the legal issue upon remand when sufficiently briefed on the record. *See, e.g.*, Reexamination Control No. 95/000,196 (after remand for application of wrong priority date for one of the claims, the Board entered new grounds of rejection based on later prior art also of record); Reexamination Control Nos. 95/001,188, 95/001,169 (after remand for consideration of Federal Circuit decision in a related case, the Board entered a new ground of rejection); Application No. 10/378,261 (after reversal due to Board error in an obviousness determination, the Board issued a new decision reconsidering the evidence of record, pursuant to the Federal Circuit decision, and reversing the obviousness rejection); Application No. 08/478,995 (after remand on PTO's motion due to intervening case law in obviousness-type double patenting rejection, the Board issued a new decision properly addressing the secondary consideration evidence of record); Application No. 09/832,440 (after remand for failure to engage in a proper enablement analysis, the Board entered a new decision applying the missing analysis and affirming the rejections on appeal).

5. Remand for lack of due process or a denial of a party's procedural rights under the Administrative Procedure Act (APA)

In **trials**, some panels have authorized additional briefing and additional evidence. *See, e.g., SAS Inst., Inc. v. ComplementSoft, LLC*, Case No. IPR2013-00226 (Paper 55) (PTAB Jan. 18, 2017) (authorizing briefing and additional declaratory evidence, where Federal Circuit found that final written decision violated APA notice requirements by adopting a new claim interpretation "midstream").

However, other panels have not authorized submission of additional evidence where additional briefing was sufficient to provide a fair opportunity for a party to respond. *See Dell Inc. v. Accelaron, LLC*, Case No. IPR2013-00440 (Paper 46) (PTAB May 26, 2016) (after remand for denying the Patent Owner a fair opportunity to respond to arguments raised by a Petitioner for the first time at oral argument and subsequently adopted by the Board in its final written decision, the Board permitted additional briefing on the untimely raised issue).

In ex parte and reexamination appeals, the Board has addressed due process concerns by entering a new ground of rejection and offering the opportunity for the applicant or patent owner to respond accordingly. *See, e.g.*, Reexamination Control No. 95/001,134 (after remand for improper burden shifting and relying on new reasoning that constituted a new ground of rejection, the Board addressed the issues in a new decision entering a new ground of rejection); Reexamination Control Nos. 95/000,067, 95/001,702 (after remand for further consideration of rejections not addressed by the Board in the first decision, the Board issued a new decision with new grounds of rejection); Application Nos. 10/306,057, 10/868,312 (after remand because the Board's decision introduced a new ground of rejection, the Board issued a new decision designating the affirmance in the original decision as a new ground of rejection); Application No. 10/770,937 (after remand for the Board's decision introducing new ground of rejection, the Board issued a second decision on request for rehearing designating the original decision as a new ground of rejection).

Where a new issue was not considered by the examiner in the first instance, the Board has remanded the appeal to the examiner. *See, e.g.*, Reexamination Control No. 95/001,555 (after remand for failure to consider certain proposed rejections that were not addressed by the examiner, the Board entered an administrative remand to the examiner for a first consideration).

6. Remands for failure to properly consider the arguments before the Board, such as misapprehending arguments, overlooking arguments, improperly considering arguments that were untimely raised, or improperly considering timely arguments as untimely

In **trials**, additional briefing has been permitted. *See Dell Inc. v. Acceleron, LLC*, Case No. IPR2013-00440 (Paper 46) (PTAB May 26, 2016) (after remand for denying the Patent Owner a fair opportunity to respond to arguments raised by a Petitioner for the first time at oral argument and subsequently adopted by the Board in its final written decision, the Board permitted additional briefing on the untimely raised issue).

In **ex parte appeals and reexaminations**, the Board has reviewed arguments that were overlooked but were properly briefed on appeal. *See, e.g.*, Reexamination Control No. 90/010,278 (after remand on PTO's motion acknowledging failure to address an argument on appeal, the Board issued a new decision on appeal); Application No. 11/811,156 (after remand for failure to address arguments related to analogous art, the Board issued a new decision considering the overlooked arguments and affirming the rejections).

