

(50%) of the SPEs stating that performance is a tool for ensuring that employees are working the hours that they claim. For example:

- *"I can determine if they are working based on production" (Exhibit Q, SPE #3)*
- *"If there are no performance issues, there is no need to follow up on T&A" (Exhibit Q, SPE #4)*
- *[...] "work product is key in determining whether T&A info is accurate" (Exhibit Q, SPE #5)*
- *"I don't care so much about the amount of hours as I do about the amount of work that gets done" (Exhibit Q, SPE #7)*
- *"I make no extra effort to see if they are in the office. I see it when cases are turned in. If production is fine, I have no difficulty in knowing that they are doing what they are supposed to" (Exhibit Q, SPE # 21)*
- *"Quite frankly, I don't care what hours they work" (Exhibit Q, SPE #36)*

The controls necessary for ensuring that these programs are used properly and not abused are not in place. This investigation found that while some controls exist, there are so many work programs and policies in place, that it is difficult for management officials to know the rules and requirements of each program and how to enforce them. Disciplining employees for abusing these programs is further complicated by a history of lax enforcement, non-enforcement, and inconsistent enforcement that has rendered the existing controls completely ineffective.

As mentioned earlier, Patents upper management has for the most part prohibited TCs and Employee Relations from using computer and swipe records as evidence against employees found to be misrepresenting time worked on their timesheets. The rationale for not using computer and swipe records is that the Agency does not want to harm employees by having "big brother" watching them. However, as evidenced by the increasing number of OIG complaints regarding time fraud throughout the Patent Corps, some employees are becoming increasingly frustrated by management's lack of enforcement.

In recent years, more and more of the existing controls have been used as bargaining chips with the union to reach agreements on Agency initiatives. This has resulted in a lackadaisical approach to enforcing work schedules and telework programs, as well as a failure to address end-loading and other performance-manipulation issues.

It appears that the loosened controls has either encouraged, or at the very least, failed to discourage end-loading. Examiners can work inconsistently throughout the year, and even fail to be present at work, with little or no consequences. These examiners are receiving the same salary and performance awards as those employees who are consistently turning in work throughout the quarter and fiscal year. Examiners are also engaging in misconduct in order to avoid being placed on performance warnings and be eligible to receive performance awards. Examiners can submit incomplete office actions for credit, called mortgaging, then go back later and complete the office action. As long as the examiner submits an appropriate amount of work by the end of each quarter, the examiner will be eligible to receive a variety of performance awards.

In the course of investigating the OIG complaints, the Agency found multiple instances where there was evidence that an employee was potentially engaging in time and attendance abuse, yet management would not allow a thorough investigation. Nor would management allow these records to be used as evidence in a disciplinary or adverse action. This adds to the impression that time and attendance abuse is tolerated.

The ADCs have developed a series of guidance documents for supervisors in an effort to help address their frustration with the perceived inability to manage employees who are unresponsive and do not appear to be working – commonly referred to by the ADCs as “extreme outliers”.

The first document in this three-set program is titled *Management Guidance on Certifying Time and Attendance (Exhibit bb)*. The guidance relies on a two prong test: (1) the amount of work submitted by the examiner in a bi-week, and (2) the level of responsiveness of the examiner. If the examiner does not respond to a supervisor’s e-mails or voicemails, and does not appear to be in the office or hoteling during the workday, the supervisor needs to review the PALM report on the first Tuesday of the new bi-week. If the examiner did not submit a reasonable amount of work for the number of hours he or she claimed to have worked that bi-week, and did not respond to the supervisor’s attempts to contact the examiner, then the supervisor should call and/or e-mail the examiner. If the examiner does not respond, the supervisor should call and/or e-mail the examiner again the next day. If the examiner still does not respond, the supervisor should contact his or her TC Director about the situation, and then contact Employee Relations.

Employee Relations will send the examiner a letter that lets the examiner know the supervisor is concerned about the examiner’s non-responsiveness and lack of work, directs the employee to report to work or sign into the hoteling equipment, provides a variety of options and services available (e.g., FMLA, EAP, LifeCare), and a reminder of the work schedule and leave requesting requirements. If the examiner is still unresponsive, then the supervisor may charge the examiner with Absence Without Leave (“AWOL”) and begin the disciplinary or adverse action process.

This guidance is flawed and ineffective as it relies on a two-prong test – the examiner not submitting work **AND** not being responsive. If the examiner meets one of those two requirements, then the supervisor cannot take further action. Supervisors will once again be faced with the inability to hold examiners AWOL or take disciplinary action against them. The ADCs rely heavily on “coaching, mentoring, and training” examiners on properly recording their time and submitting work. However, when this does not work, it is necessary to take appropriate disciplinary action.

#### **FINDINGS ON EACH ALLEGATION:**

##### **1. Time Fraud**

- a. Unnamed Patent Examiners are misrepresenting their time and attendance records, to include claiming overtime that is not being worked. This allegation cannot be proved or disproved. The lack of controls such as the requirement to log into USPTO systems and to notify managers of work schedules results in a lack of reviewable records from which a conclusion can be drawn on the time

a particular examiner is working. Therefore, this allegation is UNSUBSTANTIATED. However, evidence such as the prevalence of end-loading, as well as, the observations of SPEs indicates that this is a problem that requires significant remedial attention.

- b. Unnamed Patent Examiners are misrepresenting their time and attendance records by claiming time based on work completed instead of time worked. This allegation cannot be proved or disproved. The lack of controls such as the requirement to log into USPTO systems and to notify managers of work schedules results in a lack of reviewable records from which a conclusion can be drawn on the time a particular examiner is working. Therefore, this allegation is UNSUBSTANTIATED. However, evidence such as the prevalence of end-loading, as well as, the observations of our SPEs indicates that this is a problem that requires significant remedial attention.
- c. There is a lack of accountability for Patent Examiners to record their time correctly as long as the examiner meets his or her production goals. This allegation is SUBSTANTIATED
- d. The Agency is not policing or monitoring abuse of timesheets. This allegation is SUBSTANTIATED
- e. Conduct issues and time fraud are routinely overlooked as long as an examiner's production levels are acceptable. There is insufficient evidence to substantiate this allegation. However, anecdotal evidence and observation by the SPEs indicates that this is a problem that needs to be addressed uniformly and across all TCs. - UNSUBSTANTIATED
- f. There is a lack of accountability for Patent Examiners participating in the Hoteling Program. SUBSTANTIATED
- g. Unnamed Patent Examiners are receiving overtime pay for time they are not working. This allegation cannot be proved or disproved. The lack of controls such as the requirement to log into USPTO systems and to notify managers of work schedules which therefore results in a lack of reviewable records from which a conclusion can be drawn on the time a particular examiner is working. Therefore, this allegation is UNSUBSTANTIATED.
- h. Management is dissuading supervisors from questioning employees about time and attendance discrepancies - This allegation is SUBSTANTIATED based on the testimony of the interviewed SPEs. However, we cannot determine how widespread this issue is.
- i. There is a lack of accountability for Patent Examiners to record their time correctly. - As a result of the USPTO's very flexible work schedules, coupled with a lack of controls such as requiring employees to log in to USPTO systems or to notify managers of their work schedules, demonstrates that many managers do not know when or if their employees are working on given days throughout the bi-week. Therefore, this allegation is SUBSTANTIATED

## **2. End-loading**

- a. Patent Examiners are only working at the end of the quarter, known as "end-loading" their work and can go from unacceptable performance to award levels in one bi-week by doing 500% to more than 1000% of their production goal. SUBSTANTIATED - Data shows that approximately 20% of examiner end-load.

- b. Supervisors are not equipped to monitor the quality of the work submitted effectively due to “end-loading”. SUBSTANTIATED

### **3. Mortgaging of Work**

- a. Patent Examiners are submitting incomplete work for credit before the end of a bi-week and then going in after the bi-week to submit valid work; something the Agency calls “mortgaging” of work - SUBSTANTIATED

### **4. Performance Plan Issues**

- a. Unnamed Patent Examiners are receiving bonuses for Docket Management while they have overdue cases in their dockets. SUBSTANTIATED
- b. Standards have gotten easier with the implementation of the new PAP in FY 2010 as GS12s and above can now get credit for the work before it is checked. SUBSTANTIATED
- c. There is no reasonable way for a supervisor to monitor the quality of the work. SUBSTANTIATED
- d. Performance standards became easier with the new count system and examiner PAP. SUBSTANTIATED

## **RECOMMENDATIONS**

### **1. *Enforce work schedule policies***

Supervisors should enforce the work schedule hours. The guidelines are very clear on the hours that examiners are permitted to work. Employees should be required to submit their work schedule to their supervisor on a weekly basis, unless they work the same schedule regularly. With the flexibility of work schedules at USPTO, it is difficult for supervisors to know when all their employees are working if they are varying their work hours regularly. Supervisors must know when their employees are working and what their work schedules are in order to accurately certify WebTA. Supervisors should not make exceptions for employees to allow them to violate the guidelines and work regular hours outside of the time bands. Employees should be required to follow policies and procedures, and held accountable if they do not. With the USPTO being promulgated as both a professional environment and model Federal telework Agency, it is a reasonable expectation that employees, including Patent Examiners, can and should follow policies and procedures, thereby providing management with a tool for accountability.

### **2. *Require employees to work in their USPTO office, or at their approved telework location***

Patents management allows patent examiners to take their USPTO issued government laptop anywhere on campus, as well as to work while on vacation outside of their approved telework location. This makes locating examiners very difficult. SPEs can often not find examiners in their offices, but they cannot always use this as evidence they are not working because when confronted about their whereabouts, employees will say they were working in Dulany Gardens or the cafeteria. Employees should be required to be at their assigned USPTO office so that they are available during duty hours, and held accountable if they do not.

### **3. Implement End-loading Deterrents**

Currently, there is only a quarterly production requirement; this allows examiners to submit large volumes of work at the end of the quarter, rather than working consistently and steadily throughout the period. This practice places a lot of pressure on the SPEs to review large amounts of work in the few days following the quarter's end. As evidenced by the interviews, there is a consensus that this practice has a negative impact on quality. Further, it allows examiners great freedom in their work hours, and no real requirement to be present or to work consistently throughout the quarter and year, which leads to a lack of accountability towards pay for work performed and the supervisors ability to accurately and truthfully certify WebTA.

### **4. Review Quality Element**

Because such a high percentage of interviewees said that the Quality element does not begin a patent examiner at the Fully Successful level and then earning a rating up or down from there, and that the element is often overlooked and not properly addressed because of the exorbitant amount of effort and time required to address quality issues, this element should be reviewed. The USPTO should follow 5 U.S.C. Part 430, in particular, § 430.208(a)(2), which states, "*An agency shall not issue a rating of record that assumes a level of performance by an employee without an actual evaluation of that employee's performance*" (**Exhibit Z**). USPTO should also utilize the guidance provided on OPM's website and seek their assistance if needed.

In OPM's guidance Appraisal Design, it states, "*Designers must decide how much flexibility the program users will need and ensure the design supports reserving the Outstanding level for truly exceptional performance*" (**Exhibit aa, p.7**). Having a robust Quality element is especially important as the SPEs, Directors, and ADCs agreed that holding examiners accountable for Quality is one of the tools that they have to combat time and attendance misconduct. It is also important in ensuring the Agency's communication means with the Applicants is of the highest quality and accuracy.

### **5. Revise Docket Management Element**

To prevent employees with cases in the Ceiling Exceeded tab from receiving Outstanding ratings of record and unjustified monetary awards, it is recommended that the Docket Management element and award be revised. In addition, the manner with which examiners manipulate the Docket Management system processes and calculations has resulted in the number of cases on the Ceiling Exceeded Tab to more than quadruple since the Docket Management element was revamped (**Exhibits W, X, and Y**).

In FY 2009, the Agency paid out \$448,184.35 in awards for Pendency (Docket Management) (**Exhibit pp**). In FY 2012, the Agency paid out \$10,649,884.77 in awards for Docket Management (**Exhibit pp**). This is an increase of \$10,201,700.42, which is more than a 95% increase. It is recommended that a cost-benefit analysis be thoroughly conducted to ensure that the amount of awards currently being paid out for Docket Management is benefiting the Agency and the applicants. It is also recommended that the ratings in this element more accurately account for the number and age of applications in the examiners' ceiling exceeded tabs.

