United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF COMMERCE PATENT AND TRADEMARK OFFICE ALEXANDRIA, VIRGINIA and PATENT OFFICE PROFESSIONAL ASSOCIATION	Case No. 08 FSIP 78

DECISION AND ORDER

The Patent Office Professional Association (Union or POPA) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of Commerce, Patent and Trademark Office, Alexandria, Virginia (Employer).

Following an investigation of the request for assistance, which arose during negotiations over the impact and implementation of the Employer's eRed Folder system,[1/] the Panel determined that the issues should be resolved through an

1/ According to an Employer announcement concerning the new technology, the eRed Folder is the next step to a paperless office. It is designed to automate the paper process of patent examining by gathering office action documents electronically and allowing patent examiners to submit office actions for review and electronic signature. After preparing the eRed Folder, examiners would post the completed electronic office actions for counting by support staff who would then transmit the patent information to the applicant or the applicant's representative. The Employer began to roll out the new eRed Folder program in January 2008, and trained examiners unit-by-unit; the program was fully implemented in March 2008.

informal conference with Panel Member Barbara Bruin. The parties also were notified that if no settlement were reached, Member Bruin would notify the Panel of the status of the dispute, including the parties' final offers and her recommendations for resolving the impasse. After considering this information, the Panel would resolve the matter by taking whatever action it deemed appropriate which could include the issuance of a binding decision.

Pursuant to this procedural determination, Member Bruin conducted an informal conference with the parties on September 9, 2008, in the Panel's offices. While efforts were undertaken to reach a voluntary settlement, most of the issues remained unresolved. At the close of the meeting, the parties submitted their final offers, and they were given until September 19, 2008, to file post-conference statements of position.[2/] Member Bruin has reported to the Panel and it has now considered the entire record, including a motion by the Union for an alternative procedure for resolving the issues and a request that the Panel compel the Employer to provide certain documents which the Union initially had requested as part of a grievance.

BACKGROUND

The Employer's mission is to issue patents and register trademarks. The Union represents a bargaining unit consisting of approximately 6,000 professional employees most of whom are patent examiners. The parties are covered by a master collective-bargaining agreement (MCBA) that was effectuated in 1986. They are currently in the process of negotiating a successor term agreement.

ISSUES

In addition to the preliminary matters raised by the Union in its motion discussed below, the parties disagree over numerous issues under the following general categories: (1) a preamble for the agreement; (2) determining the supplemental

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2/ At the Union's request, the length of the parties' post-hearing briefs was increased from 15 to 20 double-spaced pages to permit the Union to provide information on issues which it believed were not fully addressed during the informal conference. No limitation was placed on the number of documents the parties could attach to their briefs.

learning time for employees to use the eRed Folder system and compensating employees for supplemental learning time; (3) training procedures; (4) accounting for lost work or extra work; (5) crediting and counting examiner work products; (6) tracking of cases in the eRed Folder system; and (7) recommending deployment improvements for the eRed Folder system.

PRELIMINARY MATTERS

On September 16, 2008, the Union submitted a motion requesting that Member Bruin convene a fact-finding hearing to take evidence and hear testimony on Union proposals that were not discussed during the informal conference as well as a new Employer proposal submitted for the first time during the meeting.[3/] The Union contends that because the informal conference focused on those issues that were most likely to be resolved voluntarily, other issues of greatest importance to the Union were not addressed. Thus, the Union requests a formal fact-finding hearing to elicit facts and testimony, particularly in regard to Union proposal number 1, a mathematical formula for determining whether the eRed Folder system adversely affects employee productivity, and Union proposals 16-19, concerning the impact of productivity on performance appraisals. In the Union's view, a formal hearing would allow the Panel Member to understand more fully the Union's proposals and place her in a better position to make a recommendation to the Panel on the resolution of the issues. The Union also requests that Member Bruin compel the Employer to provide information concerning productivity statistics. It believes the data would provide support for its claim that the implementation of the new eRed Folder system, which compels patent examiners to perform "clerical" duties, is taking time away from their job of examining patent applications and, therefore, has adversely affected employee productivity.[4/]

3/ The Union refers to Employer proposal number 10 which, essentially, is a restatement of management's statutory obligation to provide the Union with information. The proposal states: "The agency will provide information regarding eRed Folder consistent with its obligations under 5 U.S.C. § 7114(b)(4)."

