



NATIONAL ACADEMY OF PUBLIC ADMINISTRATION

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WRITTEN STATEMENT

OF

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BEFORE THE

U.S. HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

SUBCOMMITTEE ON GOVERNMENT OPERATIONS

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Good afternoon Mr. Chairman and Members of the Subcommittee. Thank you for providing me the opportunity to summarize a review conducted by an Independent Panel of the National Academy of Public Administration (the Academy) of the U.S. Patent and Trademark Office's (USPTO) telework program. The review focused on internal controls for time and attendance, and the administration of USPTO's telework program.

The Panel members were all Fellows of the Academy. An independent, nonpartisan, and nonprofit organization chartered by the U.S. Congress, the Academy counts over 850 Fellows selected for membership through their distinguished contributions to government at all levels. I likewise participated as a Fellow; the views expressed here of those of the Panel, and have no connection with my employer, the Institute for Defense Analyses.

As Members of the Subcommittee know, the USPTO, an agency of the Department of Commerce employing nearly 13,000 individuals, has been the federal leader in utilizing telework as a critical element of its organizational and workforce strategy. Its telework program started in 1997, with 18 trademark attorneys working several days a week from home and sharing office space when they returned to headquarters. The program expanded significantly in the two decades that followed, buttressed most recently by the Telework Enhancement Act of 2010 (Public Law 111-292), which further clarified the Agency's authority and granted additional flexibility. Now, most of the USPTO workforce—including trademark and patent examiners and many of their supervisors—can work off-site and, within certain parameters, choose a work schedule that accommodates personal and family needs.

THE ACADEMY STUDY

At the request of the USPTO, the Academy formed an Independent Panel to examine the Agency's operations and management as it relates to telework, with an emphasis on its patent operations. Specifically, this Panel of five Fellows, of which I served as Chair, conducted:

- An **Internal Controls (IC) Review**, which evaluated the Telework and T&A management controls, pursuant to Office of Management and Budget (OMB) Circular A-123, *Management's Responsibility for Internal Control*. The Panel examined whether the appropriate management guidance was issued, available, and followed, and whether the telework programs complied with Federal laws and regulations. The IC review was conducted by a team from Grant Thornton. These findings were incorporated into the Panel's report.
- A **Program Review**, which evaluated the effectiveness and efficiency of the USPTO's telework program, including whether the current telework structure achieves the objectives of strengthening recruitment and retention; ensuring continuity of operations during emergency conditions (COOP); reducing management and operations costs; and improving productivity without negatively impacting quality.

Over the course of a nine-month review culminating with a public report in July 2015, the Academy team interviewed officials throughout the USPTO, telework experts and other federal stakeholders; reviewed internal memoranda, reports, and a wide array of production, human capital and operational data; and analyzed data related to costs savings as a result of telework

(i.e., Real Estate and COOP). It examined human capital trends, benchmarking the USPTO telework program with those of the private and public sectors.

For the internal controls review, the team:

- Interviewed over 15 key Telework and T&A stakeholders in order to create 4 internal control process narratives;
- Went through several iterations of the process narratives prior to finalizing with the process owners;
- Identified 17 Telework and 34 T&A key controls;
- Developed test plans and created over 50 individual Prepared by Client (PBC) requests for required testing;
- Reviewed over 1,000 data samples;
- Documented test results and identified 3 deficiencies;¹ and
- Reported assessment results in a stand-alone IC report to PTO and a final Academy report.

For the program review, the Academy team:

- Conducted and analyzed a survey that was administered to all Supervisory Patent Examiners (SPEs) to develop a current picture of the SPEs' perspective on whether recent training and policy improvements were beneficial to the Patent Organization;
- Examined specific metrics regarding telework across the Agency, as well as recruitment and retention data for both the Patent and Trademark Organizations;
- Examined how the USPTO engaged with its various stakeholders on such issues as improving service to patent applicants, granting patents in a timely manner, and supporting the workforce, among other things;
- Conducted a benchmarking study to validate a previous USPTO study on best practices