The Agency has already begun this process and is currently in discussions with the bargaining unit to revise the element and award criteria to address these issues.

## **6. Review Auto-Count**

It is recommended that USPTO review the auto-count function of the production element to ensure that it is not contributing to end-loading and mortgaging. It is also recommended that auto-count be reviewed to ensure that it cannot be manipulated.

It appears that there are a high number of examiners with auto-count that have a large percentage of their work returned for corrections. The data in *Exhibit qq* shows that GS 12 examiners account for a large percentage of examiners with cases returned. GS 12 examiners make up 13.6% of the patent examiners, but they have 21.9% of total returns and 42.47% of total returns in the ceiling exceeded tab (*Exhibit qq*). A potential solution to be considered is whether auto-count could be given as a benefit to an examiner that can be earned and lost depending on their quality and end-loading behavior.

It is important to implement checks on this behavior, as this type of misconduct is very difficult to prove and the union generally will argue that it is a quality error, rather than intentional misconduct.

## **7. Requirement to log in while working, including teleworking**

The USPTO is renowned in both the private and public sectors for its award-winning telework programs. Agency telework representatives are often dispatched to provide guidance and assistance to other agencies and companies in developing, establishing and maintaining a telework program. It is imperative that the USPTO also be able to demonstrate that it does address instances of employees abusing a telework program. If the Agency continues its failure to ignore employee misconduct, it faces a potentially enormous amount of embarrassment on an otherwise successful and pioneering program.

USPTO should require all teleworking employees to log into the Virtual Private Network (VPN) and be active on e-mail and collaboration tools, including the telephone and instant messaging systems, when they are teleworking. This requirement should be present in all teleworking agreements. While an employee does not need to be active on their computer to be working for limited amounts of time, examiners do need to be logged into the VPN to be available to their supervisor, co-workers, and stakeholders (customers). They also must be logged in to use the collaboration tools and examination tools and systems. Telework is intended to be seamless and there should be no difference, except location, when an employee is working from home, or other designated telework location. The OPM Guide to Telework in the Federal Government states that, "*customers should not notice that the teleworker is working from an alternative worksite (i.e., work should be seamless)*" (*Exhibit M, p.29*). The Guide also states that, "*the manager must be kept apprised of the teleworker's schedule, how to make contact with the teleworker, and the status of all pending work*" (*Exhibit M, p.29*).

Furthermore, the ADCs all expressed communication as the means for supervisors to interact and validate their employee is working. When teleworking employees are not logged into the VPN, they are not available by their work phone or work e-mail, and they do not have access to the collaboration tools. Therefore, teleworking employees should be logged in at all times when they are working and be at least periodically active throughout the business day so as to check

for e-mails, telephone calls, and instant messages. All teleworking program documents, training, and agreements should be updated to reflect the requirement to log into the VPN and reflect the requirements in the Guide to Telework in the Federal Government. Management must then enforce these policies by addressing those known to not be adhering to the rules and enforcing consequences for those that do not.

#### **8. *Requirement to use collaboration tools***

USPTO should require mandatory use of the collaboration tools, including Office Communicator and the presence indicator, by all employees, both on-site and off-site. With so many employees working off-site, it is beneficial to all employees to have the ability to communicate in real time with one another. It is also beneficial for employees to know at-a-glance whether another employee is currently active on their computer and thus available for consultation. Employees should be required to remain active and ensure that their status is up-to-date. The Office Communicator syncs with the Outlook calendar and will alert when an employee is on leave or in a meeting, etc. The collaboration tools should be, and can be, set at a system level to ensure that employees are not able to manipulate them or override settings in an effort to intentionally or unintentionally deceive others regarding their presence.

#### **9. *Change OT eligibility requirements***

Overtime eligibility should be evaluated on a more frequent, preferably bi-weekly basis. This would assist in eliminating examiners from working overtime when their performance is below Fully Successful. Examiners should be at least Fully Successful in each critical element the bi-week before they request to work overtime. The original memo that addresses the requirements for overtime is outdated. It is recommended that USPTO update and enforce this policy. Further, the overtime and compensatory time eligibility requirements should be consistent to avoid confusion.

#### **10. *Delegate approval of investigations***

Currently, the pulling and reviewing of all records requires ADC approval. The ADCs are often the deciding officials in proposed conduct actions, and should not be involved in the case prior to receiving the proposed action and supporting documents. It is important that the deciding officials be unbiased and rely only on what is provided in the proposal package. When the ADC/deciding official is involved in the case throughout the entire process and makes the decision on whether or not evidence can be used, the process becomes tainted. It is recommended that the ADCs delegate the authority to approve records and investigations to Employee Relations Division, who conducts the investigations and can determine what records are necessary for each case.

#### **11. *Full use of records***

Managers should be allowed full access to and use of any available records when investigating suspected misconduct. Based on the interviews with the SPEs and Directors, the most common reason for not allowing the use of records was that it would create an environment of fear for the majority of examiners, or that the records are not reliable. This investigation has found that there is no evidence that employees are afraid of management looking at their records. Furthermore, employees are unaware of management's review of records, unless the review reveals misconduct. This investigation also revealed that the only time that employees are aware that

management has reviewed their records is when they are called into an investigatory meeting to discuss the evidence and any discrepancies or when they receive a disciplinary or adverse action.

As a federal employee, it is reasonable to assume that the Agency has the means and ability to monitor them to some degree. Even if employees hear through the rumor mill that another employee had their records reviewed, honest employees do not have a reason to fear a records review. More importantly, employees use Agency-issued computers, badges, Internet connection, and software on a daily basis and have no right to privacy. The Agency is well within its legal right to routinely monitor employee activity and use of its equipment and systems.

The reliability of the records can be determined by the proposing and/or deciding official. This investigation found that when records from multiple sources are used together, they can provide a compelling case. It is imperative that the Agency not overlook improper conduct, especially time and attendance fraud. If necessary, the Agency should make modifications to the way that data is collected and stored, including the length of time that data is stored, so that there is no concern about the reliability of records.

#### ***12. Enforce leave requesting procedures***

Management should be sure to enforce leave requesting procedures. Examiners are required to request leave in advance, in writing, except in unforeseen instances or emergencies. Supervisors should not grant leave after it is taken, except in rare instances. The enforcement of the leave requesting procedures should assist in ensuring that examiners are not manipulating their hours or production requirements. This will also provide supervisors with a tool to ensure with more certainty the accuracy of the examiners timecards at the end of the bi-week.

Currently, many examiners are requesting leave at the end of the bi-week, without having informed their supervisor previously. This is unacceptable and a violation of the leave requesting procedures that are in place. Supervisors are compounding the problem by making exceptions which violate policies and procedures. The USPTO has a professional environment with a highly technical and educated workforce that can be expected to follow policies and procedures. In addition, it is important to note that Patent Examiners are permitted to work while on annual leave as a way to artificially boost their productivity numbers. As a result, it is not uncommon for examiners to add leave to their timecard retroactively after knowing how much work they completed for the bi-week. Retroactive use of leave should be prohibited.

#### ***13. Consolidate and centralize memos/policies***

During the investigation, it became clear that the location and relativeness of policies and memos relating to the rules and regulations at USPTO were scattered and difficult to find. Many supervisors did not know which policy or memo was the current one in place or where to look if they had a question or needed more guidance. It is recommended that USPTO place current policies and memos in a central location and remove outdated and non-applicable policies and memos. Additionally, the policies and memos should be systematically reviewed and updated as necessary. Every effort should be made to update and consolidate all memos and policies so that it is clear to all employees and managers what is current and effective. If changes or updates need to be made to a policy once they are all updated and centralized, it is recommended that an



updated policy or addendum be available once the changes/updates are made instead of sending out memos and that a notification is sent out informing employees that changes/updates have been made.

***14. More supervisory training***

This investigation revealed that many supervisors, directors, and ADCs are not aware of the current policies in place at USPTO. This is concerning and could lead to the inequitable treatment of employees. The recommendation is that USPTO, in conjunction with centralizing all current policies and memos, provide yearly training to supervisors on the policies in place that affect them and/or their employees.

***15. Cost Benefit Analysis***

It is recommended that USPTO perform a thorough cost benefit analysis of the patent examiner award structure to ensure that the changes made to the examiner PAP in 2010 and the restructure of the award program is appropriately benefitting the Agency and that it is a justified expense to the Agency and the taxpayers.



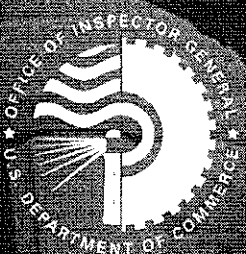
# INVESTIGATIVE REPORT

## U.S. Patent and Trademark Office

### Review of Waste and Mismanagement at the Patent Trial and Appeal Board

**FOR PUBLIC RELEASE**  
REPORT NUMBER 13-1077  
JULY 28, 2014

U.S. Department of Commerce  
Office of Inspector General  
Office of Investigations



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# Chapter I: Introduction

In February and May 2013, the Office of Inspector General (OIG) received anonymous whistleblower complaints alleging that, since 2010, Paralegal Specialists working with the Patent Trial and Appeal Board (PTAB) at the United States Patent and Trademark Office (USPTO) were being paid for not working. The complaints alleged that the Paralegal Specialists logged “non-production time” when not working and were logging 50 to 70 hours of such time per 80-hour pay period. At the time, the PTAB carried an extensive backlog of cases, averaging 21,200 matters awaiting disposition from Fiscal Years 2009 through 2013.<sup>1</sup>

The OIG conducted an investigation to verify the accuracy of these allegations, the PTAB’s effectiveness and efficiency in its use of government resources, and the degree to which any mismanagement issues were addressed.

## I. Executive Summary

On August 21, 2013, the OIG initiated investigation 13-1077-I into allegations provided by anonymous whistleblowers that paralegals at the USPTO’s Patent Trial and Appeal Board were receiving full-time pay, but had insufficient workloads over a prolonged period of time. Our investigation uncovered substantial, pervasive waste at the PTAB that endured for more than four years and resulted in the misuse of federal resources totaling at least \$5.09 million.

In 2008, the PTAB faced a growing backlog of appeals and sought to hire a wide array of new personnel to tackle the influx of cases, including judges, Paralegal Specialists, and other staff. In early 2009, the organization quickly hired 19 Paralegal Specialists, which increased its total Paralegal Specialist staff to approximately 50. PTAB managers had recommended 17 of those new hires, but the then-Chief Judge insisted – over the vocal objection of PTAB managers – on hiring two additional paralegals because he apparently did not want to lose those positions during an impending hiring freeze. The PTAB hired only one new judge before the USPTO imposed that hiring freeze in 2009.

As a result, PTAB’s paralegals, who were largely dependent on judges for their work, had insufficient workloads and considerable idle time during work hours. Many were frequently paid to do nothing, despite the fact that PTAB’s backlog was growing rapidly at the same time. PTAB managers, including its senior-most personnel, were aware of this problem as far back as 2009, but remained confident that the problem would disappear once new judges were appointed. That, however, would not occur for years, during which time many of PTAB’s Paralegal Specialists had insufficient work to fill a full-time work schedule.

The problem grew so bad that the PTAB used a separate billing code for Paralegal Specialists to charge those non-productive hours – “Other Time.” One Senior Manager described Other Time as the “I don’t have work but I’m going to get paid code.” The volume of hours charged to Other Time – which were hours that paralegals were paid their full salary, but were not

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<sup>1</sup> Years in this report refer to calendar years unless otherwise specified as fiscal years.

working – was remarkably high and troubling. In 2011, PTAB paralegals logged more than 27,000 hours to Other Time, and in 2012, nearly 26,000 hours. Some paralegals were idle for so long that they stopped telling their supervisors when they ran out of work and just waited for their next assignment.

