

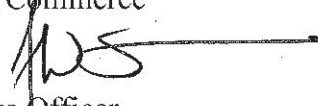


UNITED STATES PATENT AND TRADEMARK OFFICE

INTERNAL ADMINISTRATIVE INQUIRY REPORT

TO: Welton Lloyd, Jr.
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FROM: Frederick Steckler 
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CC: James Payne
Deputy General Counsel, Office of the General Counsel
United States Patent and Trademark Office

DATE: July 8, 2013

SUBJECT: Inspector General Referral No. 12-1196-H
Re: Abuse of Telework Program at USPTO

INVESTIGATOR(S): Jessica Patterson, Human Resources Specialist, GS-13
Jessica Crawford, Human Resources Specialist, GS-13
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SUBJECT: Claims of systemic time and attendance abuse by Patent Examiners,
primarily in connection with the USPTO telework and hoteling programs

PREDICATION: On August 29, 2012, the Office of Inspector General (OIG) received an
anonymous complaint alleging systemic time and attendance reporting abuse by Patent

Examiners, primarily within the telework and hoteling programs, at the United States Patent and Trademark Office (USPTO or Agency). (Exhibit A). As this was the fourth complaint in a series concerning similar allegations, on September 18, 2012, the OIG referred the complaints to the USPTO and requested that an administrative inquiry be conducted and a response to the complaints be provided. (Exhibit A). OIG also requested that USPTO address whether there are appropriate internal controls in place to prevent time and attendance (T&A) abuse within the telework and hoteling programs. (Exhibit A).

QUESTIONS ADDRESSED:

1. Whether Patent Examiners accurately report their T&A for both regular and overtime work hours?
2. Whether the USPTO has effective internal controls to guard against T&A abuse by Patent Examiners?

FINDINGS AND RECOMMENDATIONS¹

Section I sets forth the findings on the specific allegations made in the complaints, which are laid out in Appendix A. The findings were drawn from the relevant data and interviews, as stated in the "Methodology" section of Appendix A. In summary, the investigation team was not able to reach a conclusion on whether some Patent Examiners are accurately reporting T&A or whether the Agency has effective controls to guard against T&A abuses by Patent Examiners. As will be discussed more fully below, there are no records that could be relied upon or referenced to support such findings and the interview statements were inconsistent.² However, recommendations that address certain other findings by the investigation team are found in Section II.

¹ Appendix A contains a description of the complaints, background and methodology for the report. The background portion addresses the organization of the USPTO, Examiner work schedule options, and Patent Examiner duties and performance measurements, including the critical elements of the Performance Appraisal Plan (PAP) used to evaluate an Examiner's performance (Docket Management, Production and Quality). The methodology portion describes the items reviewed and actions taken which form the basis for the report's findings, conclusions, and recommendations. It also provides a list of the exhibits to the report. The background information in the report and Appendix A, including information describing labor union agreements and matters, are provided for general background purposes only.

² References to the interview responses throughout this report are intended only to provide examples of responses that support or contradict the findings. The interview responses were not quantified in any way. Thus, the citations to specific responses should not be interpreted as providing a quantifiable level of support for any specific finding. The full interview summaries have been provided with the attached exhibits.

I. FINDINGS

A. Whether Patent Examiners accurately report their T&A for both regular and overtime work hours?

Full-time employees are required to work an 80 hour bi-week regardless of their work schedule or production requirements. The complaints allege that an unspecified number of Examiners routinely do not comply with this requirement but rather claim 80 hours of work while achieving or exceeding work production requirements in less time. The investigation has not found objective evidence of T&A abuse or the extent of any abuse, including the payment of overtime for hours not worked. There are no records that could be relied upon or referenced to support such a finding. For example, the USPTO T&A system captures the total number of hours worked on a particular day, but not the particular hours of the day spent working. Additionally, the interview statements were inconsistent, with interview responses ranging from the belief that remote employees are "more dedicated and are generally less distracted," (Exhibit Q, SPE 5), to the belief that remote workers were more likely to abuse T&A than on-campus employees. (Exhibit Q, SPE 13, 16). While the statements of some Patents managers and the Employee Relations Chief suggest that there may be a problem with T&A abuse routinely occurring with certain Examiners, especially with regard to certain employees working remotely, the statements of other Patents managers were that there was no such abuse. Additionally, many Supervisory Patent Examiners (SPE) express frustration with existing controls on T&A. The specific T&A controls and interview statements suggesting the effectiveness of each control will be discussed further below.