4/ According to documents it submitted to the Panel, the Union first requested this data from management on August 8, 2008, as part of the grievance it filed over the implementation of the eRed Folder system prior to the completion of bargaining. The Employer responded by

On September 19, 2008, the Employer submitted an opposition to the Union's motion urging the Panel to deny the request for a fact-finding hearing and to refuse to intervene in the Union's efforts to obtain the productivity data. As to the fact-finding hearing, the Employer maintains that the Union's request is "a veiled attempt to appeal the Panel's selection of the appropriate process" for resolving the dispute, a determination that may not be challenged as the Panel has the authority to take whatever action it deems appropriate to resolve an impasse. It further contends that while most of the time during the informal conference was spent addressing issues primarily related to training, the parties were given an opportunity to file briefs, increased to 20 pages in length at the Union's request, to further explain their positions on all issues. Thus, a formal fact-finding hearing is unnecessary for the Union to explain its position on the issues. Concerning the Union's efforts to have Member Bruin intervene in the Union's request for the production of documents, the Employer maintains that the Panel should not interject itself in the matter because the information request relates to the Union's grievance over the implementation of the eRed Folder system and not the Panel's proceeding. To date, the Employer continues to review the Union's request for the production of data but has not made a final determination. Accordingly, there currently is no dispute and the Union does not contend that the Employer has failed to meet its statutory obligation to provide the information. It is not the role of the Panel to compel the production of documents as part of an informal conference. Ultimately, should the Employer deny the Union's request for information, the Office of the General Counsel, Federal Labor Relations Authority, would decide whether the Employer has met its statutory obligation under 5 U.S.C. § 7114(b)(4).

After considering the Union's motion and the Employer's response, the motion is hereby denied. As to the request for a fact-finding hearing, we conclude that an additional procedure is unnecessary because the Union has fully explained during the informal conference and in its brief its proposals and position on the unresolved issues. With respect to the production of

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memorandum dated August 18, 2008, that the request was under review. During the informal conference, the Union renewed its request for the data, and management again responded that the request was "under review" but added it believed there were legal impediments that ultimately would prevent the release of the data to the Union.

information, it appears the Union first requested the data on August 8, 2008, as part of an institutional grievance it initiated on January 28, 2008.[5/] Many of the Union's allegations in the grievance re-appear as Union proposals in the case before the Panel. The information requested by the Union in the grievance, essentially, concerns data on training provided to examiners on the eRed Folder system, practice time permitted and production statistics for examiners in the pilot training program that show their biweekly productivity before the eRed Folder system was implemented and their biweekly productivity just after the new system went into effect. While the information requested in the grievance also relates to the Union's proposals, we conclude that the record before the Panel already contains sufficient information to resolve the parties' dispute.[6/] Accordingly, we shall not intervene in the Union's efforts to obtain data from the Employer.

5/ The grievance alleges that the Employer implemented the eRed Folder system prior to the completion of bargaining and made changes in how office actions are counted for credit to meet performance requirements; it further alleges that examiners received inadequate training on the new system, and that management has changed procedures for retrieving and correcting office actions, all in violation of the MCBA. The Union requests a variety of different remedies for the contractual violations it alleges, among them: (1) "That the USPTO make whole any examiners whose workflow or production achievement was negatively impacted by implementation of the eRed Folder (eRF) system"; and (2) "That the USPTO pay examiners overtime based on the extra time beyond two hours worked to learn the system, apply the system to generate their work or to overcome problems due to the system where an examiner can estimate the time needed or else calculate their loss of production."

6/ Moreover, it is unclear whether the information the Union requests actually exists, whether there would be a burden on management to produce the documents, and if there are any legal impediments to the disclosure of the data, including those outlined in 5 U.S.C. § 7114(b)(4) of the Statute.

POSITIONS OF THE PARTIES

1. Preamble

a. The Union's Position

The Union proposes the following:

> The United States Patent and Trademark Office (USPTO or agency) has implemented the eRed Folder System throughout the POPA bargaining unit and is requiring employees to submit their work products in electronic form using the electronic Red Folder system (eRF or eRed Folder) rather than submitting office actions in paper form. [POPA] has determined that some of the impacts from this implementation are to delay credit or counting of examiner work product[s], to allow technical support staff members to deny and/or delay credit or counting of examiner work products and to eliminate any correction cycle after counting until mailing throughout the entire POPA bargaining unit. This agreement between the USPTO and [] POPA constitutes the agreement of the parties on the impact and implementation of the eRed Folder program.

