

**TESTIMONY OF  
PAMELA R. SCHWARTZ  
PRESIDENT, PATENT OFFICE PROFESSIONAL ASSOCIATION**

**before the**

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
SUBCOMMITTEE ON GOVERNMENT OPERATIONS  
UNITED STATES HOUSE OF REPRESENTATIVES**

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Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee, thank you for inviting me to present the views of the Patent Office Professional Association on the Inspector General's August Report, "Analysis of Patent Examiners' Time and Attendance." We appreciate this opportunity to testify on behalf of the nearly 9,000 USPTO employees we represent not only because the OIG's analysis contains incomplete and inaccurate information and reached conclusions that contradict those reached by both the GAO and the National Academy of Public Administration in their own recent studies, but also because the OIG's report was wildly distorted and sensationalized in the Washington Post.

The OIG's conclusions contradict those of the National Academy of Public Administration which found that it is "unlikely that T&A abuse is widespread or unique to teleworkers, and it does not appear to reflect the activity of the workforce as a whole... The USPTO has requisite procedures in place to monitor T&A. The Patent Organization has taken significant action to improve the management of time and attendance." *The United States Patent and Trademark Office: An Internal Controls and Telework Program Review*, 4, 69 (July 31, 2015).

Nonetheless, POPA recognizes that there are additional improvements to be made in time and attendance administration at our Agency and we are in full accord with the Agency's efforts to ensure that all employees work their full 80 hours each pay period. POPA has worked with our management regularly to achieve full compliance with time and attendance requirements and will continue to do so.

**A Patent Examiner's work**

In order to understand why the OIG's analysis of patent examiners' time is faulty, it is important to appreciate the nature and complexities of the examiners' work and how much of that work can be and often is performed off-line. The vast majority of patent examiners are physical scientists, engineers or computer scientists and all have a positive educational requirement for their position.

Examiners are assigned a docket of patent applications for examination. At any time there are applications awaiting initial examination and applications awaiting subsequent examination. When examiners pick up a new application for examination, they initially review the technical specification which describes an invention sought to be patented followed by a number of claims. The claims set forth what applicants seek to protect through the grant of a patent. There are usually numerous claims of varying scope. The specification is frequently written to provide just enough description to satisfy disclosure requirements. The disclosure may be minimal and may not be written in language normally used in the technology being examined so as to make it difficult for the examiner to understand the invention.

After analyzing the application, the examiner searches available documentation which is referred to as the “prior art” in order to ascertain whether the claimed invention is novel and non-obvious. Prior art may include previously granted U.S. patents and published applications, foreign patents, technical journals and trade publications, educational source materials and scientific texts. For the experienced examiner, this is solitary work and requires a level of attention to detail and analysis similar to the level of concentration needed to take a standardized examination in reading comprehension or logic.

Once this analysis is completed, the examiner organizes her findings and adds additional determinations concerning the adequacy of the specification and claims at meeting other statutory requirements. She then drafts a “first office action on the merits,” which is a document that usually ranges from five to 75 pages. It may allow the application or, it may reject the application and notify the applicant of its inadequacies.

Applicants receive these findings and have the opportunity to respond with amendments to their claims, with arguments why the examiner’s finding are incorrect and with supporting evidence. The examiner must then determine if the rejections should be maintained, modified or withdrawn in light of applicant’s submission. This decision-making process is solitary and intense although an examiner may consult with other examiners or supervisors during this process.

Examiners have productivity and pendency goals that add time pressure to this difficult process. If the examiner continues to reject applicant’s claims, applicant may request an interview with the examiner, may have additional opportunities to respond to subsequent office actions and eventually may appeal to the Patent Trial and Appeal Board.

Interruptions and distractions detract greatly from this process. Having to shift focus to whether a collaboration tool is up and running or to remember to update the supervisor on a small shift in when hours are worked takes time and concentration away from quality examination.

The OIG's analysis is based on flawed methodology and faulty assumptions.

First, the OIG erroneously assumes 100% accuracy of the “billions” of USPTO's electronic records that were the basis of the study (p. 4). The OIG's Report itself concedes that:

“[T]he precise number of unsupported hours and ratio of unsupported time for a specific employee *could be affected by a USPTO system breakdown*. For example, the *USPTO may not have collected workstation logs for an individual on a given day*. Moreover, some employees may be exceptions because of *errant data entry* or atypical work circumstances.”

Report at 7, [emphasis added].