Petition for a writ of certiorari filed in the Supreme Court

In **all cases**, absent good cause, proceedings on remand generally will not be stayed once the Federal Circuit has issued its mandate, even when a party has petitioned the Supreme Court for a writ of certiorari.² In **trials**, a party may

² Parties are encouraged to review the Federal Rules of Appellate Procedure, the Federal Circuit Rules of Practice, and the Rules of the Supreme Court of the United States for specific timing requirements. *See, e.g.*, Sup. Ct. R. 13(1) (“Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.”). The time period to petition the Supreme Court is separate from the Federal Circuit’s issuance of the mandate to the Board. Parties are reminded that the Federal Circuit may entertain motions to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court under Rule 41(d) of the Federal Rules of Appellate Procedure.

contact the Board to request authorization to file a motion for a stay of proceedings on remand. The Board will consider such requests on a case-by-case basis. The Board may require briefing on a motion to stay the remand proceedings, or, for convenience, the issue may be discussed and decided in a conference call. In deciding whether to stay remand proceedings, the Board's primary consideration is whether the Supreme Court's judgment would impact the Board's decision on remand. *See, e.g., Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, Case No. IPR2013-00132 (Paper 54) (PTAB Aug. 12, 2016) (the Board, *sua sponte*, staying remand proceedings after petition for writ of certiorari filed), (Paper 60) (Oct. 14, 2016) (maintaining stay after briefing because the Board was persuaded that a Supreme Court decision could impact the Board's assessment of the remanded issue); *SAS Inst., Inc. v. ComplementSoft, LLC*, Case No. IPR2013-00226 (Paper 48) (PTAB Dec. 15, 2016) (denying stay request after a conference call), (Paper 57) (PTAB Feb. 8, 2017) (denying request to stay because the issue on remand was separable from, and not influenced by, the question presented in the petition for a writ of certiorari). The Board's decision not to stay remand proceedings does not affect the right of a party to apply to the Supreme Court for a writ of certiorari.

EXHIBIT 3-3

APJ Production Expectancies

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

Withheld pursuant to exemption

(b)(2)

of the Freedom of Information and Privacy Act

EXHIBIT 4

Robert Buden's Testimony

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, 2013.¹ 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.² 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

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

² 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.³ 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

³ “US Patent and Trademark Office: Transforming to Meet the Challenges of the 21st 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 21st 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 21st 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 21st 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 21st 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. <u>Department of Commerce</u> | 4. <u>Patent Examining Groups</u> |
| 2. <u>Patent & Trademark Office</u> | 5. <u>Technology Center</u> |
| 3. <u>D/C for Patent Operations</u> | 6. <u>Art Unit</u> |

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
------------------------	------	-------------------------	------

CLASSIFICATION CERTIFICATION	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
--	-----------	------

EMPLOYEE ACKNOWLEDGEMENT - My signature acknowledges discussion of the position description and receipt of the plan, and does not necessarily signify agreement.	SIGNATURE	DATE
---	-----------	------

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 I 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 to 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 to 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. 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.**

SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name _____ Date _____ Sheet No. 1 of 11

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

[X] 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 Outstanding
103% - 109% Commendable
95% - 102% Fully Successful
88% - 94% Marginal*
below 88% Unacceptable

*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 Calculated Production Hours / Total Examining Hours

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

Optional Initial Block

Table with 4 columns: Emp., Date, Supv., Date

SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name _____ Date _____ Sheet No. 2 of 11

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 <small>These values are only available if the immediately previous action is an action on the merits done by the previous examiner.</small>			
	- 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	
column	Before Final	After Final	Before Final	After Final	Before Final	After Final	Before Final	After Final	Before Final	After Final
	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.

Optional Initial Block

Emp.	Date	Supv.	Date
------	------	-------	------

SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name _____ Date _____ Sheet No. 3 of 11

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.

Optional Initial Block

	Emp.	Date	Supv.	Date
--	------	------	-------	------

SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name _____ Date _____ Sheet No. 4 of 11

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.