The Union contends that the provision is important because it informs the reader of the purpose of the parties' agreement and the effect of the implementation of the eRed Folder system on bargaining-unit employees' working conditions.

b. The Employer's Position

The Employer does not have a counter offer. It asserts that the Panel should order the Union to withdraw the proposal because it contains erroneous information. In this regard, the Employer disputes the Union's claims that the eRed Folder system changes how work is credited or that eliminates the "correction cycle."

CONCLUSIONS

Having considered the parties' positions, we shall order the Union to withdraw its proposed preamble. No useful purpose would be served by imposing wording that includes disputed factual information regarding the impact of the eRed Folder system on employee working conditions. Such matters are more appropriately addressed and resolved through the institutional

grievance the Union initiated on January 28, 2008.

2. Determining Supplemental Learning Time and Compensating Employees for Supplemental Learning Time

a. The Union's Position

The Union's proposal is as follows:

1. Since management has already implemented the eRed Folder system and examiners have had to supplement the training provided, examiners will be compensated for that supplemental learning by recognizing the following amount of learning time:

$$\{HRS_2 - ACTS_2\ (HRS_1 \div ACTS_1)\} \div EXRS$$

HRS_1 = Total Examining Hours in the Tech Center for the bi-week prior to the bi-week in which use of eRed Folder system became mandatory

HRS_2 = Total Examining Hours in the Tech Center for the bi-week in which mandatory use of the eRed Folder system was first required

$ACTS_1$ = Total Number of Actions in the Tech Center for the bi-week prior to the bi-week in which mandatory use of eRed Folder system was required

$ACTS_2$ = Total Number of Actions in the Tech Center for the bi-week in which mandatory use of the eRed Folder system was required

EXRS = Total Number of Examiners in the Tech Center

Because the examiners had to meet their production goals on a quarterly basis, the parties estimate that the supplemental learning time identified above is the amount of unpaid overtime each examiner worked to meet their production goals as a result of the eRed Folder system implementation. The parties agree that each examiner shall be granted back pay for this previously unpaid overtime within 1 month of this agreement.

In the alternative, the Union asks the Panel to direct the parties to resume negotiations over the proposal because they have not reached a bargaining impasse on the issue.

The Union's proposal would provide an objective determination of whether examiners are being adversely affected by the implementation of the eRed Folder system by contrasting actual production time and production statistics in the weeks before and after implementation of the eRed Folder system. This ultimately may demonstrate that examiners require additional training time on the eRed Folder system if their production level shows a decline in the bi-week following implementation of the system. As to the compensation aspect of the proposal, it is only fair and equitable to compensate examiners monetarily for time lost when they had to train themselves "on the fly" and "develop workarounds to make the eRed Folder system operate correctly while at the same time having to meet their production and workflow standards." As to the Union's alternative position that the Panel direct the parties to resume bargaining over the proposal, the Employer also acknowledges that the parties are not at impasse on the issue and, therefore, the Panel should permit the parties to engage in further bargaining and mediation, as necessary.

b. The Employer's Position

The Panel should decline to retain jurisdiction over the Union's proposal and the parties should not be ordered to negotiate over it. In the Employer's view, the proposal is nonnegotiable because it is not an "appropriate arrangement," under 5 U.S.C. § 7106(b)(3), for employees adversely affected by the exercise of a management right. In this regard, the proposal is not properly tailored only to affected employees because it assumes that every examiner was "equally adversely affected" by the implementation of the eRed Folder system; accordingly, the proposal does not meet the legal criteria for negotiability. Furthermore, the monetary remedy for "voluntary overtime" that would be required by the proposal is illegal because no law exists that authorizes such payments. The Employer cannot voluntarily waive its sovereign immunity and the Panel does not have the authority to impose a provision that would subject the Agency to a suit over a compensation matter unless Congress enacts a law permitting this.

CONCLUSIONS

After carefully evaluating the parties' positions on the issue, we shall decline to retain jurisdiction over the Union's proposal. Regardless of whether bargaining has been completed or the proposal is negotiable, monetary compensation for lost examination time, if any, in connection with the implementation

of the eRed Folder system has been requested by the Union as a remedy in an institutional grievance that was initiated prior to the Union's request for Panel assistance in this case. While a party is entitled to pursue its interests in an appropriate forum, it is not entitled to pursue essentially the same interest in two forums.