As to overtime, current policies and negotiated union agreements generally require that Examiners be rated fully successful in all critical elements in the prior fiscal quarter and that eligible employees be pre-approved to work overtime hours.³ (Exhibit II, p. 2). Examiners who fail to achieve fully successful in a critical element are prohibited from working overtime in the subsequent quarter. (Exhibit II, p. 2). There has been no allegation that the overtime eligibility requirements are not being enforced. A second topic concerns the practice of Examiners not being required to specifically identify or designate particular work product as having been produced on overtime hours. (Exhibit Q, SPE 14, 36). There is no evidence that SPEs specifically identify particular work product produced on overtime hours. Rather, they verify that additional work is being performed based on work production levels and reports. (Exhibit Q, SPE 12, 26).

According to the PAP, Examiners are responsible for production based on the number of hours they work, and each hour of overtime increases the amount of work for which they are

³ It has been reported that overtime is a cost benefit to the Agency. (Exhibit RR, p. 2). It has found to be a highly efficient way to increase agency production and fee collections, far outstripping the incremental cost of overtime pay. (Exhibit RR, p. 2)

responsible. (Exhibit L, p. 9; Exhibit U, p. 5-6). Under the employee's PAP, an examiner has a certain number of hours to complete an action. Therefore, Examiners are required to submit a certain number of actions based on the total number of examining hours they claim (which includes any overtime hours claimed by the examiner) to be fully successful at the end of the relevant evaluation period.⁴ Examiners have until the end of the quarter, or other relevant evaluation period, to complete the increased level of production required by the overtime hours claimed. If an Examiner doesn't perform at least at the fully successful level by the end of the evaluation period, they may be subject to a denial of a within grade increase, or if the performance is unacceptable, to a performance action. However, because the system is based on average hours and the length of time that an examiner gets to do the work, we cannot tie a specific action to any given hour of overtime claimed.

B. Whether the USPTO has effective internal controls to guard against T&A abuse by Patent Examiners?

This section discusses various controls to provide a check on T&A by an Examiner who meets or exceeds work production requirements, whether the Agency utilizes these controls, and if so, whether the Agency utilizes these controls effectively. In sum, the investigation has found that the Agency uses both non-performance based controls (non-PAP controls) and performance based controls (Performance Appraisal Plan (PAP) controls) for Patent Examiners, but that the Agency's use of some of the controls is inconsistent. The investigation team has not reached a conclusion on the effectiveness of these controls for two reasons. First, as discussed in the section above, interview responses varied on whether interviewees think that T&A abuses are occurring and the investigation has not found any actual evidence of T&A abuse or been able to determine the extent of any such abuse. Without better information it is difficult to measure the efficacy of the controls utilized. Second, the interviews that relate to the effectiveness of the controls are inconclusive. While some interviews suggest that the Agency's controls may not be an effective check on T&A abuse, other interviews and evidence suggests that controls are effective. Many SPEs express frustration with existing controls on T&A. Some of these SPEs report having had at some point an Examiner whom they suspected of not working all the time claimed on the timesheets, though still reporting that they are able to account for and certify time worked by teleworking Examiners. (Exhibit R, questions II.2, III.2, III.7)

1. Institutional Controls

There are non-PAP controls over an Examiner's T&A, such as communication and collaboration tools, discipline, Agency records, and Agency policies such as the T&A reporting policy. These controls are largely the same for on-campus, teleworking and hoteling Examiners, except that for on-campus Examiners, physical presence can serve as an additional control against T&A abuse.

⁴ The number of hours allowed per action is based on an average expected time and the time varies on the expected average difficulty and on the grade of the employee. (Exhibit L, p. 10)

(Exhibit Q, SPE 1). The discussion on non-PAP controls below applies to all Examiners, regardless of whether they are working on-campus or at an alternative work site.

a. Agency Policies

The Agency has various policies to serve as controls on T&A for on-campus, hoteling, and teleworking Examiners. Key policies will be discussed below, along with any objective or anecdotal evidence uncovered regarding their use.

i. Work Schedule Policies

The Agency has approved various work schedules that are each very clear on the hours that Examiners are permitted to work under each work schedule. (Exhibit I). The approved work schedules and the hours that are approved for work can serve as a control on an Examiner's T&A where work schedules are enforced. (Exhibit S, ADC 1). For example, under the increased flextime policy, employees can only work between the hours of 5:00 am and 10:00 pm to meet their 80-hour bi-weekly work requirement (Exhibit J); and when teleworking or hoteling, Examiners must complete six hours of their telework day between the hours of 6:30 am and 6:00 pm. (Exhibit F). Additionally, guidelines require Examiners to submit their work schedule to their supervisors if they are not working the same work schedule regularly. (Exhibit F, p. 8). Patents and the Patent Office Professional Association (POPA) negotiated an agreement on the Patents Telework Program, which states that (1) participants must "indicate on their timesheets (690-E) which days were worked at the alternate worksite;" (2) "participants must identify their telework day in advance and obtain prior Supervisory approval of that day;" and (3) "in order that participants not be disturbed during non-duty hours when at the alternate worksite, participants will notify their supervisor when their work day commences, or prior thereto, of the hours to be worked." (Exhibit F, p. 8). Patents Telework Program (PTP) participants agree to adhere to the terms of this Program document, which can act as a control on an Examiner's T&A. (Exhibit F, Attachment I).