In fact, some PTAB paralegals charged more than 50% of their annual total work hours to Other Time over the course of multiple consecutive years. The Paralegal Specialists with the greatest average Other Time between Fiscal Years 2010 and 2013 logged the following amounts:

- #1: 46% in 2010 and 60% in 2011;
- #2: 61% in 2010, 66% in 2011, and 13% in 2012;
- #3: 53% in 2010, 35% in 2011, 54% in 2012, and 33% in 2013; and
- #4: 56% in 2010, 55% in 2011, 47% in 2012, and 12% in 2013.

The OIG's investigation revealed that Paralegal Specialists engaged in a variety of personal activities while charging their time to Other Time. For instance, PTAB paralegals told the OIG that, during hours logged as Other Time and therefore when they were getting paid from federal resources, they:

- watched television;
- surfed the internet;
- used social media, such as Facebook;
- performed volunteer work for a charity from home;
- washed laundry;
- exercised at home;
- read books, the news, and magazines;
- shopped online; and
- cleaned dishes.

The evidence established that PTAB managers were completely aware of the volume of Other Time hours during the relevant time frame and took little action to prevent such waste. Worse, PTAB managers rewarded these paralegals – including those with extensive Other Time hours – with performance bonuses of thousands of dollars apiece. For instance, the paralegals described above, who logged more than 50% of their hours as Other Time some fiscal years, received between \$2,000 and \$3,500 in performance awards each year.

In essence, PTAB management ignored the problem because they believed that hiring new judges would resolve the problem. But the problem persisted for years. PTAB managers periodically considered “special projects” to give paralegals more work. These efforts, however, were feeble, half-hearted, and ineffective at addressing the problem. Some managers also felt constrained by the paralegals' labor Union, believing that any steps to address the Other Time issue would create conflict with the Union.

Only after the OIG became aware of allegations of waste involving Other Time usage and referred these complaints to the PTAB did PTAB management start to take the problem seriously. Within hours of the direction from senior management to reduce the Other Time levels to zero, managers developed a list of potential ways to do so. One of the first ideas was implemented in May 2013 and brought Other Time levels to near zero.

In total, according to the OIG's calculations, the usage of Other Time resulted in the waste of federal resources of approximately \$5.09 million between Fiscal Year 2009 and Fiscal Year 2013. We arrived at this estimate by adding the amount of wages paid for Other Time to the bonuses provided to the Paralegal Specialists, Supervisory Paralegal Specialists, and certain Senior Managers who oversaw paralegal operations. The amount of wages attributable to Other Time logged during this period totaled more than \$4.3 million. Paralegal Specialists and Supervisory Paralegal Specialists received more than \$681,000 in bonuses, and specific Senior Managers who oversaw paralegal operations received more than \$87,000 in bonuses.

What is most egregious, however, is the conduct of numerous federal employees at the PTAB in connection with this waste. Although the Other Time problem was widely known throughout the PTAB organization, no one seemed to take ownership of the issue. In the worst cases, paralegals seemed content to have extensive idle time while collecting full salaries and benefits, and PTAB management seemed to sit on their hands, anticipating the arrival of judges at some unknown date in the future. We credit that one or more whistleblowers eventually alerted the OIG to the waste, although we recognize that no one came forward for more than three years as the Other Time problem grew.

In light of the waste uncovered over the course of this investigation, the OIG recommended that the PTAB make several changes to prevent such problems in the future. For instance, the OIG recommended that:

- The PTAB should examine Paralegal Specialist and Supervisory Paralegal Specialist workloads on a regular basis and implement a process to readjust workforce assignments, among other things, if employees have insufficient workloads.
- The PTAB should continue to reexamine its management structure to determine whether it is most efficient and effective to have so many layers of management overseeing paralegal operations.
- Because we found that the nature of the PTAB's telework programs – and particularly, the combined effect of the programs – created an environment vulnerable to abuse, the PTAB should institute clearer telework rules, including what types of activities are permissible and impermissible on official duty, and the PTAB should provide regular training to all teleworking employees and their supervisors on those rules.

## **II. Scope and Methodology**

The OIG conducted this investigation by interviewing relevant witnesses; reviewing numerous records and policies; conducting data analytics; and researching applicable legal standards. The OIG interviewed Paralegal Specialists, Supervisory Paralegal Specialists, and members of PTAB management, including two of the Chief Administrative Patent Judges (Chief Judges) in charge at the time. Witnesses were sworn and interviews were recorded. Some witnesses were interviewed more than once. The OIG obtained records from several witnesses and the USPTO, as well as data from the USPTO.

## **III. Organization of the Report**

This report will begin with an overview of the PTAB, a description of the PTAB's case backlog, a summary of the America Invents Act, and a listing of the relevant regulations and policies at issue in the investigation. After noting the allegations to be resolved, the report will discuss the facts determined during the investigation and the OIG's analysis of those facts. The report will close with the OIG's findings, conclusions, and recommendations for the USPTO.



## Chapter 2: Background

This chapter will provide an overview of the PTAB, its case backlog, the America Invents Act, and the relevant regulations and policies.

### I. Overview of the PTAB

The USPTO, a federal agency within the U.S. Department of Commerce, is responsible for granting patents and trademark registrations.<sup>2</sup> The PTAB is a component within the USPTO whose purpose is to review appeals of decisions made by patent examiners and render decisions on challenges made against existing patents.<sup>3</sup> The organization is headed by a Chief Judge and consists of various administrative patent judges, patent attorneys, and support staff, including Paralegal Specialists.<sup>4</sup> The PTAB was formerly called the Board of Patent Appeals and Interferences (BPAI).<sup>5</sup>

### II. Backlog

Since 2009, the PTAB has experienced a significant backlog of appeals, as shown in the table below.

**Table 1. Backlog of PTAB Cases by Year<sup>6</sup>**

Fiscal Year	Case Backlog
2009	12,489
2010	17,754
2011	23,963
2012	26,484
2013	25,308

The OIG analyzed this backlog in a previous audit report, finding that the USPTO increased the number of patent examiners on staff, which resulted in a rise in the volume of patent decisions

<sup>2</sup> See USPTO, *The USPTO: Who We Are*, <http://www.uspto.gov/about/index.jsp> (last visited July 17, 2014); 35 U.S.C. § 1. Under 35 U.S.C. § 2, USPTO is "responsible for the granting and issuing of patents and the registration of trademarks," among other duties.

<sup>3</sup> See USPTO, *About the PTAB*, [http://www.uspto.gov/ip/boards/bpai/ptab\\_about.jsp](http://www.uspto.gov/ip/boards/bpai/ptab_about.jsp) (last visited July 17, 2014) [hereinafter *About the PTAB*] ("The PTAB is charged with rendering decisions on: appeals from adverse examiner decisions, post-issuance challenges to patents, and interferences."). Under 35 U.S.C. § 6(b), PTAB is required to "(1) on written appeal of an applicant, review adverse decisions of examiners upon applications for patents . . . ; (2) review appeals of reexaminations . . . ; (3) conduct derivation proceedings . . . ; and (4) conduct inter partes reviews and post-grant reviews . . ."

<sup>4</sup> See *About the PTAB*, *supra*.

<sup>5</sup> See Leahy-Smith America Invents Act, Pub. L. No. 112-29, §§ 3(j), 7, 125 Stat. 284, 290, 313 (2011) (current version at 35 U.S.C. § 6) [hereinafter *America Invents Act*].

<sup>6</sup> OIG Investigative Record Form (IRF): Data Analysis; Memorandum from Chief Administrative Officer, USPTO, to the OIG 2 (undated; received by OIG on or about July 10, 2013) (on file with OIG) [hereinafter *USPTO Response*].

released.<sup>7</sup> That increase, in turn, caused a proportionate surge in appeals submitted to the PTAB.<sup>8</sup> As the volume of appeals grew, the PTAB's judicial staffing level remained essentially flat, resulting in a growing backlog of cases.<sup>9</sup> PTAB personnel, including Paralegal Specialists, were aware of this backlog during the time period in question for this report,<sup>10</sup> and PTAB management periodically communicated with staff regarding the status of the backlog.<sup>11</sup>

### III. America Invents Act

In September 2011, the Leahy-Smith America Invents Act (AIA) was signed into law, fundamentally changing the U.S. patent system from a "first to invent" system to one that grants patents to the "first inventor to file" for a patent.<sup>12</sup> The AIA also renamed the BPAI as the PTAB and placed increased duties and responsibilities on the organization.<sup>13</sup> Major provisions, including the PTAB's additional duty to review AIA-related cases, became effective in September 2012.<sup>14</sup>

The AIA granted the USPTO the authority to set its own fees for patent-related services, including appeals.<sup>15</sup> As a result, in January 2013, the USPTO more than doubled the regular

<sup>7</sup> See OIG, *USPTO's Other Backlog: Past Problems and Risks Ahead for the Board of Patent Appeals and Interferences*, Report No. OIG-12-032-A, 1, 5 (August 10, 2012) [hereinafter *OIG Backlog Report*].

<sup>8</sup> See *id.* at 1.

<sup>9</sup> See *id.* at 5.

<sup>10</sup> See, e.g., OIG IRF: Interview with Paralegal 3, Tr. 997-1009 [hereinafter *Paralegal 3 Interview*]; OIG IRF: Interview with Manager 2, Tr. 2040-46 [hereinafter *Manager 2 Interview*]; OIG IRF: Interview with Manager 1, Tr. 3699-800 [hereinafter *Manager 1 Interview*]; OIG IRF: Interview with Manager 4, Tr. 2463-80 [hereinafter *Manager 4 Interview*]; OIG IRF: Interview with Paralegal 7, Tr. 1556-73 [hereinafter *Paralegal 7 Interview*]; OIG IRF: Interview with Paralegal 2, Tr. 1794-96 [hereinafter *Paralegal 2 Interview*]; OIG IRF: Interview with Paralegal 10, Tr. 1399-412 [hereinafter *Paralegal 10 Interview*].

<sup>11</sup> See *Paralegal 2 Interview*, *supra*, at Tr. 1797-807; OIG IRF: Review of Documents from Paralegal 2 (October 3, 2012, e-mail from Chief Judge 2 to "PTAB Users" congratulating and thanking them on their work to prevent the backlog from reaching 27,000 and making the backlog decrease) [hereinafter *Paralegal 2 Documents*]; OIG IRF: Interview with Paralegal 9, Tr. 1331-50 [hereinafter *Paralegal 9 Interview*] (the backlog was discussed at the "yearly state of the board meetings," which took place mid-fiscal year); *Paralegal 10 Interview*, *supra*, at Tr. 1406-12 ("anytime we have a board meeting, it is constantly like the number one metric by which the success of the board is measured is how we're doing on our backlog").

<sup>12</sup> See America Invents Act §§ 3, 7.

<sup>13</sup> See *id.* §§ 3(j), 7.

<sup>14</sup> See *id.* §§ 3(n)(1), 7(e), 35; OIG IRF: Interview with Senior Manager 1, Tr. 308-11 [hereinafter *Senior Manager 1 Interview*]; OIG IRF: Interview with Senior Manager 2, Tr. 917-29 [hereinafter *Senior Manager 2 Interview*]. AIA-related cases include the following: inter partes reviews (challenges to an existing patent nine months or more after issuance of the patent or at any time for a first-to-invent patent), post grant reviews (challenges to an existing patent within nine months of the issuance of the patent), covered business method reviews (challenges to a business method patent), and derivation proceedings (challenges by a patent applicant to an existing patent based on the contention that the existing patent is derived from the applicant without the applicant's authorization). See America Invents Act § 7; OIG, *USPTO Successfully Implemented Most Provisions of the America Invents Act, but Several Challenges Remain*, Report No. OIG-13-032-A, 2 (September 30, 2013) [hereinafter *OIG AIA Report*]; USPTO, Derivation Proceedings, [http://www.uspto.gov/aia\\_implementation/faqs\\_derivation\\_proceedings.jsp](http://www.uspto.gov/aia_implementation/faqs_derivation_proceedings.jsp) (last visited July 22, 2014).