3. Training Procedures

a. The Union's Position

The Union proposes the following:

2B. For all other examiners who missed the original eRed Folder implementation training for a reason approved by management, management will provide up to date training for the eRed Folder system wherein the content of the training is substantively equivalent to the training given during the winter 2007/2008 Patent Training Academy sessions with respect to the main eRed Folder software and the adaptations of other software necessary to coordinate with the eRed Folder software.

2C. For rehired examiners who were not employed by the USPTO at the time of the initial eRed Folder implementation training, management will provide up to date training for the eRed Folder system wherein the content of the training is substantively equivalent to the training given during the winter 2007/2008 Patent Training Academy sessions with respect to the main eRed Folder software and the adaptations of other software necessary to coordinate with the eRed Folder software.

4. Normally, at least 1 week prior to an employee's scheduled eRed Folder training, except for employees in the Patent Training Academy or its successor, the employee will be provided with notice of their training and any make-up sessions for this training along with copies of the eRed Folder Training Manual and either copies of or electronic links to at least the eDAN Quick Reference Guide, the OACS File Wrapper Forms Quick Reference Guide, the eRF New IDS Stamp Quick Reference Guide, the Adobe Acrobat Professional Quick Reference Guide, if still applicable to the eRed Folder system.

> 6. Time an examiner spends for management approved training on the usage of the eRed Folder system shall be accurately recorded and separately accounted for by the agency.
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> 7. Normally, at least 1 week prior to deployment of upgraded or enhanced automation tools associated with the eRed Folder system, each employee will be provided with notice of their training, if any, and any make-up sessions for this training along with at least detailed Enhancement Guides describing the upgrade(s) or enhancement(s) to each system, including screen shots of any new pop-up boxes or enhancements which were made as well as clear instructions for performing any newly added functions or for using newly added features. Each employee should also be provided with a short, detailed summary of the enhancements and/or changes which were made and what functions they are replacing. Management shall positively state the amount of time, including none, necessary for the employee to become familiarized with the upgrade(s) or enhancement(s).

Newly-hired patent examiners who received training on the eRed Folder system at the Patent Training Academy were given better and more comprehensive instruction than the rest of the patent corps; therefore, proposals 2B and 2C, which seek "substantively equivalent" training as that provided at the Academy, would rectify any disparities in the training process. The proposals would ensure that former examiners, who now have been rehired, and examiners who may have missed the initial eRed Folder training, receive consistent training on all aspects of the eRed Folder system equivalent to that received by new examiners. Furthermore, the proposals underscore the requirement in the MCBA for "fair and equitable" treatment of all bargaining-unit employees. Proposals 4 and 7 would allow examiners to have copies of, or access to, training materials before the training sessions so they do not come to the sessions "cold." This would ensure that examiners have more productive training sessions. Distributing training materials in advance of training sessions also would not cause an undue burden on management and would accommodate the varying learning speeds of bargaining-unit members, some of whom are not as skilled on the computer as others. Providing examiners with at least 1 week notice of training would allow them to schedule their work better. Finally, proposal 6 would enable the Union to track the amount of time devoted to eRed Folder training to determine

whether examiners are being treated fairly and equitably, as the CBA requires. In this regard, the Union suspects that clerical employees were given substantially more eRed Folder training and permitted a 90-day learning curve (*i.e.*, adjustments to performance standards) whereas patent examiners where given considerably less training and no relaxation of performance standards.

b. The Employer's Position

The Employer proposes the following:

> 1B. For examiners who missed initial implementation training for a reason approved by management, management will provide up to date training for the eRed Folder system wherein the content of the training is substantively equivalent to the training given during the initial deployment.
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> 2. The Office will issue guidelines to supervisors concerning the assignment of the appropriate eRed Folder training for Examiners. Examiners will be responsible for applying the skills conveyed in the training to perform their job duties.
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> 4. Appropriate training and reference materials on eRed Folder updates or enhancements will be provided as determined by management.
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> 6. The parties recognize that it is desirable to provide eRed Folder training and materials in advance of deployments, updates, and enhancements.
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> 7. Time assigned by management for training will be separately accounted for and accurately recorded.