No evidence was found that these work schedule policies are not being enforced or that there is systemic abuse. However, this finding is limited by the fact that employees are required to record the number of hours worked per day but not the time of the day as to when the hours were worked. Some interviews suggest that work schedule policies are not being consistently enforced.⁵ The range of responses suggests that some SPEs are unaware of the policies regarding work schedule.

⁵ For example, ER stated that policies were not being enforced consistently for on-campus, Patents Hoteling Program (PHP) and PTP employees. (Exhibit T, p. 3). Additionally, when SPEs were asked whether they were familiar with the schedule reporting requirements for hoteling examiners, a range of responses were received including "yes," "to an extent" (Exhibit Q, SPE 3), and that they are the same for working on-campus. (Exhibit Q, SPE 4).

ii. Communication Policies

Communication is another control against T&A abuse. Most Assistant Deputy Commissioners for Patents Operations (ADC) said electronic and personal communications are the primary means for SPEs to interact with and validate whether Examiners are working. (Exhibit S, ADC 1, 3, 4). However, there are only limited Agency policies regarding communication requirements for Examiners. For example, for PHP participants, the relevant policy states that Examiners working at an alternative site must “check and respond appropriately to voicemail and e-mail periodically throughout the workday during USPTO business hours.” (Exhibit G, p. 6). The 2013 PTP negotiated union agreement states that Examiners working at alternative sites must “check their USPTO voicemail near the beginning and midpoint of their workday, and respond as appropriate” and will “access USPTO email periodically throughout their workday.” (Exhibit E, p. 2). The relevant policies and negotiated union agreements do not define how often “periodically” means or when is “appropriate” for PTP participants to respond to voicemail. (Exhibit E, pp. 2, 6; Exhibit G, p. 6). The PHP and PTP policy on responsiveness would be a more effective control on T&A if it more clearly defined how often Examiners must check and respond to voicemail and email.

Although some SPEs reported that they have no problem locating their on-campus, teleworking or hoteling Examiners (Exhibit Q, SPE 8, 22), some other SPEs reported that Examiners are sometimes not in their offices and that it is sometimes difficult to locate or contact hoteling or teleworking Examiners. (Exhibit Q, SPE 16, 18, 23). If a SPE could not locate or communicate with on-campus, teleworking or hoteling Examiners at some point during their designated work hours, such inability would not necessarily indicate T&A abuse. There is no policy requiring on-campus employees to work in their offices or teleworking examiners to work at their approved telework location all of the time. Examiners are generally permitted to take their USPTO issued government laptop anywhere on-campus, as well as to work outside of their generally approved telework location, though employees are prohibited from using their USPTO issued laptop outside the United States. As indicated above, there is a policy dictating that an employee should “periodically” respond to a supervisor’s communications, and this policy can serve as a control against T&A abuse. Also, Examiners are generally expected to respond to communications from external customers within one business day. (Exhibit F, p. 7). It is Employee Relations (ER) belief that POPA has reportedly taken the position that “external customers” does not include supervisors, such that Examiners would not be expected to respond to supervisors within one business day. (Exhibit T, p. 4).

The Agency has collaboration tools available to Examiners to accomplish work and communicate with supervisors, such as Office Communicator and the “presence indicator.” For teleworking or hoteling employees, logging onto USPTO’s Virtual Private Network (VPN) allows the Examiner to interface with the agency Collaboration tools, such as instant messaging.

Office Communicator allows employees to communicate in real time with one another; it also synchronizes with the Outlook calendar and the employee's status automatically changes when the employee is on leave or in a meeting, etc. Although not dispositive, the "presence indicator" allows other employees to see when another is "available," "busy," "away," or "idle," and could serve as a check on employees' T&A, if required to be used on-campus, or via VPN if off-campus. (Exhibit T, p. 5). There was previously no policy requiring Examiners to use collaboration tools or log onto the USPTO's VPN when working. (Exhibit E, p. 1; Exhibit F, p. 4). However, pursuant to a Memorandum of Understanding ("MOU") between POPA and USPTO that was signed on June 24, 2013, full-time teleworking employees are now required to use collaboration tools (except the presence indicator). (Exhibit OO). This MOU also requires full-time teleworking employees to use the instant messaging feature of the collaboration tools, which necessarily requires access to the USPTO's VPN in order to have functionality. (Exhibit OO).

iii. T&A Policy

The Agency has a T&A policy which articulates the requirements and procedures for T&A reporting. (Exhibit H). This policy directs that employees are responsible for accurately recording the time actually worked and leave earned and used in 15-minute increments. (Exhibit H, p. 7). Employees are also responsible for validating the entry of T&A information each pay period and affirming that the information is correct, as submitted. (Exhibit H, p. 7). Supervisors are responsible for certifying the accuracy of Examiners' T&A data in a web based T&A system known as WebTA. (Exhibit H, p. 5). This policy does not advise how supervisors are to certify the accuracy of T&A data in WebTA. Note, however, that the Agency recently adopted the *Management Guidance on Certifying T&A*, as discussed below.