<sup>15</sup> See America Invents Act § 11; *OIG AIA Report*, *supra*.

appeal fees from \$1,260 to \$2,800 – an increase of 122%.<sup>16</sup> Some of the new fees became effective in March 2013, while others became effective in January 2014.<sup>17</sup>

#### IV. Legal and Regulatory Overview

Under federal law, all federal employees are required to “disclose waste, fraud, abuse, and corruption to [the] appropriate authorities.”<sup>18</sup> In addition, U.S. Department of Commerce policies require that all U.S. Department of Commerce employees, including PTAB personnel, report to the OIG “information indicating the possible existence” of activities that “may constitute mismanagement, waste of funds, abuse of authority, or a violation of [a] law or regulation.”<sup>19</sup> Department policies also prohibit “[l]oafing, willful idleness, [and] wasting time” and an “[a]ct of negligence or careless workmanship in [the] performance of duty resulting in [a] waste of public funds or inefficiency.”<sup>20</sup> Furthermore, the “[k]nowing failure of a [U.S. Department of Commerce] officer or employee to comply with the reporting requirements . . . may result in disciplinary action . . . .”<sup>21</sup>

PTAB personnel are also subject to other policies pertaining to telework, work schedules, and labor agreements. These topics are discussed in subsequent sections of this report.

#### V. Allegation to be Resolved

In February 2013, the OIG received two anonymous whistleblower complaints alleging waste and mismanagement at the PTAB. According to the first complaint, the current Chief Administrative Patent Judge (Chief Judge 2) and other managers maintained a practice since 2010 of approving 50 to 70 hours per pay period of “other non-classified time” (code A00131, also known as Other Time) for Paralegal Specialists who work from home.<sup>22</sup> The complaint further alleged that Other Time meant “employees [we]re doing nothing,” despite the PTAB’s backlog of cases.<sup>23</sup>

The second complaint similarly alleged that, despite its extensive backlog, the PTAB had been allowing paralegals to log 60 to 70 hours of Other Time per pay period.<sup>24</sup> The whistleblower

<sup>16</sup> See 78 Fed. Reg. 4212, 4224, 4230-31 (January 18, 2013); USPTO, *Setting and Adjusting Patent Fees: At a Glance*, 27, 31 (January 18, 2013), [http://www.uspto.gov/aia\\_implementation/AC54\\_Section\\_10\\_Fee\\_Setting-Final\\_Rule\\_Fee\\_Setting\\_At\\_a\\_Glance-1\\_18\\_2013.pdf](http://www.uspto.gov/aia_implementation/AC54_Section_10_Fee_Setting-Final_Rule_Fee_Setting_At_a_Glance-1_18_2013.pdf) [hereinafter *USPTO Fees*]. Filers qualifying for “small entity” status pay 50% of the regular fees – \$1,400, which represents an increase of \$770, or 122%, over the previous small entity fees of \$630. See 78 Fed. Reg. at 4224, 4230. Filers qualifying for “micro entity” status, a new status for some filers that previously fell within the small entity status, pay 25% of the regular fees – \$700, which represents an increase of \$70, or 11%, over the previous small entity fees of \$630. See *id.* The USPTO estimated that 25% of all filers would qualify for small entity status and 6.2% or 7.8% of all filers would qualify for micro entity status. See *id.* at 4221.

<sup>17</sup> See 78 Fed. Reg. at 4212.

<sup>18</sup> 5 C.F.R. § 2635.101(b)(1) (2014); Exec. Order No. 12674 § 101(k).

<sup>19</sup> DOC Department Administrative Order 207-10 (3.01), (3.04).

<sup>20</sup> DOC Department Administrative Order 202-751, App. B.

<sup>21</sup> DOC Department Administrative Order 207-10 (3.04).

<sup>22</sup> See Hotline Tip from Anonymous Complainant #1, Case No. 13-0446 (Feb. 4, 2013).

<sup>23</sup> See *id.*

<sup>24</sup> See Hotline Tip from Anonymous Complainant #2, Case No. 13-0446 (Feb. 13, 2013).

further stated that he or she did not want to sit on the clock for 60 or 70 hours while doing nothing.<sup>25</sup>

After reviewing the complaints, the OIG referred the matter to the USPTO and required the USPTO to conduct an administrative inquiry and report back to the OIG.<sup>26</sup> In May 2013, prior to receiving USPTO's response, the OIG received a third anonymous complaint stating that the OIG was investigating the PTAB, and PTAB employees were instructed to charge hours to code "L00131" so that their hours would not show as non-production.<sup>27</sup> The whistleblower further stated that, instead of being given new cases to work on, employees were being tasked with reviewing work that had already been completed.<sup>28</sup> Additionally, the whistleblower related that, despite PTAB management's instruction, PTAB employees were still logging Other Time as of May 17, 2013.<sup>29</sup> The OIG forwarded this complaint to the USPTO for incorporation into the USPTO's administrative inquiry.<sup>30</sup>

In July 2013, the USPTO provided the OIG with a report of its inquiry.<sup>31</sup> The USPTO described the focus of its inquiry as follows: "Whether PTAB managers authorized and approved compensation for 'Other Non-Classified Time,' commonly referred to within PTAB as non-production time or 'Other Time,' . . . for time periods that employees were not assigned and did not perform any work?"<sup>32</sup> In its report, the USPTO concluded as follows:

Based on the evidence provided by [three members of senior management], the [USPTO]'s investigation concluded that the allegations that PTAB management has authorized and approved PTAB employees to claim pay for time that they were not assigned and did not perform production or non-production work was **SUBSTANTIATED**.<sup>33</sup>

The USPTO stated that it found that, for four and a half years, from October 1, 2008, to May 4, 2013, Paralegal Specialists logged and were compensated for a total of 102,108 hours of Other Time.<sup>34</sup> The USPTO estimated that it paid \$4,289,424 in wages for this Other Time.<sup>35</sup> Furthermore, the USPTO estimated that it paid Paralegal Specialists an additional \$132,032.61 in productivity-based performance bonuses in Fiscal Year 2012, "even though a paralegal's 'productivity' was increased by not factoring in all of the paid time spent not performing work."<sup>36</sup>

<sup>25</sup> See *id.*

<sup>26</sup> See Memorandum from OIG to USPTO, 1 (Feb. 13, 2013) (on file with OIG).

<sup>27</sup> See Hotline Tip from Anonymous Complainant #3, Case No. 13-0803 (May 21, 2013).

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See E-mail from OIG to USPTO (Jun. 12, 2013) (on file with OIG).

<sup>31</sup> See *USPTO Response*, *supra*.

<sup>32</sup> See *id.* at 2.

<sup>33</sup> *Id.* at 6.

<sup>34</sup> See *id.* at 4.

<sup>35</sup> See *id.* at App. A (discussing the amount of Other Time logged by paralegals).

<sup>36</sup> See *id.* at Ex. 12 (discussing performance awards paid to paralegals).

The USPTO stated that, to “ensure that PTAB improves the management of employees and ceases to have employees who are not working their full schedules,” it would

conduct an activity based information . . . and workload/utilization analysis for the resources consumed and activities or processes completed by paralegal staff supporting the [PTAB] . . . so as to assess optimal staffing requirements. To ensure PTAB is successful, the [USPTO] is appointing an outside senior management specialist to advise on and oversee PTAB’s corrective efforts, and to report on the same to the [USPTO]’s Chief Administrative Officer, who will regularly update the [USPTO]’s Chief Financial Officer, until fully resolved.<sup>37</sup>

After reviewing USPTO’s report, the OIG initiated this investigation into the causes and extent of the waste, mismanagement, and policy violations at the PTAB, and whether management had addressed the mismanagement.

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<sup>37</sup> *Id.* at 6.

## Chapter 3: Analysis

### I. Facts

#### A. Structure of the PTAB

During the time period relevant to the OIG's investigation, the PTAB's organizational structure underwent several changes, but can be generally described as follows.<sup>38</sup> The PTAB was led by a Chief Judge, who supervised two Vice Chief Administrative Patent Judges (Vice Chief Judges).<sup>39</sup> At the beginning of the relevant time frame, the Chief Judge supervised an Administrative Officer (referred to as a Senior Manager in this report), who led the administrative staff.<sup>40</sup> The Administrative Officer was responsible for non-legal administrative functions, including information technology, procurement, and human resources.<sup>41</sup> Each Vice Chief Judge was in charge of one of two divisions, Division 1 or Division 2, and directly supervised line-level judges and Support Administrators (also referred to as Senior Managers in this report), who were responsible for the legal support functions within the division.<sup>42</sup> The line-level judges were organized by subject matter and a Lead Judge headed each team.<sup>43</sup>

Reporting to each Support Administrator was a senior-grade Supervisory Paralegal Specialist (referred to as Senior Managers<sup>44</sup>) who, in turn, supervised several lower-grade Supervisory Paralegal Specialists (referred to as such or as first-line Supervisory Paralegal Specialists).<sup>45</sup> Each Supervisory Paralegal Specialist was in charge of a team of Paralegal Specialists.<sup>46</sup> The Paralegal Specialist teams were organized by the subject matter of the patent cases they reviewed.<sup>47</sup> Division 1's teams included the Biotechnology Team, Computers Team, Contested Cases

<sup>38</sup> See, e.g., *Paralegal 2 Documents, supra* (PTAB organizational chart, effective Aug. 29, 2010, and PTAB organizational chart, effective Mar. 27, 2014); OIG IRF: Interview of Manager 1, Exs. 1-2 [hereinafter *Manager 1 Interview*] (PTAB organizational charts); OIG IRF: Interview with Managing Judge 1, Tr. 81-175, 318-421 [hereinafter *Managing Judge 1 Interview*]; OIG IRF: Interview with Chief Judge 2, Tr. 1137-50 [hereinafter *Chief Judge 2 Interview*]; OIG IRF: Interview of Senior Manager 5, Tr. 395-96 [hereinafter *Senior Manager 5 Interview*].

<sup>39</sup> See *Paralegal 2 Documents, supra* (PTAB organizational chart, effective Aug. 29, 2010, and PTAB organizational chart, effective Mar. 27, 2014); *Manager 1 Interview, supra*, at Exs. 1-2; *Managing Judge 1 Interview, supra*, at Tr. 81-175, 318-421; *Chief Judge 2 Interview, supra*, at Tr. 1137-50; *Senior Manager 5 Interview, supra*, at Tr. 395-96.

<sup>40</sup> See *Paralegal 2 Documents, supra* (PTAB organizational chart, effective Aug. 29, 2010, and PTAB organizational chart, effective Mar. 27, 2014); *Managing Judge 1 Interview, supra*, at Tr. 86-128; *Manager 1 Interview, supra*, at Ex. 1-2.

<sup>41</sup> See *Senior Manager 5 Interview, supra*, at Tr. 517-25.

<sup>42</sup> See *Paralegal 2 Documents, supra* (PTAB organizational chart, effective Aug. 29, 2010, and PTAB organizational chart, effective Mar. 27, 2014); *Manager 1 Interview, supra*, at Ex. 1-2.

<sup>43</sup> See *Paralegal 2 Documents, supra* (PTAB organizational chart, effective Aug. 29, 2010, and PTAB organizational chart, effective Mar. 27, 2014); *Manager 1 Interview, supra*, at Ex. 1-2.

<sup>44</sup> Both Support Administrators and Supervisory Paralegal Specialists are referred to as Senior Managers in this report.

<sup>45</sup> See *Paralegal 2 Documents, supra* (PTAB organizational chart, effective August 29, 2010, and PTAB organizational chart, effective March 27, 2014); OIG IRF: Documents #2 from Managing Judge 1 [hereinafter *Managing Judge 1 Documents #2*] (e-mail from Senior Manager 4 describing organizational structure); *Senior Manager 1 Interview, supra*, at Tr. 59-95; OIG IRF: Interview with Senior Manager 2, Tr. 55-97 [hereinafter *Senior Manager 2 Interview*].

<sup>46</sup> See *Paralegal 2 Documents, supra* (PTAB organizational chart, effective Aug. 29, 2010, and PTAB organizational chart, effective Mar. 27, 2014); *Managing Judge 1 Documents #2, supra* (e-mail from Senior Manager 4 describing organizational structure).