Proposal 1B, which guarantees "substantively equivalent" training for examiners who missed the initial implementation training, would ensure that employees are being treated fairly and equitably. Proposal 2 is a logical extension of a provision the parties already have agreed upon which, essentially, allows the employee's supervisory patent examiner (SPE) to approve additional eRed Folder training. Under the proposal, the Employer would be required to issue guidelines to supervisors on when to approve additional training for examiners. Furthermore, the provision places employees on notice that they are to apply the skills they learn in training to help them perform their

jobs. Proposal 4, which permits management to determine reference materials and the appropriate training employees should receive on updates and enhancements of the eRed Folder system, is consistent with management's right to assign and direct employees and assign work to employees under 5 U.S.C. § 7106(a)(2)(A) and (B). Management is in the best position to know the type of training and the reference materials that should be provided. Proposal 6 recognizes the desirability of providing eRed Folder training and materials in advance of deployments, updates and enhancements of the system. The wording recognizes the Employer's interest in doing so, but does not mandate an absolute commitment because circumstances may arise where training materials might not be available in advance of training. While both parties have proposals that would require time spent on eRed Folder training not to count as production time, Employer proposal 7 would place the onus on examiners to record their training time. To do otherwise would create an undue burden on management to record training time for potentially thousands of patent examiners. Moreover, proposal 7 is consistent with the Employer's time and attendance policy that requires employees to "accurately record the time actually worked."

CONCLUSIONS

Having fully evaluated the parties' positions concerning eRed Folder system training, we conclude that, on balance, the Employer's proposals provide the better approach. In this regard, Employer proposal 1, the second sentence of proposal 2, proposal 4 and proposal 7 provide adequate training and training procedures for examiners, including those who may have missed the initial implementation sessions. As to the first sentence of Employer proposal 2, however, we shall order its withdrawal because the provision concerns management guidance to supervisors, a matter that does not affect working conditions of bargaining-unit employees. Also, inasmuch as Employer proposal 6 does not require the performance of any action and is unenforceable, we shall order its withdrawal.

4. Accounting for Lost Work or Extra Work

a. The Union's Position

The following wording is proposed by the Union:

15A. All patent line management and supervisors shall encourage accurate recording of additional time spent

> by examiners in correcting/addressing issues in work product caused through no fault of their own resulting in lost work due to problems in the eRed Folder system or related systems, and this time shall be accounted for separate from examining time. There shall be no arbitrary or pre-determined rules about the amount of time that can be spent in this activity. Examiners will engage in a reasonable good faith effort to reconstruct their work product. Examples of extra work caused through no fault of their own would include but not be limited to--papers or equivalent electronic files lost; papers or equivalent electronic files crossed in the mail, lost or unavailable eRed Folder files, improper or failed scanning of reference documents.
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> 15B. All patent line management and supervisors shall encourage accurate recording of additional time spent by examiners in correcting/addressing issues in work product caused through no fault of their own resulting in extra work on the part of the examiner, and this time shall be accounted for separately from examining time. There shall be no arbitrary or pre-determined rules about the amount of time that can be spent in this activity. Examiners will engage in a reasonable good faith effort to correct/address issues in their work product. Examples of extra work caused through no fault of their own would include but not be limited to—piecemeal review by the reviewer, change in position by the reviewer, or change in position by the Agency.

Its proposals are appropriate arrangements for employees adversely affected by the exercise of management's right to require the use of an electronic filing system in the patent examination process. The provisions would ensure a fair and equitable outcome when, through no fault of their own, examiners must spend extra time reconstructing their work product, instead of examining patents. Moreover, they would permit examiners to use time off the production clock to perform the extra work required as a result of piecemeal review of a case by the reviewer, change in position by the reviewer, or change in position by the Agency. Finally, since examiners would be permitted non-production time to address issues related to loss of work or extra work, the proposals serve as an incentive for management to quickly correct problems associated with the eRed Folder system.

b. The Employer's Position

The Panel should order the Union to withdraw its proposals. Proposal 15A, which addresses problems with "related systems," goes beyond the scope of impact-and-implementation bargaining over the eRed Folder system and, therefore, is outside the duty to bargain. Similarly, proposal 15B covers a broader spectrum of work product issues not specifically related to the eRed Folder system and, therefore, also is not an appropriate subject for negotiations. Furthermore, the proposals would provide redundant processes since there already are procedures in place for examiners to accurately record time for lost work and system failures.

CONCLUSIONS

Upon careful consideration of the parties' positions on these issues, we shall order the Union to withdraw its proposals. Their intent is to encourage examiners to record, as non-production time, any time they spend correcting/addressing work product issues which are not the fault of the examiner. There already are procedures in place for examiners to record time for lost work and systems failures, however, so the proposals appear to be unnecessary.