There was no objective evidence found of any systemic abuse of reporting procedures. This conclusion is limited though by a lack of records that might point to a conclusion either way. As stated above, while the statements of some Patents managers and the Employee Relations Chief suggest that there may be a problem with T&A abuse routinely occurring with certain Examiners, especially with regard to certain employees working remotely, the statements of other Patents managers were that there was no such abuse.⁶

ER is the unit that provides advice on pursuing employee discipline for conduct and performance issues and assists supervisors in taking disciplinary action. ER reported that they have received

⁶ Some of the interviews support the allegation of systemic abuse of reporting procedures in that some SPEs reported that they have had reason to suspect that at least one of their employees at some point was working less than the total hours claimed on the timesheets. (Exhibit Q, SPE 12). Some SPEs reported that some of their on-campus Examiners are not in their offices when they go to find them and/or that some hoteling and teleworking Examiners take a long time to respond to messages or do not respond at all. (Exhibit Q, SPE 1). Conversely, other SPEs reported that they never had reason to suspect that any of their employees was working less than the hours claimed on the timesheet. (Exhibit Q, SPE 2).

complaints from SPEs about suspicions that some Examiners are not working hours claimed on their timesheet even though they are meeting or exceeding work requirements. (Exhibit T, p. 4). ER also reported that they perceive that SPEs often fail to enforce applicable procedures with respect to these on-campus, hoteling and teleworking employees. (Exhibit T, p. 3).

iv. *Management Guidance on Certifying T&A* (April 2013)

Management is taking steps to control nonresponsive Examiners and take employee discipline actions for those who show indicia of T&A abuse. The ADCs recently developed a guidance document titled *Management Guidance on Certifying T&A* to guide SPEs in managing Examiners who are unresponsive and do not appear to be working at required performance levels. (Exhibit M). The interviews with ER and some ADCs state that the guidance is a response to needs expressed by some SPEs. (Exhibit T, p. 5). The guidance advises that absent any concern or direct knowledge of T&A abuse, managers generally should certify an Examiner's bi-weekly electronic timesheets. (Exhibit M, p. 1). However, if a manager recognizes clear signs of abuse in an Examiner's T&A records, such as the Examiner having low work production in a bi-week, not responding to a supervisor's e-mails or voicemails, and not appearing to be in the office or hoteling during the workday, the guidance advises the supervisor to review the Examiner's production on the first Tuesday of the new bi-week. (Exhibit M, pp. 2-3). If the Examiner's behavior suggests T&A abuse, such as inconsistent workload activity, non-responsiveness to supervisory communications, customer complaints, and failure to follow work schedule requirements, the guidance advises that the SPE should call and/or e-mail the Examiner, and after two days, seek ER's assistance if the Examiner remains unresponsive. (Exhibit M, p. 2-3). At that point, ER will advise charging the Examiner with Absence Without Leave ("AWOL") and begin the disciplinary or adverse action process. (Exhibit M, p. 3; Exhibit T).

Management Guidance on Certifying T&A serves as a control on an Examiner's potential or perceived T&A abuse. (Exhibit T, p. 5). The full effectiveness of the guidance is not yet known as it was only recently distributed on April 17, 2013.

b. Employee Discipline on T&A

The possibility of progressive employee discipline ordinarily should serve as a deterrent against T&A violations or abuse. However, the interview with ER suggests that the level of T&A enforcement through progressive discipline may not be at a level to act as an effective and consistent control against Examiners who meet or exceed work production requirements but who claim time not worked. While there have been some employee discipline cases for T&A abuse, the number of investigations and cases taken – and the overall effectiveness of enforcement as a control against such Examiners claiming time not worked – could not be accurately determined.

Interviews are varied on whether SPEs are enforcing agency T&A policies. Some SPEs reported enforcing policies, such as a SPE who reported going to his Technology Center (TC) Director to discuss an employee suspected of claiming hours not worked and who also reported taking at least two disciplinary actions for on campus employees for misconduct associated with T&A

abuse. (Exhibit Q, SPE 24). Yet, at least one SPE reported that he does not “waste his time” and that he was not “aware of one person who successfully terminated an examiner for time fraud. The belief is that it cannot be done. No one tries. No one wastes their time.” (Exhibit Q, SPE 34).