Quality Major Activities	Activity Level	Error Category	Evaluation Level									
			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	1	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
2. treating disclosure statements and claims of priority	Basic	1	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
3. analyzing disclosure and claims for compliance with 35 USC 112;	Basic	2		✓	✓	✓	✓	✓	✓	✓	✓	✓
4. planning field of search;	Basic	1		✓	✓	✓	✓	✓	✓	✓	✓	✓
5. conducting search;	Basic	1	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
6. making proper rejections under 35 USC 102 and 103 with supporting rationale, or determining how claim(s) distinguish over the prior art;	Basic	2		✓	✓	✓	✓	✓	✓	✓	✓	✓
7. determining whether amendment introduces new matter;	Advanced	2				✓	✓	✓	✓	✓	✓	✓
8. appropriately formulating restriction requirements, where application could be restricted	Advanced	1				✓	✓	✓	✓	✓	✓	✓
9. determining whether claimed invention is in compliance with 35 USC 101;	Advanced	2				✓	✓	✓	✓	✓	✓	✓
10. evaluating/applying case law as necessary;	Legal	*					✓	✓	✓	✓	✓	✓
11. determining where appropriate line of patentable distinction is maintained between applications and/or patents;	Legal	1				✓	✓	✓	✓	✓	✓	✓
12. evaluating sufficiency of affidavits/declarations;	Legal	*					✓	✓	✓	✓	✓	✓
13. evaluating sufficiency of reissue oath/declaration;	Legal	1					✓	✓	✓	✓	✓	✓
14. promotes compact prosecution by including all reasonable grounds of rejections, objections, and formal requirements; (M.P.E.P. 707.07(g), etc.);	Legal	1							✓	✓	✓	✓
15. makes the record, taken as a whole, reasonably clear and complete;	Legal	1							✓	✓	✓	✓
16. properly treats all matters of substance in applicant's response;	Legal	1							✓	✓	✓	✓
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	2								✓	✓	✓
19. properly rejects all rejectable claims in a final rejection; properly allows all claims in an allowance	Legal	3								✓	✓	✓

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

Optional Initial Block

Emp.

Date

Supv.

Date

SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name _____ Date _____ Sheet No. 5 of 11

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.

Optional Initial Block

	Emp.	Date	Supv.	Date
--	------	------	-------	------

SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name

Date

Sheet No.

6 of 11

*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

Emp.

Date

Supv.

Date

SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name _____ Date _____ Sheet No. 7 of 11

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	Amendments response to non-final OA, Appeal Briefs	56	98 ³
2	Special New¹ e.g. PPH, Accelerated Examination, Petitions to Make Special, Track 1, PCT, Reexam, Reissues, etc.	14	28
	Special Amended e.g. PPH, Accelerated Examination, Petitions to Make Special, Board Decisions/Remands	14	28
3	New² Regular New, Continuations in Part (CIPs), Continuations, Divisionals, RCEs	28	56
4	Expedited e.g. After Finals, Responses under 37 CFR 1.312, PUBs Cases (Printer Rushes)	14	28
5	Returns (Returned by TSS & Reviewer)	14	28

¹ 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.

² 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.

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

Optional Initial Block

Emp.	Date	Supv.	Date
------	------	-------	------

SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name _____ Date _____ Sheet No. 8 of 11

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 **Outstanding**
- 103% - 109% **Commendable**
- 95% - 102% **Fully Successful**
- 88% - 94% **Marginal***
- below 88% **Unacceptable**

*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

Optional Initial Block

Emp.

Date

Supv.

Date

SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name _____ Date _____ Sheet No. 9 of 11

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 <i>wf₀</i>	Number of Cases <i>n_o</i>	Average Days <i>wf₁</i>	Component Score $((wf_0 - wf_1) / wf_0 + 1) * 100$ <i>CS₁</i>	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) ¹	14	4	8	142.9% (110%)	1.9%
			Sum(n _o)= 235			Overall % Score 147.4%

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

Optional Initial Block

Emp.	Date	Supv.	Date
------	------	-------	------

SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name _____ Date _____ Sheet No. 10 of 11

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.

Optional Initial Block

Emp.	Date	Supv.	Date
------	------	-------	------

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	Supv.	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

III. Docket Management

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

IV. Stakeholder Interaction

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

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%	TOTAL SCORE	0

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.