5. Crediting and Counting Examiner Work Product

a. The Union's Position

The following is proposed by the Union:

16. Definitions:

> a. Demonstrated quality problems – performing at the unacceptable level in a critical quality element in their PAP rating of record, under oral warning, or under written warning based upon unacceptable performance in a critical quality element.
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> b. Substantive shall be defined as rising to the level of the Office action being materially deficient in content such that without correction the deficiency would be termed "clear error" under the Examiner PAP.

c. Performance Improvement Period (PIP) - an opportunity for an employee to improve his/her performance. A performance improvement period, PIP, and improvement period and an opportunity to improve are synonymous for purposes of this agreement.

d. Biweekly counting period – the period of time during which management and technical support staff will count examiner work product for an established biweek for production purposes under the performance evaluation system.

17. General – turn-around and signing of work products

a. All parties recognize the importance of expeditious turn-around and processing of applications. Therefore, a signatory examiner/SPE will normally provide no greater than a two work day turn-around of work products turned in to him/her by junior examiners. In those situations where this does not occur, the work product of the junior examiner will be counted/credited for production purposes, with the goal being that the junior examiner will receive production count/credit for performance evaluation purposes during the bi-weekly counting period in which the work product was submitted for review. Once counted, such work product shall then be returned to the signatory examiner/SPE for review/signature.

18. Examiners entitled to preliminary instruction – draft actions

The work product of an examiner who has no demonstrated quality problems as whose work product is entitled to preliminary instruction (or its equivalent) and/or is submitted in draft form, will have his/her work counted/credited during the same biweekly counting period as it was submitted to the reviewer by the examiner except when the work product is returned for substantive correction.

(1) If the work product is returned for correction, the examiner will be entitled to have

the issues to be corrected/addressed clearly stated in writing by the reviewer, and the means to effect said corrections [will] be positively set forth in writing by the reviewer in an instructive manner. Actions on the part of the reviewer which would not meet this requirement would be examples such as but not limited to "correct this", "call me", "contact me", "see me" and "I have a question".

(2) If the work product is returned for correction, the examiner will have his/her work cited for potential deficient performance/clear error only after having received a clear statement of the issues to be corrected by the reviewer, means to effect said corrections have been positively set forth in an instructive manner in writing by the reviewer, and upon such time as the work product is turned back in for signature and the returned corrections have not been made. For purposes of correction, the first occurrence of an error in a function the examiner is not responsible for during any fiscal year relative to any specific function (double patenting, restriction, etc.) shall be viewed as instructive rather than as an issue of potential clear error/deficient performance.

19. Examiners receiving no preliminary instruction – final form work product

a. An examiner who has no demonstrated quality problems and whose work product is submitted in final form (or its equivalent) will have his/her work credited/counted during the same biweekly counting period as it was submitted for credit.

(1) If the work product is returned for correction, the examiner will have his/her work credited/counted at the time the corrected work is turned in for review/signature unless the biweekly counting period has already ended.

(2) If the work product is returned for correction, the issues to be corrected will be clearly stated in writing by the reviewer, and the means to effect said corrections will be

> positively set forth in writing by the reviewer in an instructive manner.
>
> (3) The examiner may rely upon said statement of the issues as a defense supporting his/her position and against clear error in the second/subsequent occurrence.
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> b. For the work product to be returned for correction without work being credited/counted, the corrections at issue must be substantive and the examiner must not have signatory authority for the work product.

Its proposals are within the scope of bargaining over the eRed Folder system because they address changes the Employer made in the counting and crediting of work products when it implemented the new system. They were not addressed in any substantive way, however, during bargaining or mediation. Accordingly, the Panel should direct the parties to resume negotiations, for a specified period of time, over the proposals.

b. The Employer's Position

The Panel should decline to retain jurisdiction over Union proposals 16-19. The Employer maintains that the parties have not reached a bargaining impasse over them because they do not relate to the impact and implementation of the eRed Folder system and, therefore, it has no obligation to bargain. For this reason, it also would be inappropriate for the Panel to grant the Union's request that it order the parties to resume negotiations over the issues. The proposals also appear to interfere with management's rights to direct employees and assign work because they would prevent management from holding employees accountable for work and require management to give credit for work before ensuring that it is complete. Finally, the proposals represent the Union's perennial attempt to bargain over when work is credited for purposes of meeting performance standards. In this regard, the Union has proposed substantively identical wording during the parties' current MCBA negotiations on Article 23, "Performance Appraisals and Quality Initiatives."

