

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE UNITED STATES PATENT AND TRADEMARK OFFICE
AND NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 245
TM GS-9/11/12 PERFORMANCE APPRAISAL PLAN**

The United States Patent and Trademark Office (“Agency” or “Office”) and National Treasury Employees Union, Chapter 245 (“Union” or “NTEU”) agree to the following Memorandum of Understanding (“MOU”) with respect to the Performance Appraisal Plan for GS-9/11/12 Examining Attorneys.

This MOU includes agreements between the parties, as well as provisions ordered by the Federal Services Impasses Panel in its May 30, 2008, decision in Case Nos. 07 FSIP 89 and 91.

I. GENERAL

1. Management will comply with any obligations under the Federal Service Labor-Management Relations Statute and any existing collective bargaining agreements to the extent required by law.
2. The 1997 PAP and the January 30, 1997, PAP Management Implementation Guidelines shall remain in effect until the parties have reached agreement on all issues of impact and implementation of the proposed PAP to the extent required by law. The new PAP will go into effect no earlier than October 1, 2008.
3. Rating officials will assign a performance rating that is fair and reasonable under the circumstances when an application of the rating system leads to an unfair or unreasonable overall performance rating. When rating any examining attorney under performance appraisal plan standards, a supervisor should ensure that special circumstances do not exist which would require adjustment, and that he or she assigns an overall rating that would be fair and reasonable given the examiner’s particular circumstances.
4. Performance standards shall be applied in a fair and reasonable manner.
5. If a lack of work impacts an attorney advisor’s rating for performance at the Fully Successful, Commendable or Outstanding levels in the Production element, an appropriate adjustment shall be considered to enable attorney advisors to potentially perform at all enumerated performance levels.
6. To ameliorate the adverse impact on a union representative’s ability to meet performance standards while performing authorized representational activity, as well as the adverse impact on attorneys caused by a representative’s inability to perform representational activities without such consideration, management will not place the representative at a disadvantage in appraising performance due to the time spent performing representational activities.
7. Authorized time spent performing Union representational functions will not be considered as a negative factor in evaluating any critical or non-critical element.

8. The assignment of a performance rating to a union representative depends on his or her representational status. If an examining attorney performs his or her representational duties on a part-time basis, his or her performance rating should be based only on his/her job related duties. For example, if a representative's time is divided into 80% work activities and 20% union activities, a manager must look at the 80% as if it were 100% for purposes of a performance rating and recognition. If an examiner performs representational duties on a full-time basis, the examiner is unrateable and cannot receive a performance rating.

9. The Office will continue to provide real-time production reports to examining attorneys.

10. The Office will maintain records used to determine performance ratings in accordance with applicable federal government regulations relating to records retention. Management will consider resolving examiners' complaints concerning the accuracy of the performance records.

11. It is the responsibility of the Office to maintain the computer system in working order.

12. If a rating official becomes aware of any deficiency or error that will be used in a performance appraisal, he/she must disclose the facts concerning the deficiency to the examining attorney as soon as practical, normally within two weeks from when the rating official becomes aware of the deficiency.

13. Management shall make available to NTEU 245 all records that could reasonably show whether performance standards were selectively enforced pursuant to a request under 5 U.S.C. 7114(b)(4).

14. The Office will provide to NTEU 245 data for all proposed performance-based actions, performance-based actions, proposed adverse actions, adverse actions, and denials of within grade promotions pursuant to a request under 5 U.S.C. 7114(b)(4).

15. Management will consider all requests for adjustments and may grant reasonable adjustments as appropriate. Management may grant reasonable adjustments if appropriate to production requirements for those with extended absences from the office due to illness, disability, maternity/paternity, or part-time schedules. Management may grant reasonable adjustments if appropriate to production requirements for mentoring, details and work projects, jury duty, and military leave.

16. To fully support the Office's production and quality goals under the new PAP and consistent with the Office's longstanding practice, the "initial pre-production training period" for newly-hired GS-9/11 examining attorneys may be defined as a minimum of 12 weeks, or 60 business days, not including Federal holidays.

17. In order to facilitate the transition from training to a production environment, the Office may provide a biweekly adjustment during the first quarter following the pre-production training period depending on the Office's determination of the needs of the particular training class.