The investigators could not accurately identify the number of cases in recent years involving Examiners who meet or exceed work production requirements but who claim time not worked. ER and SPE interviews provide some support for the proposition that most discipline for such Examiners is limited to on-campus Examiners, with few disciplinary actions for teleworking and hoteling Examiners claiming time not worked. (Exhibit T, p. 3; Exhibit Q, SPE 3, 16; Exhibit R, Director 19). Yet, there is no corresponding data that is definitive on this point because ER does not specifically track such cases. Furthermore, Patents also uses informal counseling to address suspected instances of T&A abuse, which is not tracked by ER. (Exhibit MM).

Additionally, there is evidence that the number of conduct actions for T&A abuse may be affected by a lack of full access to records that could support T&A cases. The Agency maintains a number of records that ER and some SPEs believe would be useful in a case involving T&A. (Exhibit T, p. 3-5; Exhibit Q, SPE 11, 12). These include “swipe records” that record each employee via the swiping of their USPTO badge as they enter USPTO buildings; computer log records such as internet/email usage; search records; phone records; and “puck” records of employees holding monthly parking passes, which reflect the entry and exit from the USPTO garages. (Exhibit T, p. 3). ER stated that these records can be important tools which, when used together with other information, can provide compelling evidence on the activities of an employee, particularly if employees were required to log on and share work schedules. (Exhibit T, p. 3; Exhibit MM). However, most of the ADCs were skeptical as to the utility and need for records. (Exhibit S, ADC 1, 4, 5). The reason for not wanting to pull monitoring records includes a belief that the records are generally unreliable and a desire to not be seen as “big brother,” through constant electronic surveillance. (Exhibit T, p. 3; Exhibit R, Director 19; Exhibit S, ADC 1, 2). There is no tracking of when or how often such records have been used or denied.

Access to monitoring records is usually requested when ER and the manager believe they have valid concerns about an Examiner’s conduct. (Exhibit MM). Within Patents, approval to pull these records for a Patent Examiner must come from an ADC, and generally, the manager must at least show that they have first warned the Examiner about the misconduct. (Exhibit MM). ER reported the belief that other business units do not have this approval process and usually allow ER to pull any records that would support or disprove the allegations. (Exhibit MM). According to ER, records are only pulled for on-campus Examiners under certain circumstances. (Exhibit MM).

The exact threshold for obtaining records that would support T&A cases is not in a disseminated policy and is unclear. ER and some SPE and Director statements reflect a belief that Patents has either precluded the use of such records or that the threshold for obtaining such records is so high as to effectively preclude investigations and conduct actions for T&A actions. (Exhibit Q, SPE 2, 3, 9, 16, 24, 32, 38, 42, 49; Exhibit R, Director 2-4, 6, 10, 15, 16, 17, 20; Exhibit T, p. 2-3).

ER reported that Patents management stated that they do not want to take cases based on records like swipe in, puck records or computer usage, and often decline to allow the use of records. (Exhibit MM). Furthermore, ADCs report that they have been advised by their supervisors that certain kinds of records like computer and puck records should not be used to verify T&A. (Exhibit S, ADC 1-5). ER also reported that, as a result, they routinely decline to investigate suspected T&A abuse for off-campus employees and fewer T&A actions are taken overall. (Exhibit T, pp. 2-4). Pursuant to the 2003 PTP policy, employee use of Agency equipment (specifically computers), software and other materials is voluntary. (Exhibit F, p. 4). However, the employee is required to access their email periodically throughout the workday and during USPTO business hours. (Exhibit F, p. 4). The updated 2013 PTP policy states that Examiners at the GS-12 grade level and above, with at least one year of continuous USPTO service are permitted to telework twenty (20) hours per bi-week without any computer access, where they can perform work-related activities without use of their computer. (Exhibit E, p. 1).

On one hand, ER stated that without the use of monitoring records, T&A actions for time claimed but not worked are substantially more difficult to support. (Exhibit T, p. 3). ER reported that the only cases taken for time claimed but not worked without the use of monitoring records, is where the Examiner admits to misconduct. (Exhibit T, p. 3). As noted above, however, there also is a desire not to be seen as “big brother,” through the use of electronic surveillance. This may particularly be the case in the context where an Examiner already is meeting or exceeding required levels of work performance.⁷

On the other hand, some SPEs reported successfully pulling records in the past, though the dates of those actions were not noted. (Exhibit Q, SPE 16, 19, 24, 32, 39). Furthermore, a fair number of SPEs believed that management would support them if they wanted to take T&A cases against an Examiner. (Exhibit Q, SPE 6, 12, 14, 17, 19, 20, 22, 30, 36).