CONCLUSIONS

After carefully evaluating the parties' positions, we shall decline to retain jurisdiction over the Union's proposals

because, as both parties acknowledge, voluntary efforts to reach agreement have not been exhausted. By declining to retain jurisdiction, the parties are free to pursue resolution in other forums including term bargaining negotiations where the Union currently has proposed substantively similar proposals.

6. Tracking Cases in the eRed Folder System

a. The Union's Position

The Union's proposals are as follows:

> 20A. To protect examiners in situations where work is performed and not credited in a timely fashion, whenever an employee forwards an eRed Folder for review or approval, the eRed Folder system shall generate a separate application history (*i.e.*, an audit trail) on the employee's computer showing the serial number of the application, the date and time the eRed Folder was forwarded and the recipient to whom the eRed Folder was forwarded. This application history shall be maintained on the examiner's computer and available for direct access by the examiner for at least 1 fiscal quarter before it can be deleted.
>
> 20B. Since management has eliminated the possibility of an examiner electronically retrieving their work product once it has been transmitted to the reviewer or transmitted for counting, depending on the signatory level of the examiner, management shall not mail or otherwise electronically post to applicant or applicant's representative the examiner's work product until at least 2 work days have expired following the day the work product was transmitted by the examiner.

The Union contends that proposal 20A is needed to help rectify a tracking problem examiners are experiencing as a result of the implementation of the eRed Folder system. In this regard, when examiners electronically submit work for review or signature they have no way of knowing which clerical employee in the "pool" of legal instruments examiners (LIEs) is processing the work. Furthermore, the eRed Folder system does not provide a record of the examiner sending the work product to another employee. The provision would remedy these deficiencies by allowing examiners to track when completed work was submitted for review/signature, to whom it was sent, and the LIE who is handling the application. Proposal 20B would provide a "window"

of 2 days during which an examiner may be able to retrieve a work product to make corrections before it is mailed out or electronically submitted to a patent applicant or applicant's representative. Currently, it may take months for an application containing errors to be returned to an examiner for correction and resubmission of the corrected work product to the patent applicant. The proposed procedure would allow for greater efficiency in the disposition of work products and a decrease in the pendency of applications.

b. The Employer's Position

The Panel should order the Union to withdraw its proposals. Arguably, proposal 20A concerns the technology, method and means of performing work, a permissive subject of bargaining, under 5 U.S.C. § 7106(b)(1) of the Statute, which the Employer elects not to negotiate to impasse. On the merits, the proposal would require the Employer to make a costly (estimated at over $500,000) and unnecessary enhancement to its eRed Folder system. A tracking feature did not exist when paper folders were used by examiners and there is no demonstrated need for one now, particularly when the cost for such a system would outweigh its benefit. Moreover, the Union's proposal is unnecessary because examiners currently can track the status of their work products at any time through the Patent Application Location and Monitoring (PALM) system, which creates a docket report for all examiners. Also, the "snag it" feature on their computers allows examiners to take snapshots of their work and either save that information on their computers or print it out. Union proposal 20B needlessly would add to the pendency of patent applications by requiring that work not be transmitted to a patent applicant for 2 workdays after it was submitted by the examiner for approval/signature. It does not make good business sense for the Agency, whose mission is to issue patents, to defer the issuance of all patents for 2 workdays. When an examiner submits work for review/signature, it must be complete before it is counted; therefore, once it is forwarded for counting (review/signature), there should be very limited circumstances in which that work needs to be retrieved. Finally, although examiners cannot retrieve their work electronically, they still are able to retrieve it manually.

CONCLUSIONS

Upon careful consideration of the issues and the parties' positions with respect to them, we shall order the Union to withdraw its proposals. The Union's proposed alternative

tracking system appears to be unnecessary given the capabilities of the PALM system. Nor is it in the best interest of the mission of the agency to hold back the issuance of every patent for a period of 2 days when there is no demonstrated need for doing so. Finally, in the event examiners need to retrieve work already submitted, the more practical alternative is for them to inform their supervisors of the need to modify the work product before it advances further through the issuance process.