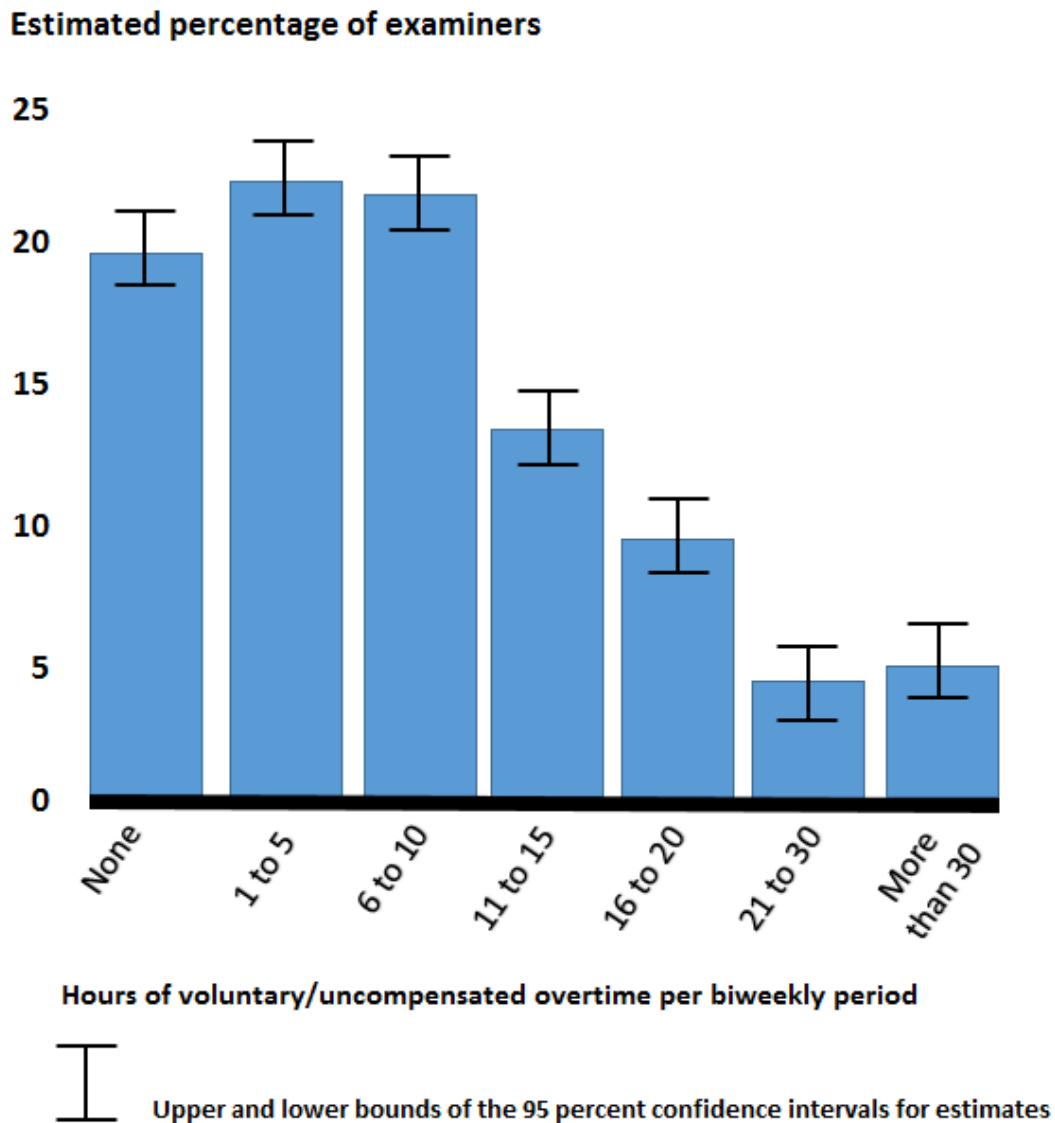
Second, the OIG's own report reveals that ***reliance on turnstile, VPN and workstation records does not reliably capture all the work performed by the examiners***. The Report concedes on page 6 that there were 2,100 examiner days where there were PALM data timestamps but no turnstile, VPN or workstation records confirming that the employee was working. (Although the OIG allegedly gave the employee “credit” for those particular days, not all examiner work results in a PALM data timestamp.)