USPTO

-- 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.

USPTO

-- 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

1

Performance Appraisal Plan (PAP)

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

2

Performance Appraisal Plan (PAP)

- Production, Quality and Docket Management are considered “Critical Elements” of the PAP.
- 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.

3

Performance Appraisal Plan Productivity

- Each Examiner’s “Expectancy” (Production Goal) Is Determined by:
 - The Examiner’s Position Factor based on GS grade, signatory authority level and extra credit items (e.g. Senior or Expert status).
 - Complexity of technologies on the examiner’s docket (Hours/Production Unit, Hrs/PU).

4

Performance Appraisal Plan Productivity	
<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

5

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

6

Performance Appraisal Plan Productivity

- Note that examiners **DO NOT** receive production credit for all the work they do. They only receive production credit for First Actions, Final Rejections and Disposals.

7

Performance Appraisal Plan Productivity

- Examiners perform many activities that take time but do not count toward biweekly production credit including:
 - Helping Public and Peers.
 - Filling out Time and Attendance records (WebT&A).
 - After Final Advisory Actions.
 - Telephone Restriction Practice.
 - 2nd & Subsequent Non-Final Actions.
 - Printer Inquiries.

8

Performance Appraisal Plan Productivity

- Examiners perform many activities that take time but do not count toward biweekly production credit including (con't):
 - Preparing for Pre-Appeal and Appeal Conferences.
 - Classification of Applications.
 - Researching and initiating application transfer requests.
 - Explaining examiner actions to supervisors.
 - Computer Downtime.

9

Performance Appraisal Plan Productivity

- Production Unit = Balanced Disposal (i.e. the time to complete prosecution of patent application, start to finish).
- Production Unit = $(N+F+D)/2$ where:
 - N = Credits for First Actions (FAOM).
 - F = Credits for Final Rejections.
 - D = Credits for Allowances, Abandonments, Interferences, Examiner's Answers on Appeal.

10

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. 11

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.

12

Performance Appraisal Plan Productivity

Sample Production Calculation

GS-14 Primary Examiner in Biotechnology (25.9 Hrs/PU)
w/64 Hrs of examining time and 3 PUs completed:

Expectancy = (GS-12 Complexity/Position Factor) + 2.5 =
(25.9 Hrs/PU/1.35 GS-14 PF) + 2.5 = 21.7 Hrs/PU

Expected PUs = Examining Hours/Expectancy =
64 Ex. Hrs/21.7 Hrs/PU = 2.95 Expected PUs

% Production = (Achieved PUs/Expected PUs) X 100 =
3 PUs Achieved/2.95 PUs Expected X 100 = 102%

13

Performance Appraisal Plan Productivity

■ Productivity Rating:

- | | |
|--------------------|----------------|
| – Outstanding | 110% and above |
| – Commendable | 103% - 109% |
| – Fully Successful | 95% - 102% |
| – Marginal | 88% - 94% |
| – Unacceptable | Below 88% |

14

Performance Appraisal Plan Quality

- Quality measurement is divided into three distinct categories of major activities:
 - Category 1: basic patent examining duties.
 - Category 2 – patent examining duties requiring analysis of application compliance with patent statutes and making proper rejections.
 - Category 3 – determining patentability or non-patentability of patent claims.

15

Performance Appraisal Plan Quality

- Category 1 Activities:
 - Checking applications for compliance with formal requirements of patent statutes and rules and for technological accuracy.
 - Treating Information Disclosure Statements (IDS) and claims for priority.
 - Planning and conducting prior art searches.
 - Formulating proper restriction requirements when application can be restricted.

16

Performance Appraisal Plan Quality

- Category 1 Activities (con't):
 - Determining where appropriate line of patentable distinction is maintained between applications and/or patents.
 - Evaluate sufficiency of reissue oath/declaration.
 - Promote “Compact Prosecution” by including all reasonable grounds of rejection, objections and formal requirements.
 - Makes the record, as a whole, reasonably clear and complete.

17

Performance Appraisal Plan Quality

- Category 1 Activities (con't):
 - Properly treat all matters of substance in Applicant Responses.
- 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.