<sup>47</sup> See *Paralegal 2 Documents, supra* (PTAB organizational chart, effective Aug. 29, 2010). Supervisory Paralegal Specialists are referred to as Managers in footnotes.

Team, and Interference Team.<sup>48</sup> Division 2's teams included the Chemical Team, Communications and Electrical Team, and Mechanical and Business Methods Team.<sup>49</sup> These team names were the same as those for the judges.<sup>50</sup> However, despite their names, the Paralegal Specialist teams did not require knowledge or expertise in their designated subject matter.<sup>51</sup> Thus, the team names were merely a management vehicle to divide Paralegal Specialists into smaller units.<sup>52</sup>

The Chief Judge reported to the Deputy Undersecretary of Commerce for Intellectual Property and Deputy Director of the USPTO (USPTO Deputy Director), who, in turn, reported to the Undersecretary of Commerce for Intellectual Property and Director of the USPTO (USPTO Director).<sup>53</sup> From April 2005 until he retired on January 1, 2011, Chief Judge I served as Chief Judge.<sup>54</sup> Chief Judge I declined OIG's request to be interviewed for this investigation, and because he is no longer a federal employee, the OIG cannot require him to provide a statement or participate in an interview.<sup>55</sup> Following Chief Judge I's retirement in January 2011, a Vice Chief Judge (Managing Judge I) served as Acting Chief Judge until May 2011.<sup>56</sup> During those months, he also retained his position of Vice Chief Judge.<sup>57</sup> In May 2011, Chief Judge 2 became Chief Judge.<sup>58</sup> All of the employees at the PTAB ultimately reported to the Chief Judge.<sup>59</sup> See Appendix A for organizational charts.

Managing Judge I told the OIG that during Chief Judge I's tenure as Chief Judge, the PTAB's administrative functions reported directly to Chief Judge I.<sup>60</sup> Managing Judge I stated, however, that Chief Judge I later changed the organizational structure so that certain administrative functions fell within the purview of the Vice Chief Judges.<sup>61</sup> Chief Judge I made this change over the objections of the two Vice Chief Judges, including Managing Judge I, who directly supervised dozens of judges at the time.<sup>62</sup> Subsequent to this change, one of the two Vice Chief Judges resigned, leaving Managing Judge I as the sole Vice Chief Judge who directly supervised upwards of 100 PTAB employees.<sup>63</sup> After Chief Judge I retired, Managing Judge I continued to be the sole Vice Chief Judge while acting temporarily as Chief Judge, essentially filling the role of

<sup>48</sup> See *Paralegal 2 Documents*, *supra* (PTAB organizational chart, effective Aug. 29, 2010).

<sup>49</sup> See *id.* (PTAB organizational chart, effective Aug. 29, 2010).

<sup>50</sup> See *id.* (PTAB organizational chart, effective Aug. 29, 2010, and PTAB organizational chart, effective Mar. 27, 2014); *Manager I Interview*, *supra*, at Ex. 1-2.

<sup>51</sup> See OIG IRF: Review of Outside Consulting Firm Report, Attach. 1 at 27, 48 [hereinafter *Outside Consulting Firm Report*]; OIG IRF: Interview of Paralegal 4, Tr. 178-96 [hereinafter *Paralegal 4 Interview*].

<sup>52</sup> See *Outside Consulting Firm Report*, *supra*, at 27, 48.

<sup>53</sup> See *Chief Judge 2 Interview*, *supra*, at Tr. 3062-66; USPTO, Organizational Chart, [http://www.uspto.gov/about/bios/uspto\\_org\\_chart.pdf](http://www.uspto.gov/about/bios/uspto_org_chart.pdf) (last visited July 23, 2014).

<sup>54</sup> See OIG IRF: Second Set of Documents Received from Office of Human Resources [hereinafter *OHR Documents II*]; *Managing Judge I Interview*, *supra*, at Tr. 147-60, 165-75. Managing Judge I recalled beginning his role as Acting Chief Judge in 2010. *Id.* at Tr. 147-60, 165-75.

<sup>55</sup> See Case Notes 39 and 42 (attempts to interview Chief Judge I).

<sup>56</sup> See *OHR Documents II*, *supra*; *Chief Judge 2 Interview*, *supra*, Tr. 82-92; *Managing Judge I Interview*, *supra*, at Tr. 86-98, 147-60.

<sup>57</sup> See *OHR Documents II*, *supra*; OIG IRF: *Chief Judge 2 Interview*, *supra*, at Tr. 82-92; *Managing Judge I Interview*, *supra*, at Tr. 86-98, 147-60.

<sup>58</sup> See *OHR Documents II*, *supra*; OIG IRF: *Chief Judge 2 Interview*, *supra*, at Tr. 82-92.

<sup>59</sup> See *Managing Judge I Interview*, *supra*, at Tr. 318-21.

<sup>60</sup> See *id.* at Tr. 345-91.

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> See *id.* at Tr. 325-91; OIG IRF: Documents #1 from Managing Judge I, Ex. 3 at 3 [hereinafter *Managing Judge I Documents #1*].

the top three managerial positions at the PTAB simultaneously until Chief Judge 2 became Chief Judge in May 2011.<sup>64</sup>

Between Fiscal Years 2009 and 2013, the total number of Paralegal Specialists who worked at the PTAB in any given pay period ranged between 38 and 51.<sup>65</sup> In Fiscal Year 2009, the start of the relevant time period, the number of Paralegal Specialists increased dramatically from approximately 32 to 51; then the number decreased over the next few years. The number of judges did not increase until Fiscal Year 2012. Table 2 below shows the total number of individuals who worked at the PTAB in a given year as a Paralegal Specialist, judge, or Supervisory Paralegal Specialist.<sup>66</sup>

**Table 2. Judge, Paralegal Specialist, and First-Line Supervisory Paralegal Specialist Staffing By Fiscal Year<sup>67</sup>**

FY	Judges	Paralegals	Judges: Paralegals	First-Line Supervisory Paralegal Specialists
2009	82	51	~1 ½ : 1	8
2010	79	49	~1 ½ : 1	8
2011	70	46	~1 ½ : 1	8
2012	152	41	~3 ½ : 1	8
2013	168	38	~4 ½ : 1	8

#### **B. Role of Paralegal Specialists**

During the time frame in question, Paralegal Specialists largely worked on ex parte appeals, inter partes appeals, reexamination cases, interferences, and, after September 2012, AIA cases.<sup>68</sup> More specifically, Paralegal Specialists performed intake case reviews to determine whether a case delivered to the PTAB complied with relevant statutory requirements, and if it did not, the Paralegal Specialist would write a brief memorandum to the appellant indicating why the appeal failed to conform with statutory requirements.<sup>69</sup> Paralegal Specialists also created docketing notices; docketed cases; and created electronic working files (eWFs), which were case files that included pertinent documents for the judges to render their opinions.<sup>70</sup> After the judges

<sup>64</sup> See *Managing Judge 1 Interview, supra*, at Tr. 411-21.

<sup>65</sup> OIG IRF: Data Analysis, *supra*.

<sup>66</sup> The table does not reflect week-by-week variations as individuals came and left the organization. As noted previously, in this report, the term "Supervisory Paralegal Specialist" only refers to a first-line supervisor of Paralegal Specialist, and although technically second-line supervisors of the Paralegal Specialists are also classified as Supervisory Paralegal Specialists, we identify them as Senior Managers in this report for clarity.

<sup>67</sup> OIG IRF: Data Analysis, *supra*. Totals reflects the number of paralegals and judges employed at any point in the fiscal year. In 2008, there were nine team leads, who were classified as Paralegal Specialists and became Supervisory Paralegal Specialists in 2009.

<sup>68</sup> At the end of 2012, when much of the AIA became effective, trial work falling under the AIA began to "ramp up." OIG IRF: Interview with Paralegal 1, Tr. 741-48 [hereinafter *Paralegal 1 Interview*].

<sup>69</sup> *Paralegal 3 Interview, supra*, at Tr. 470-78.

<sup>70</sup> *Paralegal 1 Interview, supra*, at Tr. 629-37. One Senior Manager noted that the PTAB is currently creating a new information technology system that would create the eWFs, and therefore Paralegal Specialists have stopped creating eWFs at this time. *Senior Manager 1 Interview, supra*, at Tr. 794-800.



drafted their opinions on the cases and sent them to the Paralegal Specialists, the Paralegal Specialists proofread and edited the decisions for grammar and style<sup>71</sup> and verified citations.<sup>72</sup> The Paralegal Specialists then provided the judges with their edits, and the judges reviewed and finalized the opinions, which the Paralegal Specialists then mailed to the parties.<sup>73</sup> The Paralegal Specialists also uploaded opinions to the eFOIA system<sup>74</sup> and, on occasion, performed legal research.<sup>75</sup> Paralegal Specialists did not generate their own work; they relied on others, particularly judges, to give them work.<sup>76</sup>

Paralegal Specialists used computers to perform most of their work.<sup>77</sup> They had an electronic communication tool, which they could use to message in real-time their supervisor or other Paralegal Specialists who were online. Each Paralegal Specialist and his or her supervisor could view whether a Paralegal Specialist or the Supervisory Paralegal Specialist was online through this tool. The communicator tool used different colors to indicate a user's status: a green light (the user was online and active); a yellow light (the user was online and inactive); a white light (the user was not online); and a red light (do not disturb the user).<sup>78</sup>

According to several Paralegal Specialists interviewed by the OIG, they believed that they possessed the skills necessary to accomplish the tasks assigned,<sup>79</sup> although a couple of them noted that they did not receive enough training to do the AIA cases.<sup>80</sup> Some asked for more responsibility, such as drafting opinions.<sup>81</sup> A Senior Manager noted to the OIG that more than 15 Paralegal Specialists had law degrees,<sup>82</sup> and a key member of management stated to the OIG that he believed that this set of Paralegal Specialists were hard workers and were far more

<sup>71</sup> *Paralegal 2 Interview, supra*, at Tr. 419-23. They also reviewed decisions to ensure that the parties' names and dates in the opinion were correct and inputted case information. *Paralegal 3 Interview, supra*, at Tr. 462-65.

<sup>72</sup> *Paralegal 3 Interview, supra*, at Tr. 452-57.

<sup>73</sup> The paralegals would not physically mail the opinions; rather, they would send them to a central receptionist who would print them and mail them from the USPTO headquarters, or the paralegals would send them electronically, if appropriate. *Paralegal 1 Interview, supra*, at Tr. 639-46.

<sup>74</sup> *Id.* at Tr. 648.

<sup>75</sup> *Id.* at Tr. 724-35; *Paralegal 3 Interview, supra*, at Tr. 435-50.

<sup>76</sup> *Paralegal 1 Interview, supra*, at Tr. 1552-58; *Paralegal 10 Interview, supra*, at Tr. 1456-57.

<sup>77</sup> See, e.g., OIG IRF: Interview with Paralegal 5, Tr. 680-83 [hereinafter *Paralegal 5 Interview*]; *Paralegal 3 Interview, supra*, at Tr. 384-86.

<sup>78</sup> See, e.g., OIG IRF: Interview with Paralegal 6, Tr. 1180-83 [hereinafter *Paralegal 6 Interview*] (stating that the light would be green when the Paralegal Specialist was working); OIG IRF: Interview with Manager 3, Tr. 793-810 [hereinafter *Manager 3 Interview*]; *Manager 4 Interview, supra*, at Tr. 2930-39; *Manager 4 Interview, supra*, at Tr. 2930-44.

<sup>79</sup> See, e.g., *Paralegal 3 Interview, supra*, at Tr. 1238-52 (stating that she did not believe she needed any further training education to complete her tasks); *Paralegal 1 Interview, supra*, at Tr. 2116-19 (stating that he did not believe that he required any further training or education to accomplish his tasks); *Paralegal 2 Interview, supra*, at Tr. 1876-79 (stating that she did not believe that she needed any further training or education to accomplish her tasks better); OIG IRF: Interview with Paralegal 8, Tr. 999-1002 (stating that he did not feel that he did not have enough training or education to accomplish certain tasks) [hereinafter *Paralegal 8 Interview*]; *Paralegal 9 Interview, supra*, at Tr. 1526-30 (stating that she does not believe there are tasks she cannot do because she does not have enough training or education).