Similarly, ***the OIG did not account for unrecorded, uncompensated overtime regularly worked by examiners to meet their production goals***, which far exceeds the 2% “unsupported” time. The GAO recently issued a report on patent quality, in which it concluded that most Examiners must work extra, uncompensated hours to meet their required production quota:

“[W]e estimate that, given a typical workload, about 70 percent of examiners have less time than needed to complete a thorough examination. In addition, we estimate that more than 70 percent of examiners worked voluntary or uncompensated overtime in the past 6 months to meet their minimum production goals.”

GAO, *Patent Office Should Define Quality, Reassess Incentives, and Improve Clarity*, 25- 26 (June 2016). A companion report, GAO-16-490, contained the results of a survey of the amount of *uncompensated* overtime Examiners typically work to meet their productions quotas:

**Figure 6: Estimated Biweekly Voluntary/Uncompensated Overtime Worked by Patent Examiners in the Past 6 Months**



Source: GAO survey of U.S. Patent and Trademark Office patent examiners. | GAO-16-479

Even the OIG’s report acknowledges that “the analysis found many days where the evidence of computer-related work activity appeared to exceed the time claimed for the day.” Report at 5.

*Third, even if a teleworker was not connected to the agency’s computer system (VPN), this doesn’t mean that he wasn’t working – as described above many aspects of an examiner’s jobs can be done off line, like working from printed application*

documents, studying off-line prior art copies of patent and non-patent literature such as technical journals that have been printed previously, and drafting the first and subsequent office action memos. An examiner can easily and productively fill up a full workday without the necessity of being on-line.

The OIG's report acknowledges that Examiners perform work on the computer before logging into the agency's system via VPN:

“When using a traditional VPN connection, workstation data does not transmit until a secure connection to the VPN is established. Thus, *any work performed on the workstation prior to connecting to the VPN* would not be transmitted to, nor record [sic] on USPTO's servers.”

Page 14, footnote 33 (emphasis added). The OIG's report notes that logging in is necessary for “using the examiner suite of software necessary to perform the *majority* of their work,” (report at 17; emphasis added). Thus, even the OIG recognizes that it is not necessary for an examiner to be logged in to perform all of her work.

Furthermore, *there was no policy requiring teleworkers to be logged into the agency's servers during all their working hours for a substantial portion of the 15 months studied by the OIG* (August 10, 2014 through February 22, 2015). The OIG acknowledges that there was a “statistically significant” reduction in the number of unsupported hours following the issuance of the agency's Full-Time Teleworker Policy in February, 2015. Report at 16. *To the extent that some teleworkers did not log into the agency's servers via the VPN in the nine months that followed the issuance of this policy, it does not mean that they were not working; it only means that they were not yet consistently conscientious about complying with this new policy.* Buried deep in the OIG's report is this important concession, which undermines the Report's conclusions:

“The OIG recognizes, however, the possibility that those examiners may have worked offline and that, as a result, the total number of unsupported hours for full-time examiners could be lower over the 15-month period.”<sup>39</sup>

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<sup>39</sup> Since the OIG methodology uses VPN and workstation records to support work time for teleworkers, *this approach could incorrectly determine that certain hours were unsupported if the examiners were working but did not connect to the USPTO network.*”

Report at 17 (emphasis added).

The fact that examiners who had “unsupported time” earned bonuses by exceeding production goals does not indicate that they were cheating, but rather it proves

the opposite - that the OIG's methodology does not fully capture all the work that examiners do – since they met and exceeded their production goals.

While the OIG suggests that the production goals are too lax, more thorough studies of this issue by the GAO cited above concluded that Examiners actually need more time to conduct examinations. According to the OIG, the amount of time allocated for each examination should be reduced due to increase in technology and on-line search ability since those goals were established in 1976. However, the number of U.S. patents to be searched has doubled since then, and the availability of electronic searching has made far more prior art that must be consulted as part of the search accessible, including technical journals and databases of foreign patents.

Even assuming that the OIG's methodology was accurate, *the ostensibly “unsupported” hours equal only 1.6% of overall time - less than 8 minutes a day on average.* A 98.4% efficiency rate of time accounting demonstrates an extraordinarily high level of productivity for any employer. As a result of this extraordinary productivity, the Examining Corps has reduced both the backlog of unexamined patent applications as well as the average time for completing examination by 25% in the last five years. As noted above, the amount of voluntary, uncompensated overtime work routinely performed by the examining corps far exceeds the number of so-called “unsupported” hours identified by the OIG.