Patents management encourages the use of communication and mentoring as tools to combat perceived T&A abuse, and believes them to be effective controls against T&A abuse. When SPEs suspect T&A abuse, they are advised to direct their employees to work or direct them to log in. (Exhibit S, ADC 1). Therefore, currently, T&A enforcement actions for time claimed but not worked are mostly limited to “failure to follow” cases after a Direct to Work order has been issued. (Exhibit T, p. 4). In these situations, the SPE will direct the Examiner to come to work, and if they fail to comply, they will be charged with a “failure to follow” misconduct action. (Exhibit T, p. 4). Additional advice to deal with perceived T&A abuse is provided in the new *Management Guidance on Certifying T&A*. (Exhibit M).

⁷ Examiners have specific productivity and timeliness requirements that can be monitored by the SPE on a daily basis regardless of an employee’s work site location. (Exhibit P; Exhibit U).

2. Employee PAP Controls

Several SPEs cited the Performance Appraisal Plan (PAP) elements as controls available to them to ensure that employees are performing work during work hours, including while working remotely. (Exhibit Q, SPE 10, 13, 14). This section sets forth findings regarding whether the critical PAP elements are effective guards against T&A abuse.

Some complaints generally alleged that management “tolerates” T&A abuse since Examiners are provided multiple opportunities to improve work performance pursuant to the “safety zone” agreement negotiated with POPA, under which an examiner has an opportunity to improve unacceptable performance before being given an oral warning. (Appendix A). There are no records or statistical data to support or disprove this assertion; however, interviews provided some anecdotal information. For example, some SPEs and ER are dissatisfied with the current system of “safety zones,” which is believed to lengthen the time required to deal with poor work performers. (Exhibit Q, SPE 9, 11, 14; Exhibit T). In fact, safety zone letters are intended to allow Examiners’ work performance to fluctuate temporarily without initiation of performance related discipline. (Exhibit JJ; Exhibit T). Because of this, some SPEs and ER contend that Examiners have no incentive to improve performance until the threat of removal kicks in. (Exhibit Q, SPE 9, 14; Exhibit T). These interviews are inconclusive, though, as interviews also show that some SPEs have found that the system in place for dealing with poor performers is effective. (Exhibit Q, SPE 3, 4, 5, 10). Other SPEs viewed this system as “somewhat effective” depending on the employee involved. (Exhibit Q, SPE 16, 22). Finally, while more severe performance actions may take longer under the current system, ER has acknowledged that Patents consistently takes performance actions. (Exhibit T).

Based on these findings, it cannot be concluded that Patents “tolerates” T&A abuse as a result of the established performance structure. Rather, the system established is one that initially focuses on communication, training, mentoring, and rehabilitation to improve deficient performance.

a. Production Element

In 2011, Utility and Plant Examiners received an adjustment of 2.5 hours to their base production expectancy, while at the same time receiving a reduction in credit to other types of work completed. (Exhibit NN, p. 1-3). Many, though not all, of the interviewees felt this was a lessening of work production requirements. (Exhibit Q, SPE 4, 42; Exhibit R, Director 1, 3, 9; Exhibit S, ADC 1; Exhibit T). However, it was pointed out that while the uniform grant of additional production time may not have been needed for Examiners in some art units, other art units needed the additional time to produce quality work. (Exhibit R, Director 9). Along those lines, some interviewees believe that the additional time balances out the increased difficulty of the examining function. (Exhibit R, Director 24).

Some Examiners perform large percentages of their work at the end of the quarter (known as “end-loading” their work) to make up time claimed but not actually worked. (Exhibit T, p. 6). There is no policy that prohibits end-loading. However, it is widely believed that end-loading

produces a lower quality work product and, thus, is not a desired practice. (Exhibit T, p. 6; Exhibit Q, SPE 1, 8)

Though end-loading exists, it was also pointed out that end-loading pre-existed the current PAP. (Exhibit Q, SPE 25, 42; Exhibit R, Director 20). Further, end-loading does not equate to time not worked. For example, the nature of the work on some cases or in certain art units may require longer examining periods before submitting office actions. (Exhibit Q, SPE 37). Also, some Examiners' workflow is to spend long periods on search and examination because they are fearful of quality and want to make their actions perfect prior to submitting it to the SPE. (Exhibit Q, SPE 7, 20, 37, 49). In such cases, Examiners would have fulfilled their bi-weekly hourly work requirement even though they appear to be "end-loading." There is no practical way to immediately distinguish between these situations and end-loading with time not worked. There is no policy that prohibits end-loading and thus there are no conduct cases taken on this basis. (Exhibit T). The 2011 PAP guidelines, which were recently updated on April 11, 2013, state that where an Examiner submits a grossly disproportionate amount of work at the end of a quarter or fiscal year, the Examiner's work may be subject to a heightened quality review. (Exhibit N, p. 43; Exhibit U, p. 44).