<sup>80</sup> *Paralegal 7 Interview, supra*, at Tr. 2198-246 (stating that she needed some more training on AIA because they only had minimal training a few years ago); *Paralegal 10 Interview, supra*, at Tr. 1554-71 (stating that she learned AIA cases by doing them, noting that the "training was very poor" and too long ago).

<sup>81</sup> See, e.g., *Paralegal 1 Interview, supra*, at Tr. 2123-36, 2468-70 ("[W]e are capable of doing some more basic work than we're given."). When there was discussion in 2011 with the Chief Judge about possibly creating an attorney position for the Paralegal Specialists with law degrees to help with writing "simpler decisions" to get them out faster one Paralegal Specialist stated, "we were so excited about that." *Paralegal 2 Interview, supra*, at Tr. 2114-25.

<sup>82</sup> OIG IRF: Review of Documents from Senior Manager 1 [hereinafter *Senior Manager 1 Documents*] (list noting which PTAB employees had law degrees).

productive than the Paralegal Specialists without law degrees.<sup>83</sup> Another key member of management also stated that there was a gap in skill between the new Paralegal Specialists who were attorneys and those without law degrees who had been at the PTAB for many years.<sup>84</sup> He stated that the PTAB's plan was "to close [the gap] through training."<sup>85</sup> More than one manager noted that these new paralegals were "overqualified."<sup>86</sup>

A few of the managers believed that some additional training was necessary for the Paralegal Specialists, particularly training regarding the AIA cases because the prior AIA training occurred too long ago.<sup>87</sup> At the time of his interview, a Senior Manager stated that management was currently training the Paralegal Specialists on AIA.<sup>88</sup> Another Supervisory Paralegal Specialist mentioned that the Paralegal Specialists could use a "refresher course in . . . English, and maybe . . . bluebooking," although they are "pretty good at it."<sup>89</sup>

During the relevant time frame and afterwards, Paralegal Specialists have had a promotion potential to GS-11, and, generally, the only position of advancement in the organization has been the Supervisory Paralegal Specialist position.<sup>90</sup> Numerous Paralegal Specialists and Supervisory Paralegal Specialists told the OIG that adding more advanced positions or a GS-12 promotion potential would motivate Paralegal Specialists to work harder and to remain at the PTAB longer.<sup>91</sup> Additionally, at least one Paralegal Specialist informed the OIG that she looked for a detail when she began to realize she had no opportunity to be promoted at the PTAB.<sup>92</sup> When the PTAB started receiving AIA cases, a Senior Manager suggested creating a GS-12 position for Paralegal Specialists who worked on those cases because the work was considerably more difficult and this way the managers could pick who was best able to do this work.<sup>93</sup> Management did not create this position.<sup>94</sup>

<sup>83</sup> See [REDACTED]

<sup>84</sup> [REDACTED]; see also [REDACTED] (the PTAB has a "very distributed range of paralegal talents and training, . . . it's nearly bimodal").

<sup>85</sup> OIG IRF: Interview with Senior Manager 6, Tr. 2428-30 [hereinafter *Senior Manager 6 Interview*].

<sup>86</sup> *Manager 1 Interview, supra*, at Tr. 3859-82; *Manager 3 Interview, supra*, at Tr. 1536-41.

<sup>87</sup> See, e.g., *Manager 2 Interview, supra*, at Tr. 2351-84 (stating that the supervisor's Paralegal Specialists are capable to work on their current tasks, but it would be helpful to have a standard of procedure for the AIA cases and some additional training).

<sup>88</sup> *Senior Manager 6 Interview, supra*, at Tr. 2440-42; see also *Senior Manager 2, supra*, at Tr. 2773-74 (stating that some Paralegal Specialists were trained the week before her interview).

<sup>89</sup> *Manager 1 Interview, supra*, at Tr. 4161-69.

<sup>90</sup> See *Paralegal 5 Interview, supra*, at Tr. 900-18; see also *Paralegal 3 Interview, supra*, at Tr. 1151-63 (stating that "there is no higher position because after you're a paralegal you're a supervisor . . . and that's all it is" and if a Paralegal Specialist does not have a science, technical, or engineering degree, he or she cannot become a patent attorney). A couple of Paralegal Specialists have moved to other administrative positions, but not as part of the typical career ladder for Paralegal Specialists. See *Paralegal 7 Interview, supra*, at Tr. 2395-426.

<sup>91</sup> See, e.g., *Paralegal Interview 1, supra*, at Tr. 2219-82; *Paralegal 2 Interview, supra*, at Tr. 648-58, 2369-97; *Paralegal 3 Interview, supra*, at Tr. 1136-65; *Paralegal 5 Interview, supra*, at Tr. 867-921; *Paralegal 7 Interview, supra*, at Tr. 2356-97; *Manager 2 Interview, supra*, at Tr. 2540-75; *Senior Manager 1 Interview, supra*, at Tr. 3380-493; see also *Senior Manager 6 Interview, supra*, at Tr. 2326-2404 (stating that retaining talented paralegals at the GS-11 level is a concern and a challenge); *Paralegal 1 Interview, supra*, at Tr. 2227-34 (stating that there was interest in even "marginal advancement" opportunities); *Manager 1 Interview, supra*, at Tr. 3859-908 (noting that the PTAB should create attorney positions for Paralegal Specialists to avoid losing "good people"). But see *Paralegal Interview 11, supra*, at Tr. 2442-67 (expressing belief that specialized AIA positions at a higher grade level would not motivate Paralegal Specialists to work harder).

<sup>92</sup> *Paralegal 2 Interview, supra*, at Tr. 650-58.

<sup>93</sup> *Senior Manager 2 Interview, supra*, at Tr. 2724-65.

<sup>94</sup> *Id.* at Tr. 2724-45.

### **C. Role of the Paralegal Specialist Union**

During the time frame in question, all PTAB paralegals were covered by a collective bargaining agreement (the Labor Agreement) between the USPTO and the National Treasury Employees Union Chapter 243 (the Union).<sup>95</sup> The Labor Agreement, which also covered other non-managerial, "nonprofessional employees" of the USPTO,<sup>96</sup> regulated a number of areas pertaining to employment conditions. In making employment decisions, the following provisions of the Labor Agreement would have been relevant.

#### **1. Part-time Employment, Furloughs, and Reductions-in-Force**

Employees who were scheduled to work less than 80 hours per two-week pay period were considered part-time.<sup>97</sup> Employees could not have been involuntarily reassigned from a full-time position to a part-time position unless the procedures governing reductions-in-force (RIFs) and adverse actions were followed.<sup>98</sup> Additionally, prior to commencing such procedures, the USPTO must have first determined whether any employees would have voluntarily converted to part-time employment.<sup>99</sup> Furloughs of more than 30 calendar days were considered RIFs.<sup>100</sup>

The USPTO was required to notify the Union of any proposed RIF as far in advance as possible.<sup>101</sup> Prior to any RIF action, the Union must have been given the opportunity to negotiate the impact and implementation of the RIF to the maximum extent permitted by law.<sup>102</sup> Additionally, the USPTO's policy as stated in the Labor Agreement was to accomplish reductions in workforce through non-RIF means, such as attrition, when possible.<sup>103</sup>

#### **2. Job Duties and Details**

The Labor Agreement stated that the USPTO and the Union agreed with the principle of equal pay for substantially equal work.<sup>104</sup> Thus, if a review revealed that an employee was performing higher-level duties and responsibilities than those entailed by the employee's existing job description, the employee was to be compensated for the highest level of work to the extent permitted.<sup>105</sup>

The selection of employees for details, defined as temporary assignments of employees to different positions or duties, were to be conducted fairly and equitably.<sup>106</sup> Volunteers were to

<sup>95</sup> See OIG IRF: Documents #2 from Senior Manager 1, Exs. 1, 5 at 6 [hereinafter *Senior Manager 1 Documents #2*] (includes collective bargaining agreement between the USPTO and the National Treasury Employees Union Chapter 243, effective Sep. 29, 2003).

<sup>96</sup> See *id.* at Ex. 5 at 6.

<sup>97</sup> See *id.* at Ex. 5 at 25.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.* at Ex. 5 at 73.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *id.* at Ex. 5 at 67-68.

<sup>105</sup> See *id.*

<sup>106</sup> See *id.* at Ex. 5 at 71.

be solicited, and if more employees than necessary volunteer, first consideration was to be given to the most qualified senior employee who had volunteered.<sup>107</sup> If there were too few volunteers, first consideration was to be given to the most qualified junior employee.<sup>108</sup>

#### **D. Role of Supervisory Paralegal Specialists**

Supervisory Paralegal Specialists were generally tasked with assigning, monitoring, and checking the work of the paralegals, as well as acting as a "go-between in many cases between the paralegals and the judges."<sup>109</sup> There were eight Supervisory Paralegal Specialists each year between Fiscal Years 2009 and 2013.<sup>110</sup> According to witnesses interviewed by the OIG, much of their work was "tedious," such as assigning and tracking the work assignments, which largely consisted of data entry.<sup>111</sup> One of the Supervisory Paralegal Specialists stated that she also answered the AIA telephone line and completed spreadsheets with case details.<sup>112</sup> One managerial employee explained that the Supervisory Paralegal Specialists were "more lackeys than they are anything else," and the only authority they had was to assign work and rate their Paralegal Specialists.<sup>113</sup>

According to one Supervisory Paralegal Specialist, the Supervisory Paralegal Specialists were required to review 20 samples of each Paralegal Specialist's work product per quarter, although she did not have time to do so.<sup>114</sup> Another Supervisory Paralegal Specialist stated to the OIG that the Supervisory Paralegal Specialists were required to review six of the opinions that each Paralegal Specialist had worked on each month.<sup>115</sup> In reviewing work, if the supervisors found errors, they informed the Paralegal Specialists to be cautious of those errors and made efforts to remind those Paralegal Specialists in the future.<sup>116</sup>

A Senior Manager informed the OIG that, in the summer of 2013, Chief Judge 2 noticed errors in AIA decisions; thus, management directed the Supervisory Paralegal Specialists to review every AIA decision in their paralegals' dockets.<sup>117</sup> Some Supervisory Paralegal Specialists and

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<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> Senior Manager 1 Interview, *supra*, at Tr. 1130-45.

<sup>110</sup> See OIG IRF: Data Analysis, *supra*.

<sup>111</sup> Senior Manager 1 Interview, *supra*, at Tr. 1151-58.

<sup>112</sup> Manager 1 Interview, *supra*, at Tr. 1031-37, 1087-97.

<sup>113</sup> [REDACTED]; see also Manager 1 Interview, *supra*, at Tr. 3465-76 (agreeing that Supervisory Paralegal Specialists do not create any work, they just pass along work). On occasion Supervisory Paralegal Specialists do work for judges. Manager 1 Interview, *supra*, at Tr. 4115-50. According to an employee, Supervisory Paralegal Specialists are not "privy to a lot of decisions that are made at the Board," and when they are asked for their opinions, and they give them, management has "already made [its] mind up what [it is] going to do anyway, and it's just a matter of formality that [it] even ask[s]" the Supervisory Paralegal Specialists for their opinions. [REDACTED]; see also [REDACTED] (until the last year or two, Supervisory Paralegal Specialists were not invited to meetings and asked for their input on changes management would be making even though they "are the ones that know what's going on").

<sup>114</sup> Manager 1 Interview, *supra*, at Tr. 1093-1108; see also Senior Manager 1 Interview, *supra*, at Tr. 1103-29 (Supervisory Paralegal Specialists working for this manager were required to review 20 samples of each Paralegal Specialist's work product per quarter and four decisions per Paralegal Specialist per month).

<sup>115</sup> Manager 2 Interview, *supra*, Tr. 508-13.

<sup>116</sup> See Manager 1 Interview, *supra*, at Tr. 1119-24.