¹ The three deficiencies are described here. First, during the comparison of separated/terminated employees to the active teleworkers, it was noted that twenty-four (24) employees from the list of 515 separation/terminations dated between 4/1/2014 - 3/31/2015 were included as active teleworkers in the Patent telework database as of 4/1/2015. The Panel recommended that USPTO should inform the Business Units (BUs) to input separations in the telework database in a timely manner and set a specific timeframe within which to take this action. The Panel also suggested that this requirement should be documented in an official memorandum or policy. Second, during the comparison of 45 separated employees and their final timecards, it was noted that one employee had a separation date of 6/29/14 but they still submitted a timecard for work performed on 8/1/14. Further testing showed that the employee did not separate from USPTO until after 8/1/14 and did not separate from the Department of Commerce. The employee instead had transferred to another DOC agency. The Panel recommended that the Office of Human Resources (OHR) and the National Finance Center (NFC) should address the reporting issue when pulling data for employees who separate from USPTO but transfer to another agency within DOC. Instead of pulling the last action USPTO processed as the "Actual Separation Date" for reporting purposes, it should pull the transfer date as the separation date. Third, out of the 45 Patent employee records sampled, 5 Patent employee's CD-81s could not be located. During the comparison of the remaining CD-81s, the maximum number of hours listed for one Patent employee was .05 lower than the amount on the timecard. For another Patent employee, the CD-81 noted that this person did not have approval to work the overtime that was recorded and approved on the timecard. The Patent Organization should consider using the automated premium pay request, which is currently available in WebTA, as a way to further automate the collection (and maintenance) of accurate information contained in the Form CD-81. In addition, the Patent Organization should consider updating its overtime policies to revisit current processes.

for teleworking and compared them to other public and private sector organizations that used telework broadly;

- Completed a general review of other issues related to the efficient and effective management of the workforce; and
- Examined data from the USPTO on the Quality Index Report (QIR), which uses a series of variable metrics, one of which determines patent quality for individual examiners.

Individual patent decision work products were not examined as part of this study; thus, the Panel did not try to determine whether working on-site or teleworking affected the quality of individual examiner decisions. Quality Index Report (QIR) data, however, separate examiners who hotel (that is, those who work permanently offsite and use USPTO physical office space rarely if ever) and those who do not hotel (that is, telework only 2-3 days per week and use USPTO physical office space on other days). The data show that hotelers and non-hotelers produce work at the same level of quality. These data are part of USPTO's broad quality assessment, but are not currently used to evaluate individual examiner work.

KEY PANEL FINDINGS

Based on the research conducted for this review, the Panel offered six overarching observations:

- 1) The workers who were found to have committed T&A fraud by the USPTO in the internal report were disciplined. The USPTO addressed all but one recommendation listed in its final internal investigation report (that the Agency review its awards to patent examiners).
- 2) Suspected Time and Attendance abuse began to be reported a bit more often during our review: there were 46 suspected cases in 2014, and 58 cases in 2015, albeit just one-tenth of one percent of examiners (and some of these cases could be for the same individual).
- 3) It would appear unlikely that T&A abuse is widespread or unique to teleworkers, and it does not appear to reflect the actions of the workforce as a whole. Working on-site is no different (and should not be different) than teleworking in needing to keep track of someone's whereabouts and work performance.
- 4) The IC review confirms that the T&A policies and controls in place are the same for both on-site and teleworking employees and comply with the A-123 guidelines.
- 5) The Agency's teleworking and hoteling program should continue.

The Panel also offered findings on a series of broader issues:

- Operational and Human Capital Benefits of Telework;
- Productivity;
- Effective Practices;
- Performance and Conduct;
- Productivity and Quality;
- Patent Production System; and
- Supervisory Perspectives.

These are discussed briefly in the sections below.

Operational and Human Capital Benefits of Telework

USPTO's telework program has produced a number of important operational and human capital benefits. The program saves USPTO money on real estate, transit, IT, and other fixed costs—in a typical year, an estimated \$26 million. It is also one of several factors that help USPTO recruit and retain employees. Others include the higher salary (23 percent start as GS-5 and 7, and 17 percent start at a GS-9) for entry-level patent examiners, an attractive federal benefits package, and substantial financial awards for high production levels. From an operational standpoint, the use of a virtual workforce maintains productivity during weather-related and other emergency closures. COOP savings vary year to year, but are estimated to average \$7 million per year.