18

Performance Appraisal Plan Quality

- Category 2 Activities:
 - Analyzing application disclosure and claims for compliance with 35 USC 112.
 - Making proper rejections under 35 USC 102 and 103 with supporting rationale, or determining how claim(s) distinguish over the prior art.
 - Determine whether Applicant's amendment(s) introduce new matter to the application.
 - Determining whether claimed invention is in compliance with 35 USC 101.

19

Performance Appraisal Plan Quality

- Category 2 Activities (con't):
 - Properly closes prosecution and does not make a premature final rejection.
- 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.

20

Performance Appraisal Plan Quality

- Category 3 Activities:
 - Properly rejects all rejectable claims in a final rejection.
 - Properly allows all patentable claims in an allowance.
- Only Primary Examiners are responsible for Category 3 Activities and for Category 2 activity of closing prosecution/final rejection.

21

Performance Appraisal Plan Quality

- Quality Performance is measured using the “Clear Error” standard. Clear Error occurs when the examiner’s action:
 - does not reasonably comply with the major activities of the Quality Element; and
 - could not have been permitted at the time and under the circumstances that the action was taken; and
 - is not an honest and legitimate difference of opinion between the examiner and a reviewer as to what action should have been taken.

22

Performance Appraisal Plan Quality

- 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.

23

Performance Appraisal Plan Quality

- Quality Combined Error Score*:
 - CAT1 = Category 1 Errors/Total Actions Done
 - CAT2 = Category 2 Errors/Total Actions Done
 - CAT3 = Category 3 Errors/(Finals + Allowances)
 - Combined Error Score =

$$\frac{(\text{CAT1} + \text{CAT2} + \text{CAT3})}{3}$$

*If an examiner's error rate in any Category is greater than or equal to 7.50%, the overall Quality rating will be Unacceptable.

24

Performance Appraisal Plan Quality

- The Quality rating is based on the Combined Error Score and compliance with three Indicia of Outstanding or Commendable Performance.
- Quality Indicia:
 - 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.

25

Performance Appraisal Plan Quality

- Quality Indicia (con't):
 - The Office actions as well as the file record clearly indicate that the examiner fully complies with the principles of compact prosecution.
 - 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.

26

Performance Appraisal Plan Quality

- Quality Element Rating:
 - Outstanding: Error rate is 0% - 4.49% and, except for rare occurrences, the examiner complies with all three Indicia.
 - Commendable: : Error rate is 4.50% - 5.49% and in substantially all actions the examiner complies with all three Indicia.
 - Fully Successful: The error rate is 5.50% - 6.49%.
 - Marginal: The error rate is 6.50% - 7.49%.
 - Unacceptable: The error rate is 7.50% or greater.

27

Performance Appraisal Plan Docket Management

- Unless otherwise directed by management, examiners are required to:
 - Handle all applications and proceedings awaiting action in accordance with the time period or Special handling instructions prescribed by current policy.
 - Forward all work for processing and/or handling promptly or in accordance with prescribed time periods.
- 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.

28

Performance Appraisal Plan Docket Management

- Each category has a particular “Expected Average Days” time period which is determined to be at the 100% performance level.
- Each category also has a particular “Ceiling Control Days” time period which is determined to be at the unacceptable level of performance.
- 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%.

29

Performance Appraisal Plan Docket Management

- Components in Each Docket Management Category:
 - Category 1: Amendments.
 - Category 2: Special New and Special Amended applications (e.g., Accelerated prosecution, Patent Prosecution Highway, Petition to make special, Track 1, Reissue, etc.).
 - Category 3: New Applications (e.g., Regular New Applications, Continuations, Continuations-in-Part, Divisionals, RCEs).

30

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).

31

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.

32

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.

33

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%

34

Performance Appraisal Plan Docket Management

- DM time periods may only be paused or reset in a few limited circumstances.
- 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.

35

Performance Appraisal Plan Stakeholder Interaction

- All examiners are responsible for performance under the Stakeholder Interaction Element.
- Major Activities:
 - Courteous & Professional Treatment of External Stakeholders by:
 - Generally returning phone calls in 1 business day.
 - Generally reviewing/responding to emails every day.
 - Providing work schedule information to customers via voice mail.