<sup>117</sup> See Senior Manager 2 Interview, *supra*, at Tr. 1465-95; Senior Manager 1 Interview, *supra*, at Tr. 1064-97. The Supervisory Paralegal Specialists did not begin reviewing every other decision, however. *Id.* at Tr. 1089-97.

Paralegal Specialists stated that, despite the Chief Judge's perceptions, they did not notice increased errors in opinions over time.<sup>118</sup>

Chief Judge 2 stated to the OIG that he had often instructed Senior Managers and "at least some of the supervisory paralegals who reported to them" to "make sure [they] know what [their] people are doing."<sup>119</sup> In particular, he stated that he instructed these managers to know "who we have out there, what they're doing, and . . . we know how they're working and what they're producing."<sup>120</sup> However, according to the evidence reviewed in this investigation, the managers of the Supervisory Paralegal Specialists did not seem to require the Supervisory Paralegal Specialists to monitor their Paralegal Specialists' status throughout each workday.<sup>121</sup> None of the Supervisory Paralegal Specialists interviewed by the OIG stated that they were directed to use the communicator to monitor their Paralegal Specialists, and several other Supervisory Paralegal Specialists confirmed that they did not use the communicator to monitor their Paralegal Specialists.<sup>122</sup> In fact, evidence showed that they relied on their Paralegal Specialists to inform them of times when they were not working.<sup>123</sup>

One Senior Manager also stated to the OIG that the Supervisory Paralegal Specialists would not monitor Paralegal Specialists using the communicator tool; rather, the Supervisory Paralegal Specialists would use that tool to determine whether Paralegal Specialists were available to receive work assignments or if the Supervisory Paralegal Specialist needed to find a Paralegal Specialist.<sup>124</sup> One managing judge stated that in 2011 or 2012, the Paralegal Specialist Union president was "very angry about the thought that [PTAB management] might dare to track where [the paralegals] were" using the communicator system, and he believed that a Senior Manager assured the Union president "that was not the purpose of the communicator."<sup>125</sup>

<sup>118</sup> A Senior Manager informed the OIG that he believed "it was over exaggerated sometimes when [the judges] were complaining about errors." OIG IRF: Interview with Senior Manager 4, Tr. 1202-22 [hereinafter *Senior Manager 4 Interview*]. A Supervisory Paralegal Specialist reported that the supervisor's team's quality had increased. *Manager 2 Interview, supra*, at Tr. 661-69. Another also saw improvement with her team. *Manager 1 Interview, supra*, at Tr. 1492-96. Another Supervisory Paralegal Specialist stated that although about one year ago, judges "complained that . . . that they thought there were too many errors[.] . . . [t]hat wasn't [her] . . . experience." *Manager 4 Interview, supra*, at Tr. 1051-54. A Paralegal Specialist who would see other individuals' decisions informed the OIG that she thought error stayed the same over the past few years. *Paralegal Specialist 2 Interview, supra*, at Tr. 947-57.

<sup>119</sup> *Chief Judge 2 Interview, supra*, at Tr. 989-1041.

<sup>120</sup> *Id.* at Tr. 1012-30.

<sup>121</sup> *Senior Manager 2 Interview, supra*, at Tr. 1204-40. In approximately 2010 or 2011, Senior Manager 2 directed a Supervisory Paralegal Specialist to "[k]eep an eye" on specific Paralegal Specialists who were recording Other Time, despite having had work assigned. *Id.*

<sup>122</sup> See, e.g., *Manager 2 Interview, supra*, at Tr. 303-41, *Manager 1 Interview, supra*, at Tr. 578-84, 800-17; *Manager 4 Interview, supra*, at Tr. 457-87. However, one Supervisory Paralegal Specialist stated that she monitors her paralegals using the communicator "as much as she can." *Manager 3 Interview, supra*, at Tr. 766-71.

<sup>123</sup> See, e.g., *Manager 2 Interview, supra*, at Tr. 315-41. On the other hand, one Supervisory Paralegal Specialist stated that because of her particularly workload, she had "[t]oo much work . . . for [her] to monitor their coming and going," and because they "normally" accomplished their work, she believed "there[ wa]s really no need for me to monitor them." *Manager 1 Interview, supra*, at Tr. 800-817.

<sup>124</sup> *Senior Manager 1, supra*, at Tr. 1367-81; see also *Senior Manager 5 Interview, supra*, Tr. 778-91 (stating that he did not suspect that Supervisory Paralegal Specialists were using the communicator system to monitor when the Paralegal specialists were working).

<sup>125</sup> *Managing Judge 1 Interview, supra*, Tr. 632-45.

## E. Performance Evaluations and Performance-Based Bonuses

This section discusses performance appraisals and performance-based bonuses for Paralegal Specialists and Supervisory Paralegal Specialists from Fiscal Year 2009 to Fiscal Year 2013.

### I. Paralegal Specialists

The Paralegal Specialists' performance appraisal period ran from October 1 to September 30.<sup>126</sup> Paralegals' performance appraisals were formulaically determined primarily by how quickly and accurately they completed tasks.<sup>127</sup> These appraisals, known as production-based performance appraisals plans (production-based PAPs)<sup>128</sup> comprised the following four weighted elements: quality (30%), productivity (30%), timeliness (20%), and customer service (20%).<sup>129</sup> For each element, a Paralegal Specialist received a rating between one and five – one being "Unacceptable," two being "Marginal," three being "Fully Successful," four being "Commendable," and five being "Outstanding."<sup>130</sup> The weight of each element was then multiplied by the rating to reach a point score for that element; the sum of the scores was added to reach a total performance appraisal score between one hundred and five hundred.<sup>131</sup> A score of 460 to 500 was Outstanding.<sup>132</sup> The corresponding one-digit total scores were maintained by the USPTO in a five-point scale from 1 to 5, and these are the score that the OIG used in its data analyses.<sup>133</sup>

The "quality" element was rated according to a Paralegal Specialist's "error rate" with respect to the work products produced by the Paralegal Specialist.<sup>134</sup> The "productivity" element was rated according to a "Production Goal Achievement" percentage defined as the number of earned work units divided by the number of labor hours (production time) spent earning those work units.<sup>135</sup> The PAP included a list of tasks and the number of pre-defined work units for each task.<sup>136</sup> Production time did not include hours charged to Other Time or other non-production time codes.<sup>137</sup> The "timeliness" element was rated according to how quickly tasks

<sup>126</sup> See *Senior Manager 1 Documents #2*, *supra*, at Ex. 5 at 83.

<sup>127</sup> See OIG IRF: Documents from Manager 4, Ex. 3 [hereinafter *Manager 4 Documents*].

<sup>128</sup> See, e.g., *Senior Manager 4 Interview*, *supra*, at Tr. 1234-48; OIG IRF: Documents Received from Office of Human Resources, USPTO, Ex. 4 at 3 [hereinafter *OHR Documents*].

<sup>129</sup> See *Manager 4 Documents*, *supra*, at Ex. 3.

<sup>130</sup> See *id.*.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* If the score was between 100 and 199, then the Paralegal Specialist received an overall rating of Unacceptable; 200 to 289 was Marginal; 290 to 379 was Fully Successful; 380 to 459 was Commendable. *Id.*

<sup>133</sup> OIG IRF: Data Analysis, *supra*.

<sup>134</sup> See *Manager 4 Documents*, *supra*, at Ex. 3. The rate was based on a minimum of 20 work products sampled per quarter, with an error charged against the Paralegal Specialist if "a reasonable management official could not have permitted the document to leave the [PTAB] with such an error." See *id.* An error rate of less than 2% resulted in an Outstanding rating for the quality element; less than 3% but more than 2% resulted in Commendable; less than 4% but more than 3% resulted in Fully Successful; less than 5% but more than 4% resulted in Marginal; and 5% or greater resulted in Unacceptable. See *id.*

<sup>135</sup> See *id.* A rounded Production Goal Achievement percentage of 110% and above resulted in an Outstanding rating for the production element; 105% to 109% resulted in Commendable; 95% to 104% resulted in Fully Successful; 90% to 95% resulted in Marginal; and below 90% resulted in Unacceptable. See *id.*

<sup>136</sup> See *id.* For example, preparing a decision yielded three work units, and mailing a decision yielded one-half of a work unit. See *id.*

<sup>137</sup> See *id.*

were completed after being assigned.<sup>138</sup> Finally, the “customer service” element was rated “based on direct observation and input/discussion with customers, stakeholders, and/or peers.”<sup>139</sup>

Paralegal Specialists self-reported their production time and, according to several witnesses interviewed by the OIG, some realized that they could “game the system” by under-reporting their production time<sup>140</sup> or by intentionally working when a supervisor was not available to provide assignments.<sup>141</sup> For example, if the Outstanding-level target time for an assignment was two hours and a Paralegal Specialist took four hours to complete the assignment, the Paralegal Specialist could report that he or she finished the assignment in only two hours, thereby inflating his or her productivity statistic.<sup>142</sup> Also, if a Paralegal Specialist’s supervisor worked Monday through Thursday from 6:00 AM to 4:00 PM, the Paralegal Specialist could have decided to work Wednesday through Saturday from 12:00 PM to 10:00 PM so that he or she was not present when the supervisor had work to distribute.<sup>143</sup> By manipulating the assignment system in this manner, Paralegal Specialists could avoid work, while causing no change in their productivity statistics.<sup>144</sup> Other issues relating to flexible scheduling are discussed in the “Flexible Work Schedules and Telework Programs” section of this report.

The USPTO and Union entered into agreements each year to specify the amount of performance-based bonuses for certain Union employees, including PTAB Paralegal Specialists.<sup>145</sup> During the time period relevant to the OIG’s investigation, bonuses were a percentage of salary, generally 1% for a Fully Successful overall performance rating, 3% for a Commendable rating, and 5% for an Outstanding rating.<sup>146</sup> To be eligible for a full performance award, the Labor Agreement and yearly bonus agreements stated that employees “must have worked in their job functions[,] including mandatory job-related training and job-related non-production hours,” for at least 1,250 hours during the appraisal period.<sup>147</sup> Employees who worked less than 1,250 hours but more than 600 in their job functions were eligible for a pro-

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<sup>138</sup> See *id.* Each type of task was assigned a pre-determined baseline; for example, the baseline for preparing a decision was 1.5 days. *Id.* On a case-by-case basis, PTAB management had the discretion to award a greater number of work units for particularly time-consuming assignments. See *id.* Achieving a 1.5-day average turnaround for preparing decisions resulted in a Fully Successful sub-rating for that task type; an average of one day resulted in Commendable; an average of half a day resulted in Outstanding; an average of two days resulted in Marginal; and an average greater than two days resulted in Unacceptable. See *id.* The sub-ratings for each type task were averaged to yield the overall rating for the timeliness element. See *id.*

<sup>139</sup> See *id.* Paralegal Specialists were expected to routinely respond to customer requests with factually accurate information and consistent with PTAB and USPTO policies. See *id.* Additionally, Paralegal Specialists’ work product was expected to “reflect thorough research and consideration of customer issues and concerns.” See *id.* Paralegal Specialists were also expected to routinely respond to inquiries on the same day received or by the established deadline; respond to customers in a clear and courteous manner that directly addresses issues and questions; routinely exhibit a willingness to work with customers to resolve issues; and activate out-of-office e-mail and phone notifications when on approved absences. See *id.*

<sup>140</sup> See, e.g., *id.*; Senior Manager 4 Interview, *supra*, at Tr. 1262-1419.

<sup>141</sup> See, e.g., Paralegal 5 Interview, *supra*, at Tr. 1028-48.

<sup>142</sup> See, e.g., Manager 4 Documents, *supra*, at Ex. 3; Manager 4 Interview, *supra*, at Tr. 1262-1419.

<sup>143</sup> See, e.g., Paralegal 5 Interview, *supra*, at Tr. 1028-48.

<sup>144</sup> See, e.g., *id.*

<sup>145</sup> See OIG IRF: Documents from Senior Manager 2, Ex. 3, [hereinafter *Senior Manager 2 Documents*]; OHR Documents, *supra*, at Exs. 6, 104.

<sup>146</sup> See Senior Manager 2 Documents, *supra*, at Ex. 3; OHR Documents, *supra*, at Ex. 6.