II. PRODUCTION

A. Balanced Disposals

1. Retroactive first action class credits will not count towards any first action cap. Retroactive first action credits will be given for any classes added to an application once the additional fees are paid.
2. All standards under the PAP will be adjusted on a pro-rated basis for part-time employees.
3. If any electronic application malfunctions or fails to operate properly, it is within management's discretion to make reasonable adjustments to production requirements as appropriate.
4. Attorney advisors shall continue to be provided with the examiner activity report modified to measure performance under the new PAP. Management may consult with the Union regarding the content and format of the modified activity report.
5. If a new attorney advisor begins production on a date that does not correspond with the beginning of a quarter, then the goals for the remaining time will be prorated. If the abbreviated quarter is deemed to consist of sufficient time (or if the abbreviated quarter is at the end of the attorney advisor's rating year), the attorney advisor will receive a production score for that abbreviated quarter. If the abbreviated quarter is deemed to consist of an insufficient time to base a production score, then the abbreviated quarter will be combined with the following quarter (unless the abbreviated quarter is at the end of the attorney advisor's rating year).
6. Attorney advisors should monitor the number of first actions completed and promptly request a waiver to the production cap if needed. Management will notify attorney advisors promptly of their decision on a request for a waiver of the production cap.
7. Supervisors will favorably consider requests for waivers to the production cap. Consideration will be given to employees who have worked overtime, credit hours or compensatory time during the bi-week.
8. Adjustments may be made during the rating period or at the end of the rating period, as appropriate.
9. Management will notify attorney advisors before withdrawing credit for any reason during the last two weeks of any quarter. The attorney advisor may timely present any information he or she would like management to consider prior to a decision to withdraw credit.
10. Under the following guidelines, and except as otherwise noted below, GS-12 examining attorneys may transfer to the current quarter a maximum of 50 balanced disposals from the quarter immediately proceeding it, so long as the examiner's production for both the current and previous quarters is at least Marginal:

- a) During the first two weeks of the second quarter of the fiscal year, the GS-12 examiner may transfer up to 50 BDs from the BD totals of the first quarter to the BD totals of the second quarter or may transfer 25 BDs to be earned in the second quarter into the first quarter. During the first two weeks of the third quarter of the fiscal year, the examiner may transfer up to 50 BDs from the BD totals of the second quarter to the BD totals of the third quarter. During the first two weeks of the fourth quarter of the fiscal year, the examiner may transfer up to 50 BDs from the BD totals of the third quarter to the BD totals of the fourth quarter.
- b) The request must be made in writing before the end of the two-week period.
- c) The score for the quarter will be determined once the BD transfer has been given effect. In no case may the total BDs for the year before and following the transfers differ. In the event that BDs are transferred to a previous quarter, the subsequent quarter will have a negative BD balance until such time that the examiner has produced sufficient BDs.
- d) No BDs may be transferred if the examiner's total number of BDs in either the transferring or receiving quarter is below Marginal. An examiner may not transfer BDs into any quarter that the examiner is subject to a performance improvement plan. No BDs may be transferred between rating years.
- e) The transfer of BDs is for the determination of the quarterly score only and will not be considered in connection with the level of award for which the examiner is eligible. The transfer of BDs into any quarter will not be considered for a determination of eligibility for either a within grade increase or a promotion.

GS-9/11 examining attorneys may not transfer balanced disposals.

B. Docket Management

1. In computing periods of time prescribed or allowed in the PAP, the day of the act, event, or occurrence from which the designated period of time begins to run shall not be included. Where the last day of any time period for taking an action falls on a Saturday, Sunday, or holiday, or where the Office is closed for business for all or part of the business day, the action would not be considered overdue if completed on the next business day.
2. For an attorney advisor without signatory authority to issue a particular action, the time for an action to be completed will be tolled during the time that the application is with the attorney advisor's mentor or supervisor for review of the attorney advisor's proposed action.
3. Supervisors will consider requests for extension of time for completion of cases so long as the request is made in advance of the deadline for taking action. Requests will be considered on a case-by-case basis.
4. If a file is delivered to an attorney advisor while the attorney advisor is on leave, the date of delivery will be interpreted as the date the attorney advisor returns to a duty status.

5. If an attorney advisor feels unable to meet the processing times set forth in the PAP, he or she may request an extension in advance of the deadline. The processing times may be extended on a case-by-case basis by the manager for new and amended applications, and for applications returned for correction and abandonment.
6. All docket management deadlines will be applied in a fair and reasonable manner.
7. An application where the Office of Trademark Quality Review (TQR) has identified an error will not be considered to have been returned to the attorney advisor merely due to the receipt of notice of the error from TQR. The application will be considered to have been returned to the attorney advisor when the attorney advisor's supervisor instructs him or her to take corrective action.
8. An attorney advisor will be notified (such as by e-mail) when a new application that was not electronically requested by the attorney advisor (e.g., a special mark or copending application) is placed in his/her electronic queue or otherwise assigned.
9. Supervisors may consider the following as potentially valid reasons for extending the processing times for applications:
 - a) A supervisor directs the attorney advisor to perform other duties that prevented taking timely action on an application;
 - b) Material necessary for the preparation of an action (such as information from the library or translations department or a file from the warehouse) has not been provided to the attorney advisor though requested in a timely manner;
 - c) The record of the application requires correction due to data entry errors committed by a party other than the attorney advisor that prevented action from being completed;
 - d) A subsequent response must be entered by other Office personnel prior to the action being taken;
 - e) The applicant or applicant's attorney requests a conference, intends to file a subsequent response, or intends to notify the attorney advisor of amendments or provide other information which would potentially change the status of the application within a definite and brief time period of the date the application is due for action;
 - f) On a case-by-case basis, if the attorney advisor is handling any portion of another attorney advisor's amended docket and makes a request in advance of the deadline;
 - g) The attorney advisor is absent on approved leave for a significant period of the time available to take the action, or on the day the application is due for action the attorney advisor is on leave due to illness, incapacity or personal emergency;
 - h) The file requires scanning so that its entire contents may be displayed in TICRS;
 - i) Completion of the action is dependent upon the action of Office personnel over whom the attorney advisor has no control, and the actions have not occurred as intended to such an extent that the ability to complete the work is hampered;