Nevertheless, there is some objective evidence that end-loading is occurring. ER compiled data on the number of Examiners who completed over 50% of the total quarter's office actions in the last two pay periods of each quarter in FY 2009 and FY 2012. (Exhibit FF). The same data was pulled for Examiners completing over 70% of the total office actions for the quarter in the last two pay periods of those years. (Exhibit FF). This data, compiled into graph form, indicates that the percentage of Examiners who appear to be end-loading was slowly decreasing in FY 2009. Yet, in FY 2012, the percentage of Examiners who appear to be end-loading increased in all four quarters. (Exhibit FF). However, as already stated, there is no way to determine whether some or all of these Examiners have fulfilled their bi-weekly hourly work requirement even though they appear to be "end-loading."

b. Quality Element

It is widely accepted that consistent work performance throughout the bi-week – rather than engaging in practices such as end-loading – generally produces higher quality work. However, some interviewees disagreed that quality is necessarily negatively affected by end-loading. (Exhibit Q, SPE 18, 24; Exhibit R, Director 3). Though there is no statistical data to support a conclusion that quality is not being consistently enforced as a PAP element, some SPEs stated that they find the element too difficult and complex to apply and enforce. (Exhibit Q, SPE 1, 3, 49). At least one TC has provided assistance to the SPEs by providing quality assistance volunteers to review work at the end of year. (Exhibit Q, SPE 50).

Some interviewees cited the fact that the quality element allows for the use of auto-count, whereby Examiners at the GS-12 grade level and above are able to submit work for credit without prior review, as possibly contributing to T&A abuse. (Exhibit Q, SPE 4; Exhibit R, Director 7). Auto-count allegedly enables Examiners to manipulate T&A by earning production and Docket Management credits for incomplete work submitted as a result of improper end-

loading and making up time previously not worked. Though it is widely believed that this behavior of submitting incomplete actions for credit (known as mortgaging) takes place, such behavior existed prior to the requirements and allowances of the current Examiner PAP. (Exhibit T). That said, ER reports an increase in mortgaging cases taken over the last year and believes the number would be higher, but that most actions for mortgaging are on hold pending further discussions regarding how to address this issue. (Exhibit T). Improper end-loading and mortgaging can be associated with T&A abuse. However, there are also reasons that work may be returned for correction that would not fall under a clear error standard. (Exhibit U, p. 38).

Some data suggests that the perceived increase in mortgaging cases may be attributable to the increased use of auto-count. PALM data pulled and compiled into chart form by ER in Exhibit GG lists the percentage of cases returned for correction in the ceiling exceeded tab, broken down by grade level for FY 2012. The data shows that a high number of Examiners that utilize auto-count have a large percentage of their work returned for corrections. (Exhibit GG). GS-12 examiners make up only 13.6% of all Examiners, but they have 21.9% of total returns and 42.47% of total returns in the ceiling exceeded tab. (Exhibit GG). This is significant because GS-12 Examiners are able to submit all office actions in final form, receiving credit for all non-final actions upon submission, without any quality check. (Exhibit X, slide 27).

c. Docket Management Element

Docket management (DM) is meant to incentivize the movement of cases off the Examiner's docket.

The interviewees' opinions varied with regard to this element. Some interviewees criticized the DM standards as too easy and able to be manipulated (as with mortgaging). (Exhibit Q, SPE 3, 7; Exhibit R, Director 6). Other interviewees disagreed. (Exhibit S, ADC 2, 4). And a couple of the interviewees found the DM system "confusing." (Exhibit Q, SPE 22; Exhibit R, Director 3).

There is some evidence that the DM element does not effectively measure an Examiner's performance or act as a T&A safeguard, as Examiners with overdue cases on their Ceiling Exceeded Tab continue to receive DM awards and be rated fully successful or higher.⁸ For example, Exhibit AA shows the number of Examiners with cases in the Ceiling Exceeded Tab for FY 2012 and reveals that 2,607 Examiners each have between one and six ceiling exceeded cases (totaling 6318 ceiling exceeded cases) and seven Examiners have more than 100 cases each (totaling 1045 cases). (Exhibit AA). PALM data assembled by ER also shows that nearly 800 Docket Management awards were paid out in FY 2012 to Examiners with cases in the Ceiling Exceeded Tab. (Exhibit BB). Similarly, at the end of FY 2012, 3639 Examiners that were rated

⁸ Examiners qualify for DM awards based on their overall DM score. An Examiner may be able to have numerous cases on the Ceiling Exceeded Tab and still be eligible to receive a DM award by timely completing other work for credit. Examiners may work excessive hours or be tempted to mortgage cases in order to meet their DM deadlines.

above 95%, or fully successful, had accumulated a total of 26,216 ceiling exceeded cases. (Exhibit HH).

Despite the above, DM is a new element and it is believed that the element will be refined and strengthened over time. (Exhibit S, ADC 3, 4). On April 1, 2013, it was announced that USPTO and POPA agreed to changes that would strengthen the DM element. (Exhibit W). The changes are intended to specifically address the growing number of ceiling exceeded cases. (Exhibit W). The changes include more cases being moved off of the Ceiling Exceeded Tab to the Docket Management Plan Tab, which imposes increased penalties for an Examiner's failure to act on the case, as well as increased penalties for cases reaching their ceiling control number. (Exhibit W).