7. Recommending Deployment Improvements for the eRed Folder System

a. The Union's Position

The Union's proposals are as follows:

> 22. A summary of questions and remarks regarding eRed Folder that have been submitted through the Patent Automation Feedback e-mail or equivalent will be provided to the Union twice per year for 2 years after the effective date of this agreement.
>
> 23. The Agency shall forward the copies of any paperwork or e-mails relating to employees who received any oral warning, written warning or proposed adverse action received while utilizing the eRed Folder system for the time period from when eRed Folder was deployed to the employee and prior to the implementation date of this agreement. The Agency shall forward this information to the Union President for evaluation at the end of each fiscal quarter.
>
> 24. The Agency shall track lost examining time due to malfunction or inoperability of the eRed Folder system. Such lost examining time shall be accurately recorded and separately accounted for by the Agency. The Agency shall provide a report to the Union President documenting the lost examining time on a quarterly basis for each Technology Center or its equivalent and for each Work Group or its equivalent within the Technology Center.

Proposal 22, which would require the Employer to provide feedback on the e-Red Folder system, is intended to help the Union assess whether modifications to the system may be needed. The best way for the Union to do so is by evaluating comments from users of the system. Under the proposal, the Employer

would provide the Union with a summary of questions and remarks regarding eRed Folder that have been submitted not only through the Patent Automation Feedback email address but its "equivalent." Thus, even if the Employer were to disable the Patent Automation Feedback email, it still would be required to establish another email address where comments could be posted. Proposal 23 would provide certain information to the Union permitting it to track counseling and discipline meted out to employees who may have had performance problems associated with the use of the eRed Folder system. Its adoption is warranted to provide "sunshine on the human problems associated with the eRed Folder" system. Finally, proposal 24, which would tally examining time lost due to malfunction or inoperability of the eRed Folder system, is necessary to motivate the Employer to properly maintain the system so that it does not adversely affect employee productivity.

b. The Employer's Position

The Employer proposes the following:

> 9. A summary of common questions and remarks regarding eRed Folder that have been submitted through the Patent automation Feedback email will be provided to the Union twice per year for 2 years after the effective date of this agreement. Examiners will be encouraged to submit questions and remarks regarding eRed Folder to the Patent Automation Feedback email.
>
> 10. The agency will provide information regarding eRed Folder consistent with its obligations under 5 U.S.C. § 7114(b)(4).

Proposal 9 would be less onerous on the Employer than Union proposal 22 because it would require the Employer to summarize only the "common" questions and remarks on the eRed Folder system that have been posted on the Patent Automation Feedback email address. Limiting the amount, as well as the source, of the information to be summarized would relieve the Employer of having to canvass numerous other sources for comments on the eRed Folder system, a burdensome responsibility. Proposal 10 would require the Employer to provide information regarding the eRed Folder system consistent with its obligations under 5 U.S.C. § 7114(b)(4). One of management's objections to Union proposal 23 is that it may interfere with employee privacy interests because the Employer would have to disclose information to the Union concerning employee performance and

disciplinary problems. The Employer's proposal, on the other hand, underscores management's legal responsibilities under the Statute when providing information to the Union, ensuring that employee rights under the Privacy Act are not violated.

CONCLUSIONS

Having fully evaluated the parties' positions on these issues, we find that the Employer's proposals provide the more reasonable approach to resolving the dispute. Employer proposal 9 should serve to provide the Union with sufficient feedback from users of the eRed Folder system without overly burdening management with the responsibility of gathering that information from numerous unidentified sources. Furthermore, Employer proposal 10 is an affirmative statement of the Employer's statutory responsibility to provide information that protects employees' privacy rights concerning disciplinary and adverse actions with respect to the eRed Folder system. Accordingly, we shall order the adoption of the Employer's proposals.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel, under 5 C.F.R. § 2471.11(a) of its regulations, hereby orders the following:

1. Preamble

The Union shall withdraw its proposal.

2. Determining Supplemental Learning Time and Compensating Employees for Supplemental Learning Time

The Panel declines to retain jurisdiction over the Union's proposal.

3. Training Procedures

The parties shall adopt Employer proposal 1B, the second sentence of Employer proposal 2, and Employer proposals 4 and 7. The first sentence of Employer proposal 1 and Employer proposal 6 shall be withdrawn.

4. Accounting for Lost Work or Extra Work

The Union shall withdraw its proposals.

5. Crediting and Counting Examiner Work Product

The Panel declines to retain jurisdiction over the Union's proposals.

6. Tracking Cases in the eRed Folder System

The Union shall withdraw its proposals.

7. Recommending Deployment Improvements for the eRed Folder System

The parties shall adopt the Employer's proposals.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

November 26, 2008
Washington, D.C.