36

Performance Appraisal Plan Stakeholder Interaction

- Courteous & Professional Treatment of External Stakeholders by generally (con't):
 - Providing voice mail notice of extended absences (3 or more business days).
 - Directing callers to correct office or person.
 - Conducting all interviews and/or other contacts with external stakeholders as scheduled, with adequate preparation and courtesy.
 - No interview and/or other contact is arbitrarily or capriciously refused.

37

Performance Appraisal Plan Stakeholder Interaction

- Courteous & Professional Treatment of External Stakeholders by generally (con't):
 - Use proper decorum in official communications.
- Provide search consultation and other assistance to the public and peers.

38

Performance Appraisal Plan Stakeholder Interaction

- Examiner performance is also measured against a defined set of indicia of performance:
 - Routinely uses interview practice to facilitate compact prosecution.
 - Examiner is accessible and responsive regardless of physical location (teleworking).
 - Provides appropriate information to address stakeholder inquiries.

39

Performance Appraisal Plan Stakeholder Interaction

- Performance Indicia (con't):
 - Responds to internal stakeholders in a timely manner.
 - Responds appropriately to requests for personal interviews in a timely manner.
 - Examiner is always well prepared for interviews.

40

Performance Appraisal Plan Stakeholder Interaction

- Rating is based on demonstrated behavior relative to the Major Activities and Performance Indicia.
 - 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.

41

Performance Appraisal Plan Stakeholder Interaction

- Stakeholder Interaction Rating (con't).
 - 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.
 - Fully Successful: All major activities identified are normally performed in a timely and courteous manner.

42

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.

43

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.

44

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							
GAU	PP:2014-26	ENDING:9/30/2014	GRADE:GS-14	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				
COURSE CTION	APPL NUMBER	6 ACTION NO	COUNT VALUE	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							
	PP	QTR	FTR	STATISTICAL ANALYSIS			
LEAVE	0.00	0.00	81.00	PERCENT OF EXPECTANCY	127	116	115
EXCUSED ABSENCE	0.00	0.00	10.00	PERCENT OF EXPECTANCY QSI EQUIV.	127	116	115
HOLIDAY	0.00	20.00	88.00	TOTAL EXAM HOURS	52.00	235.00	946.50
OTHER	65.00	324.00	1086.50	CALCULATED PRODUCTION HOURS	66.26	271.64	1086.87
DETAIL	0.00	0.00	0.00	PERCENT NEW OF TOTAL ACTIONS	60.00	40.00	59.05
NON-ASSIGN	0.00	0.00	0.00	PERCENT ALLOWED OF DISPOSALS	50.00	53.85	50.94
REGULAR EXM HRS	52.00	235.00	870.50	PERCENT REG EXAM HOURS	44.44	40.59	40.75
OVERTIME EXM HRS	0.00	0.00	76.00	EXPECTANCY (GS-12)	30.70	30.74	30.74
TOTAL EXAM HOURS	52.00	235.00	946.50	HOURS PER P.U. USING FACM/PCT	19.81	11.86	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/IFER	26.00	18.08	17.86
				ACTIONS PER DISPOSAL/IFER	2.50	1.92	1.98
FIRST ACTIONS							
	PP	QTR	FTR				
ELECTIONS/RESTRICTIONS	0	0	0				
REJECTIONS (INCLUDING FINAL)	2	6	26				
ALLOWANCES	1	4	15				
OTHER	0	0	0				
TOTAL 1ST ACTIONS	3	10	41				
TOTAL FACM	9	24	96	Docket Management Overall PAP Score	136.19	117.19	135.90
FULL PCT SEARCH	0	0	0				
HALF PCT SEARCH	0	0	0				