Finally, while “potential” amount of loss estimated by the OIG was \$18 million over 15 months, the USPTO has determined that it saves over \$100 million dollars a year due to its extensive telework programs, including over \$38 million in annualized real estate savings. According to the USPTO, in FY 2015 the 2,000 full-time teleworkers who participate in the Telework Enhancement Act Pilot program were actually 6% more productive than other examiners in terms of annual production units, resulting in a revenue gain of over \$35 million – far more than the alleged potential loss estimated by the OIG. U.S. Patent and Trademark Office, *FY 2015 Analysis of Costs and Benefits and Criteria for Evaluation of Effectiveness Pursuant to the Telework Enhancement Act of 2010*, 10, 19-20 (April 29, 2016).

#### POPA's Response to the OIG's Recommendations

Recommendation 1. POPA supports and is assisting with a reevaluation of the outdated examiner production goals. The USPTO in fact began a comprehensive review called the “Examination Time Analysis” several months ago and is obtaining the input of not only the examining corps but also academics and outside stakeholders. We expect that the final result of this evaluation will result in a finding that, for most technology areas, the examining corps is currently being provided insufficient time to conduct their examinations. This has resulted in the extraordinary amount of uncompensated overtime work that patent examiners are performing to meet the existing goals. Technology has grown far more complex, application specifications have more than doubled in length and the amount of prior art that must be searched has grown by the millions since the present

goals were established. Although computerized searches have now facilitated *finding* prior art, this has resulted in more prior art available that must be studied by the examiner.

Recommendation 2. POPA is willing to explore with agency management a workable means for examiners to notify their supervisors of their expected work schedules. We have an excellent working relationship with management and have consistently reached agreements when there is a need to do so.

Recommendation 3. POPA is not opposed to reinstituting the use of badges to exit the USPTO facilities, but would like employees to have access to these electronic records in order to more accurately report their biweekly time and attendance. We expect this to result in improved time and attendance records throughout the Agency.

Recommendation 4. POPA has just begun discussions with management about requiring all teleworking examiners to remain logged into the VPN during working hours. Although we have only had a couple of conversations with our management, we feel that we are already close to reaching an agreement on this recommendation.

### Conclusion

At a time when our management has made improving quality the priority, the OIG Report has been a distraction. It has harmed quality examination by demoralizing the entire Patent Corps. I have heard from many hard-working examiners about how frustrated and unhappy they are because of the OIG Report and the reckless reporting by the Washington Post that created the false impression that examiners were not doing their jobs and were not being held responsible for doing their work by our management. That is simply not the case.

The employees POPA represents have certain rights including transparency and fairness. None of the employee records used by the OIG in preparing the report are available to the employees themselves. Employees do not have the ability to check their time records for accuracy against the security gate records, the VPN records or computer usage records. This leaves the employees vulnerable when they make simple recordation mistakes or simply forget to keep track of their time. In the latter situation, employees have to guess when they worked even though the Agency has records that it may use against the employees at a later date. POPA would like employees' records to be made available to the employees so that they can use the records in preparing their time sheets and can avoid making mistakes. This is a step the Agency can take to assist the employees in improving time and attendance recordation.

There is a lesson to be learned from the OIG Report. It is that if employees are going to be monitored for time and attendance using security gates, computer usage records and VPN records, none of which are intended for monitoring time, employees have to be aware that it is important to create an electronic footprint when they are working. Therefore, we have urged the Agency to reach out to all patent examiners and

share their individual results from the OIG study with them. We expect that there are many examiners who believe that they are fulfilling time and attendance requirements, but due to the methodology of the OIG, still showed up as having unaccounted for time under the study.



Pamela R. Schwartz  
Biography

Pamela R. Schwartz became president of the Patent Office Professional Association (POPA), the Federal labor union representing almost 9,000 patent examiners and other patent professionals located at the U.S. Patent and Trademark Office (USPTO) in Alexandria, Virginia, at regional offices in Detroit, Michigan, Denver, Colorado, Dallas, Texas, San Jose, California and throughout the country in January of 2016. She has been an officer of POPA since 1989. As president of POPA, she is also a non-voting member of the USPTO Patent Public Advisory Committee.

Ms. Schwartz joined the USPTO in 1982 examining in the area that is currently Technology Center 1700, Chemical and Materials Engineering. She has been a primary patent examiner since 1990.

Ms. Schwartz received a B.S. in Chemical Engineering from Drexel University in 1982 and a J.D. from the George Washington University Law School in 1987.

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