- j) Electronic systems required to complete the action are unavailable for a significant period of the time available to take action;
- k) The attorney advisor has spoken with or exchanged e-mails with the applicant or applicant's attorney and an agreement which put the application in a condition for approval or allowance is imminent.

10. In seeking to establish the manner in which an application was handled, the managing attorney should seek input from the attorney advisor before drawing any conclusions. If and when the managing attorney concludes that an application was improperly handled (i.e., that a delay will not be excused), written notice of that finding should be given to the attorney advisor.

C. First Actions

In the component of First Actions, if the attorney advisor has taken on at least one-half (1/2) of the docket of another examining attorney, but has not met the First Action requirement, management may consider adjusting the First Action requirement for an appropriate length of time.

III. QUALITY

1. For attorney advisors with partial signatory authority or probationary full signatory authority, a minimum of nine Office actions per quarter that were not reviewed prior to issuance will be reviewed. All such files will be randomly selected from a computer-generated list of Office actions taken during the rating period.
2. Findings by OTQR of excellent writing or evidence may be considered in determining an attorney advisor's rating in the Quality element.
3. An attorney advisor will be provided with copies of all mentor reports used in the evaluation of the attorney advisor's rating in the Quality element in a timely manner. Any instances of errors or deficient quality that are considered in the attorney advisor's rating in the Quality element will be communicated to the attorney advisor as soon as practical, normally within two weeks from when the rating official becomes aware of the deficiency.
4. An attorney advisor may request that the supervisor review and consider in the Quality element rating additional Office actions that were not reviewed prior to issuance. The supervisor will determine whether such additional review is warranted under the circumstances.
5. Management will take into consideration errors within a file previously handled by another attorney advisor. If an attorney advisor takes over an application previously assigned to another attorney advisor, managers will consider whether there was an opportunity for the attorney advisor to take corrective action on any errors. Management will further consider whether the attorney advisor, in complying with accepted office procedures and policies in processing the inherited application, should have been expected to discover the errors.
6. The Office shall identify the source of a finding of error, but not the name of the individual, and explain the reasons for determinations of error in writing upon request.

7. The Office will provide examining attorneys with samples of excellent Office actions that include references to the form paragraph numbers that have been used. The Office Actions will include the following issues: (1) disclaimers; (2) identification of goods and services; (3) specimen refusals; (4) drawing requirements; (5) surname refusals; (6) descriptiveness refusals; (7) likelihood of confusion refusals; (8) ornamental refusals; (9) title of a single creative work refusals; and (10) geographically descriptive refusals. The Office will continue to provide, via the TQR website, sample documents that demonstrate the difference between Excellent, Satisfactory and Deficient Office Actions.

8. Supervisors will take care not to distribute confidential individual performance statistics, including lists or summaries without names, in such a manner that an attorney advisor's individual statistics would likely be revealed to other bargaining unit members.

9. Any error or deficiency finding on work completed before implementation of the new GS-9/11/12 PAP will not count toward the performance rating for GS-12 examiners under the new PAP. Those errors or deficiencies can be counted as appropriate under the current PAP for purposes of progress review and can be considered in the final rating for the year.

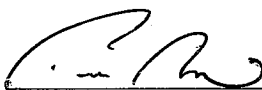
IV. CUSTOMER SERVICE AND ORGANIZATIONAL EFFECTIVENESS

Section 66(a) applications will not be counted towards the denominator of the phone percentage calculation. Also, examiner's amendments include combined examiner's amendments/priority actions (EA/PAs).

V. BONUS

The Memorandum of Understanding of 1/17/07 and its attachments shall apply.

FOR THE AGENCY



Tomas Vlcek
Chief Negotiator

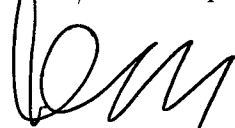
9/2/08
DATE

FOR NTEU



Iryll Umel
National Field Representative

9/2/08
DATE



Howard Friedman
President, NTEU 245

9/9/08
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