CONFIDENTIAL DATA - PRIVACY ACT PROVISIONS MUST BE FOLLOWED

45

Docket Management Report

USPTO/TRANET Home Site Map Resources Contacts Internal Search

DM Workflow Planner

Expected Days	Actual Average Days	Component Score	Total Cases	Contributing Score	Options
FY 2014 - Q 4 [FY 2014 PP 20 to FY 2014 PP 26]					
Category 1	56	50	110.71	[+] 6	22.9
Category 2	14	13.5	103.57	[+] 2	7.14
Category 3	28	20.4	127.14	[+] 10	43.84
Category 4	14	11	121.43	[+] 4	16.74
Returns	14	3.714	110	[+] 7	26.55
OPC Adjustment	OPC hours: 30				2.5
Score					119.69
FY 2014 - Q 3 [FY 2014 PP 14 to FY 2014 PP 19]					
Category 1	56	34	139.29	[+] 5	25.79
Category 2	14			[+] 0	0
Category 3	28	12.545	155.19	[+] 11	63.22
Category 4	14	5.429	161.22	[+] 7	41.79
Returns	14	4.75	110	[+] 4	16.29
OPC Adjustment	OPC 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	[+] 5	17.18
OPC Adjustment	OPC 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	17.86
Category 2	14	4.667	166.67	[+] 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	[+] 13	46.12
OPC Adjustment	OPC hours: 18				0
Score					139.27
Overall OPC Adjustment	Total number of 2.5% OPC DM adjustments made this year: 5				
Overall Score	3.125				
	139.1				

View Production and Award Calculator

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

46

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.

47

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.

48

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.

49

Rewarding Performance

Productivity Gainsharing Award (con't)

<u>Goal Achievement*</u>	<u>Award (% of Base Salary)</u>
--------------------------	---------------------------------

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.

58

Conclusion

- USPTO managers constantly monitor virtually every aspect of examiner performance down to six minute intervals.
- 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.

59

Conclusion

- Examiners direct efforts to Agency goals as set forth in, and measured by the PAP.
- Examiners respond to performance incentives with increased performance to further assist the USPTO in achieving its mission.

60

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,¹⁸⁴ 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

¹⁸⁴ 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.

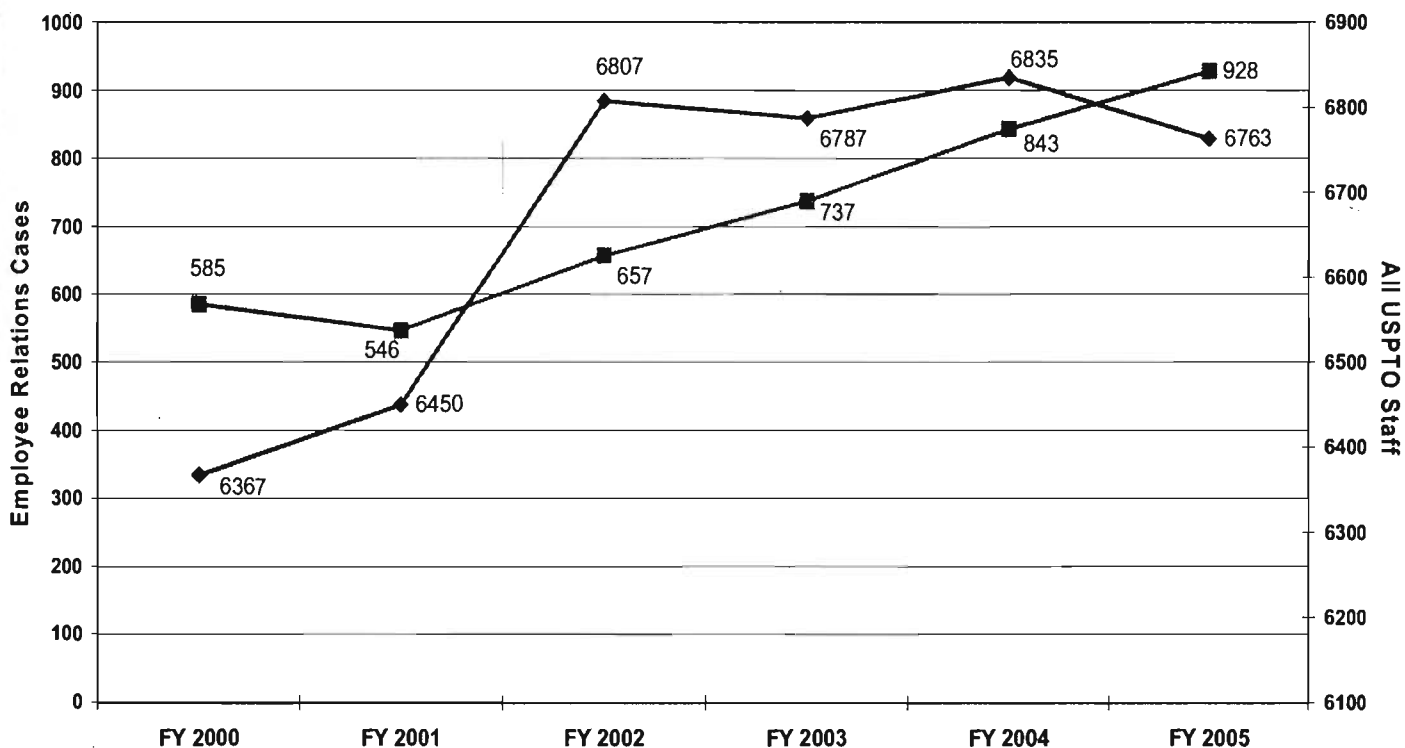
As a result of past practice, USPTO is required to give its employees an oral warning prior to a written warning. This is not required by federal regulations for most other civil servants, who receive a written warning before management proceeds to removal or other adverse action. USPTO patent examiners 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.