Productivity

Production is about the same, by grade level, for on-site examiners as for part-time teleworkers and full-time hotelers. Overall, hotelers complete, on average, 1–1.5 more patent applications per year than those who work on-site, primarily because they are at higher-grade levels, therefore more experienced and able to work faster. Examiners' performance in production and docket management is comparable between hotelers and non-hotelers.

In general, the USPTO has used its production-based awards program successfully to achieve various objectives. For example, the Pendency Award has helped the Agency reduce the number of cases that are active beyond their ceiling control days. Special Achievement and Gainsharing have incentivized patent examiners to go beyond the fully successful level of performance. The Trademark Organization has used awards effectively to incentivize higher production and increase quality.

Effective Practices

The Panel found that the USPTO policies are in line with many best practices in the public and private sector. One of the biggest differences, however, is that the other public and private organizations interviewed as part of this review said that they consider telework a privilege, and as such can adjust teleworking arrangements if they are not working effectively for either the employee or the organization. By contrast, the USPTO telework eligibility criteria are defined in agreements with USPTO unions and changes would therefore be the subject of negotiation. Strong supervisor/employee relationships, especially with respect to regular visual communication, are critical to successful telework programs. Personal communication (e.g., video conferencing), not just e-mail, is an effective practice used to effectively manage a remote workforce. Although visual collaboration tools are readily available to USPTO employees, they are not used as regularly as they should be to provide (virtual) face-to-face communication among employees, and between employees and supervisors.

Performance/Conduct & Productivity/Quality

The Panel found no differences between the teleworkers and non-teleworkers in their performance and conduct. Production is the same by grade level for on-site examiners and teleworkers/hotelers. The current system for patent examination system and incentives

emphasize quantitative performance (production) over qualitative performance, however, even though production and quality are rated equally in the examiners appraisal plan. A new pilot program called the consistent credit initiative (CCI) worked well as a pilot, but may not be as successful corps-wide, because the penalties for not complying that were used in the pilot no longer exist.

Patent Production System

The Production system, which is used to determine output in the Patent Organization, provides data sufficient to verify work output. While this is an allowable method of verifying time worked in a flexible work environment, it does raise the question of whether the quota itself is appropriate.

External organizations and the USPTO have reviewed the production standards at various times in the past, yet the USPTO has not made significant changes to the standards for decades. The DOC OIG recommended a review of production standards in 2004, and the Office employed consultants to examine this issue as recently as 2010. Many of the current standards for art units were established as long ago as 1976. Instead of reviewing each art unit individually, the Office's most recent changes were to add 2.5 hours for all art units to complete the examination of a patent application. While this additional time may be necessary in certain art units, this one-size-fits-all approach may provide more time than necessary for patent applications of lower complexity. The Panel believes that USPTO should consider the impact of technological advances as it revises production standards, including search engines and collaborative models being employed elsewhere.

Supervisory Perspectives

The Supervisory Patent Examiner (SPE) survey² results showed that 80 percent of respondents reported that they had sufficient resources to certify T&A, but about 17 percent of SPEs stated they did not have the resources they need to manage T&A, and 10 percent said they did not have the same ability to verify T&A for both on-site and teleworking employees. SPEs surveyed also reported that they had to wait several months to conclude an investigation of T&A abuse, because of delays in the Employee Relations Office (ER). This delay dilutes a supervisor's ability to quickly discipline employees who abuse T&A, and hampers the speedy resolution of employee issues.

Supervisors also faced challenges because (1) they needed to be familiar with the complex details of 29 different telework agreements (written as the program evolved over time) and (2) an electronic presence indicator was not required for all employees, showing when employees are available to work. In addition, examiners do not have a defined work schedule, because they only have to notify their supervisors of how many hours they plan to work, not the actual hours they

² The Academy Survey was sent to all 631 SPEs and more than 66 percent, 379 out of 631 responded. The survey results are considered statistically valid with a margin of error of +/- 4 percent at a 95 percent confidence level. NAPA received a 27 percent response rate to the question asking for further written comments (100 out of the 379 respondents). The response rate varied by question, but the Academy views the rate of response as a positive indicator that many supervisors are invested in and committed to the Agency.

will be at work (e.g. 9:30 AM -6:00 PM), and they can change their schedules at any time.