II. RECOMMENDATIONS

While this investigation found the interview responses inconclusive as to whether T&A abuse is occurring and found no records that could be relied upon or referenced to support such a finding, it did point out a number of areas that would benefit from improvements. To the extent that any of the following recommendations contemplate USPTO management potentially changing the terms and conditions of employment of bargaining unit members, the Agency would need to evaluate any potential obligations or standard practices involving labor unions.

1. *Management Guidance on Certifying T&A* (April 2013)

Patents should closely monitor the effectiveness of its new policy, *Management Guidance on Certifying T&A* that was distributed on April 17, 2013. This policy gives guidance and tools to help ensure proper completion of T&A, and to guard against T&A abuse. For example, the policy outlines a series of steps for a manager to take when suspecting an Examiner has not worked an entire 80-hour bi-week. This is a new policy and thus there has not been an opportunity to evaluate its implementation or effectiveness, and so feedback should be gathered and this course of action adjusted and improved as needed.

2. Communication Tools

The USPTO and POPA recently reached an agreement making the use of collaboration tools (except the presence indicator) mandatory for full-time teleworking Examiners. Among the mandated collaboration tools is instant messaging, which necessarily requires the use of USPTO's VPN in order to function. This should allow supervisors to better communicate with Examiners in real time when necessary. The USPTO should evaluate the effectiveness of these recent requirements and continue to explore whether further changes are necessary. Where appropriate, management could enforce these policies by addressing those known to not adhere to the rules and enforcing consequences for them. Management should also consider issuing a guide to best practices when teleworking to all employees participating in one of the Agency's many teleworking programs, and/or creating a teleworking awareness campaign on the USPTO's Intranet site, including a "Teleworking Tips of the Month" or something similar.

3. Quality Element in PAP

Examiners who provide a consistent work product spread over a bi-week, rather than making up time worked at the end of a quarter, are generally believed to have a higher quality of work product. However, many SPEs report that the quality element is too complex and difficult to enforce and, as such, this element can be overlooked and quality issues may not be properly addressed. Thus, this element does not appear to provide a strong deterrent to improper end-loading (which can be indicative of T&A abuse). The USPTO should explore increasing training on this element, revising this element so that SPEs can more meaningfully apply and enforce the standards, and increased use of Technical Quality Assurance Specialists (TQAS) resources to provide reviews as is currently being done in at least one TC. Consideration of whether the auto-count allowances set forth in the PAP are contributing to improper end-loading and mortgaging should also be given. Finally, management should consider following the reopening provisions for the Examiner's PAP, as outlined in the October 22, 2010 MOU between POPA and USPTO, on issues related to the Examiner PAP. (Exhibit V). This provision requires that, at the request of either party, POPA and management shall meet in order to assess the need for further changes to the Examiner PAP. (Exhibit V, p. 10)

4. Docket Management Element in PAP

The USPTO and POPA recently reached an agreement to revise the DM standard to address the increasing number of cases that are at or above the ceiling control number. The USPTO should continue to evaluate the DM element after implementation of the recent changes and explore whether further steps are necessary to strengthen the DM element.

5. Overtime Reporting

There is no requirement that an Examiner specifically identify particular work product produced on overtime hours. The USPTO should explore the reasonableness and utility of a requirement that Examiners specifically identify or designate such work produced on OT hours rather than simply relying on work production reports as proof of time worked.

6. Use of Records

Cases for violations or T&A abuse should be referred to ER, consistent with the new *Management Guidance on Certifying T&A*.

Patents should communicate to ER and supervisors its policy regarding pulling and using records in support of T&A cases against Examiners who meet or exceed work production requirements. If there is a threshold showing necessary prior to pulling and using records in such situations, Patents should identify clearly that threshold to both ER and supervisors. Finally, Patents and ER should examine and discuss whether that threshold impedes T&A cases and should be revised. Patents should consider providing a centralized contact person for communicating with ER on this subject.

7. Consolidation of Memoranda and Policies

During the investigation, it was realized that the numerous policies and memoranda relating to the relevant rules and regulations at the USPTO were sometimes difficult to find. Many of those interviewed did not know the particular requirements of programs they are tasked with enforcing. It is recommended that the USPTO place current policies and memos in a central location and remove outdated and non-applicable materials. Additionally, the policies and memos should be systematically reviewed and updated as necessary. Changes and updates should continue to be communicated to SPEs and employees.

8. Supervisory Training

The USPTO should provide regular training to supervisors on the requirements of the various flexible work policies, including how to monitor and enforce accurate T&A reporting under the new *Management Guidance on Certifying T&A*.