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 2001.¹⁸⁵ 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

¹⁸⁵ "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.¹⁸⁶

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 cases¹⁸⁷ 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.¹⁸⁸

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

¹⁸⁶ 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.

¹⁸⁷ 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.

¹⁸⁸ 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.¹⁸⁹ 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.

¹⁸⁹ 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, 2nd 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:
 - o the pending claims don't correspond to those in the cut and pasted Office action;
 - o 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
 - o 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.

United States House of Representatives
Committee on the Judiciary
Bob Goodlatte, Chairman

"Truth in Testimony" Disclosure Form

Clause 2(g)(5) of Rule XI of the Rules of the House of Representatives require the disclosure of the following information by witnesses appearing in a nongovernmental capacity.

Hearing: <i>Abuse of the USPTO's Telework Program; Ensuring Oversight, Accountability and Quality</i>
Date: <i>18 Nov 2014</i>

1. Name: <i>Robert D. Budens</i>	2. Entity(ies) you are representing: <i>Patent Office Professional Association (POPA)</i>
-------------------------------------	--

3. Business Address and Telephone Number: <i>P.O. Box 25287 Alexandria, VA 22304 22313</i>
--

4. Have <u>you</u> received any Federal grants or contracts (including any subgrants and subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	5. Have any of the <u>entities that you are representing</u> received any Federal grants or contracts (including any subgrants or subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
---	--

6. If you answered "yes" to either item 4 or 5, please list the source (by agency and program) and amount of each grant, subgrant, contract, or subcontract, and indicate whether the recipient of such grant was you or the entity(ies) you are representing. (Please use additional sheets if necessary.)

7. Signature: <i>Robert D. Budens</i>	Date: <i>14 Nov 2014</i>
---------------------------------------	--------------------------

Robert D. Budens

Biography

Robert D. Budens is president of the Patent Office Professional Association (POPA), the Federal labor union representing the more than 8,000 patent examiners and other patent professionals at the U.S. Patent and Trademark Office (USPTO) in Alexandria, Virginia.

Mr. Budens joined the USPTO as an examiner in the Biotechnology group of the USPTO in July 1990, specializing in immunological methods of detecting and treating HIV infections and AIDS. He has been a Ph.D. Level Primary Examiner since 1994. In 1998, he became a Chemical Delegate of POPA's Executive Committee and has served as president of the Association since January, 2006. As president of POPA, he is also a non-voting member of the USPTO Patent Public Advisory Committee.

Mr. Budens has B.S. and M.S. degrees in Microbiology from Brigham Young University and a M.S. in Immunology from the University of Texas Southwestern Medical Center in Dallas.

-