The Panel also noted that the supervisory review and certification of time is subjective in nature, meaning that each supervisor uses different communication methods during the bi-weekly reporting period to validate that employees are working. Some supervisors review reports to verify production and some verify time by having constant communication with the employee, while others do not. USPTO has no requirement to maintain evidence and documentation to support how supervisors verify T&A before they certify an employee's timecard.

Overall Conclusion

Despite some of the challenges identified, the Panel's overall conclusion is that it would appear to be unlikely that T&A abuse is widespread or unique to teleworkers, and it does not appear to reflect the actions of the workforce as a whole. The Panel recommended that the USPTO should continue its Telework and Hoteling Programs, while enhancing the tools it uses in strengthening their management practices as recommended in the report.

KEY PANEL RECOMMENDATIONS

Based on its conclusion that the management of the telework program should be strengthened, the Panel issued over 30 recommendations for USPTO's consideration, including:

- Management should continue to review the procedures with supervisors to ensure that they are using available tools to confirm that employees are actively engaged in patent examination, and should examine impediments and concerns raised by supervisors about being able to do their jobs effectively.
- The USPTO should continue to provide refresher training on the management guidance concerning Time and Attendance.
- The USPTO should establish separate probationary/conditional periods for beginning full-time teleworkers. Full-time teleworkers should be required to maintain "fully successful" status for two years after completing their training in order to continue being eligible for full-time telework.
- Teleworkers should re-sign their teleworking agreements every two years to acknowledge acceptance of current telework policies and procedures.
- The USPTO should continue to focus on developing ways to measure the quality of the examination process to target areas for training and to provide indicators of activities in the process that might lead to improvements in the quality of patents. The USPTO can leverage its new Patent Quality Initiative as the foundation for this review. Quality should be continually assessed.

- The USPTO should perform an in-depth review of production standards for all of the 600-plus art units to determine if they are set at appropriate levels, and make adjustments, as needed.
- The USPTO should continue to explore more collaborative methods of conducting patent examinations, especially the search process. This should include continuing to collaborate with other countries to improve patent prior art searches and to explore whether crowdsourcing or other methods would improve the quality of prior art searches.

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Mr. Chairman, USPTO has the critical mission of protecting intellectual property by examining applications for patents and trademarks. Quality and timeliness in issuing patents and registering trademarks are integral to the successful long-term performance of the U.S. economy.

In its 2015 review, our Panel determined that the telework program has provided important benefits to the USPTO, potentially strengthening recruitment and retention, and ensuring on-going work during emergencies. The Panel recommended that the USPTO continue its Telework and Hoteling Programs, while enhancing oversight mechanisms and improving its management practices.

Mr. Chairman, that concludes my prepared statement, and I would be pleased to answer any questions you or the Subcommittee Members may have.

Corporate Biography

David S. C. Chu President Institute for Defense Analyses



David Chu serves as President of the Institute for Defense Analyses. IDA is a non-profit corporation operating in the public interest. Its three federally funded research and development centers provide objective analyses of national security issues and related national challenges, particularly those requiring extraordinary scientific and technical expertise.

As president, Dr. Chu directs the activities of more than 1,000 scientists and technologists. Together, they conduct and support research requested by federal agencies involved in advancing national security and advising on science and technology issues.

Dr. Chu served in the Department of Defense as Under Secretary of Defense for Personnel and Readiness from 2001-2009, and earlier as Assistant Secretary of Defense and Director for Program Analysis and Evaluation from 1981-1993.

From 1978-1981 he was the Assistant Director of the Congressional Budget Office for National Security and International Affairs.

Dr. Chu served in the U. S. Army from 1968-1970. He was an economist with the RAND Corporation from 1970-1978, director of RAND's Washington Office from 1994-1998, and vice president for its Army Research Division from 1998-2001.

He earned a bachelor of arts in economics and mathematics, and his doctorate in economics, from Yale University.

Dr. Chu is a member of the Defense Science Board and a Fellow of the National Academy of Public Administration. He is a recipient of the Department of Defense Medal for Distinguished Public Service with Gold Palm, the Department of Veterans Affairs Meritorious Service Award, the Department of the Army Distinguished Civilian Service Award, the Department of the Navy Distinguished Public Service Award, and the National Academy of Public Administration's National Public Service Award.