<sup>147</sup> See Senior Manager 1 Documents #2, *supra*, at Ex. 5 at 92; see also Senior Manager 2 Documents, *supra*, at Ex. 3; OHR Documents, *supra*, at Ex. 6.

rated bonus.<sup>148</sup> Employees who worked less than 600 hours in their job functions were not eligible for an award.<sup>149</sup>

The Labor Agreement stated that USPTO “will not prescribe nor permit a predetermined distribution of ratings.”<sup>150</sup> It also stated that the Paralegal Specialists had “no entitlement to a performance award or other type of incentive award,” and “[a]ll awards [we]re subject to budgetary limitations and [we]re paid at the discretion of the [USPTO].”<sup>151</sup> All relevant supplementary agreements noted that all applicable Labor Agreement provisions applied, including the provision on budgetary limitations.<sup>152</sup>

The PTAB’s Administrative Officer calculated the performance bonus for each Paralegal Specialist.<sup>153</sup> The Chief Judge gave the final approval for all employees.<sup>154</sup> As discussed below, Paralegal Specialists received a total of \$561,195.91 in bonuses from Fiscal Year 2009 to Fiscal Year 2013.

## 2. Supervisory Paralegal Specialists

The performance appraisal for Supervisory Paralegal Specialists was based on non-formulaic criteria and consisted of the following five weighted elements: supervision (25%), supporting the mission of the PTAB (20%), team quality (20%), team timeliness (20%), and team customer service (15%).<sup>155</sup> For each element and for the overall rating, the supervisors could be appraised as Unacceptable, Marginal, Fully Successful, Commendable, or Outstanding.<sup>156</sup> The ratings were determined by the supervisors’ manager and approved by the Support Administrator.<sup>157</sup> Bonus amounts were determined by the Senior Manager and the Support Administrator, but there was a general understanding that for non-Union employees such as Supervisory Paralegal Specialists, bonuses would be a percentage of salary based on the performance rating: none for Fully Successful, 2% for Commendable, and 4% for Outstanding.<sup>158</sup> These bonus amounts, however, were flexible and not fixed.<sup>159</sup> The Chief Judge gave the final approval for these bonuses.<sup>160</sup> As discussed below, Supervisory Paralegal Specialists received a total of \$120,523.55 in bonuses from Fiscal Year 2009 to Fiscal Year 2013.

<sup>148</sup> See *Senior Manager 2 Documents*, *supra*, at Ex. 3; *OHR Documents*, *supra*, at Ex. 6; see also *Senior Manager 1 Documents #2*, *supra*, at Ex. 5 at 92.

<sup>149</sup> See *Senior Manager 1 Documents #2*, *supra*, at Ex. 5 at 92.

<sup>150</sup> See *id.* at Ex. 5 at 87.

<sup>151</sup> See *id.* at Ex. 5 at 92.

<sup>152</sup> See *Senior Manager 2 Documents*, *supra*, at Ex. 3; *OHR Documents*, *supra*, at Ex. 6.

<sup>153</sup> See *Senior Manager 5 Interview*, *supra*, at Tr. 2577-90; *Senior Manager 4 Interview*, *supra*, at Tr. 2211-52.

<sup>154</sup> See *Senior Manager 4 Interview*, *supra*, at Tr. 2244-50; *Managing Judge 1 Interview*, *supra*, at Tr. 2916-57.

<sup>155</sup> See *Senior Manager 1 Documents*, *supra*, at Ex. 3; *Senior Manager 1 Interview*, *supra*, at Tr. 1406-15.

<sup>156</sup> See *Senior Manager 1 Documents*, *supra*, at Ex. 3; *Senior Manager 4 Interview*, *supra*, at Tr. 2333-40.

<sup>157</sup> See *Senior Manager 5 Interview*, *supra*, at Tr. 2603-38, 2566-75.

<sup>158</sup> See *id.* at Tr. 2603-38.

<sup>159</sup> See *id.*

<sup>160</sup> See *Senior Manager 4 Interview*, *supra*, at Tr. 2244-50; *Managing Judge 1 Interview*, *supra*, at Tr. 2916-18.



## F. Flexible Work Schedules and Telework Programs

Three work programs have been available to PTAB Paralegal Specialists and Supervisory Paralegal Specialists during the relevant time frame and afterwards: flexible work schedules under the USPTO's "Increased Flexitime Policy," telework arrangements under the "Hoteling Program," and enhanced hoteling flexibility under the "50 Mile Radius Agreement" option. The vast majority of Paralegal Specialists and Supervisory Paralegal Specialists participated in all three programs once eligible.<sup>161</sup> The combined effect of the three programs afforded extensive flexibility in scheduling and teleworking. Managing Judge 1 stated that by the end of the time frame relevant to the OIG investigation, 95% of all Paralegal Specialists were full-time hotelers, and only two to three worked in the office regularly.<sup>162</sup>

### I. Flexible Work Schedules – "Increased Flexitime Policy"

The "Increased Flexitime Policy" (IFP) offers a flexible work schedule to full-time USPTO employees, including PTAB Paralegal Specialists and Supervisory Paralegal Specialists.<sup>163</sup> The IFP allows employees to complete their 80-hour bi-weekly work requirement by working as few as four days per week – either four weekdays, or three weekdays and a Saturday.<sup>164</sup> Employees can work between 5:30 AM and 10:00 PM, but must work during "core hours" – hours designated by a federal agency, as required by law, when all flexible schedule employees are required to work.<sup>165</sup> The USPTO has one core hour: between 1:00 PM to 2:00 PM each Tuesday.<sup>166</sup>

Employees can work a maximum of 12 hours per day, excluding the required unpaid 30-minute meal break.<sup>167</sup> Hours worked on a particular day do not need to be worked continuously; employees may clock-in and clock-out during the day.<sup>168</sup> Time is to be reported in 15-minute increments, and employees are responsible for keeping track of their own time.<sup>169</sup> Additionally, employees who will be absent on a weekday must notify their supervisors in advance and leave out-of-office notifications on their e-mail and phone accounts, "as appropriate."<sup>170</sup>

<sup>161</sup> See, e.g., Chief Judge 2 Interview, *supra*, at Tr. 1059-82; USPTO Response, *supra*, at Ex. 8.

<sup>162</sup> USPTO Response, *supra*, at Ex. 8.

<sup>163</sup> See Senior Manager 1 Documents #2, *supra*, at Ex. 5 at 151; OIG IRF: Documents from Manager 3 (Increased Flexitime Policy document), 1 [hereinafter *Manager 3 Documents*].

<sup>164</sup> See Senior Manager 1 Documents #2, *supra*, at Ex. 5 at 151-52; Manager 3 Documents, *supra*, at 1 (Increased Flexitime Policy document).

<sup>165</sup> See 5 U.S.C. § 6122; Manager 3 Documents, *supra*, at 1 (Increased Flexitime Policy document).

<sup>166</sup> See Documents from Manager 3, *supra*, at 1 (Increased Flexitime Policy document). Core hours for "POPA [Patent Office Professional Association] bargaining unit members" were 1:00 PM to 2:00 PM each Thursday. See *id.* If an employee works from home for at least six hours on a weekday, then the employee must work six of those hours between 6:30 AM and 7:00 PM. OHR Documents, *supra*, at Ex. 4 at 12; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 12. If an employee works from home for less than six hours on a weekday, then the employee must work all of these hours between 6:30 AM and 7:00 PM. *Id.*

<sup>167</sup> See Senior Manager 1 Documents #2, *supra*, at Ex. 5 at 151, 153; Documents from Manager 3, *supra*, at 1, 4 (Increased Flexitime Policy document).

<sup>168</sup> See Senior Manager 1 Documents #2, *supra*, at Ex. 5 at 151; Documents from Manager 3, *supra*, at 1 (Increased Flexitime Policy document).

<sup>169</sup> See Senior Manager 1 Documents #2, *supra*, at Ex. 5 at 151; Documents from Manager 3, *supra*, at 3 (Increased Flexitime Policy document).

<sup>170</sup> See Senior Manager 1 Documents #2, *supra*, at Ex. 5 at 152-53; Documents from Manager 3, *supra*, at 3 (Increased Flexitime Policy document).

The IFP is subject to restrictions.<sup>171</sup> Employees must “coordinate their work schedules to ensure that necessary office coverage is maintained.”<sup>172</sup> In addition, IFP rules state that “employees may be required to be present at work at specific times to attend to specific events such as meetings, projects, and training.”<sup>173</sup> In such cases, the USPTO will give reasonable advance notice, and employees will be expected to adjust their schedules accordingly.<sup>174</sup> Furthermore, “[m]odifications may be required to ensure internal and external customer needs are met.”<sup>175</sup> Participation in the IFP is voluntary and contingent upon a “Fully Successful” performance rating.<sup>176</sup> Some employees, such as those whose presence is required during normal business hours, may not be eligible to participate in the IFP.<sup>177</sup>

In practice, evidence showed that the IFP had occasionally hindered Paralegal Specialists’ productivity.<sup>178</sup> Because Paralegal Specialists received assignments only when their supervisors were working, Paralegal Specialists with differing work schedules from their supervisors’ schedules sometimes had more downtime and received fewer assignments.<sup>179</sup> As stated by one Paralegal Specialist, “[A Paralegal Specialist] cannot make [a] supervisor[y] paralegal wake up [early] in the morning to assign [the Paralegal Specialist] a case. That [has] got to be the most screwed up system I’ve ever heard of. If I arrive at work [early in the morning] and my supervisor [does not arrive] until [late in the morning], what are you to do? . . . . You can’t change my schedule.”<sup>180</sup> Also, as discussed previously, if a Paralegal Specialist’s supervisor worked Monday through Thursday from 6:00 AM to 4:00 PM, the Paralegal Specialist could have decided to work Wednesday through Saturday from 12:00 PM to 10:00 PM so that he or she was not present when the supervisor had work to distribute.<sup>181</sup> Additionally, as a PTAB Senior Manager informed a Supervisory Paralegal Specialist, “if the employee does not notify you that they are out of work and chooses to work on the weekend even if work is not assigned, there isn’t much we can do about that.”<sup>182</sup>

<sup>171</sup> See *Senior Manager 1 Documents #2, supra*, at Ex. 5 at 152; *Documents from Manager 3, supra*, at 3 (Increased Flexitime Policy document).

<sup>172</sup> See *Senior Manager 1 Documents #2, supra*, at Ex. 5 at 152; *Documents from Manager 3, supra*, at 3 (Increased Flexitime Policy document).

<sup>173</sup> See *Senior Manager 1 Documents #2, supra*, at Ex. 5 at 152; *Documents from Manager 3, supra*, at 3 (Increased Flexitime Policy document).

<sup>174</sup> See *Senior Manager 1 Documents #2, supra*, at Ex. 5 at 152; *Documents from Manager 3, supra*, at 3 (Increased Flexitime Policy document).

<sup>175</sup> See *Senior Manager 1 Documents #2, supra*, at Ex. 5 at 152.

<sup>176</sup> See *Senior Manager 1 Documents #2, supra*, at Ex. 5 at 152-53; *Documents from Manager 3, supra*, at 2 (Increased Flexitime Policy document).

<sup>177</sup> See *Senior Manager 1 Documents #2, supra*, at Ex. 5 at 152-53; *Documents from Manager 3, supra*, at 2 (Increased Flexitime Policy document).

<sup>178</sup> See OIG IRF: Interview of Paralegal 11, Tr. 2932-58 [hereinafter *Paralegal 11 Interview*].

<sup>179</sup> See *id.*

<sup>180</sup> [REDACTED]

<sup>181</sup> See, e.g., *Paralegal 5 Interview, supra*, at Tr. 415-36.

<sup>182</sup> See OIG IRF: Review of Documents from Senior Manager 5 [hereinafter *OIG IRF: SM Documents*] (e-mail from Senior Manager 5 dated July 30, 2012, with the subject line “RE: Working on a Saturday... general question”). Furthermore, on a few occasions, the high degree of scheduling flexibility caused the PTAB to pay overtime to Paralegal Specialists on days when the Paralegal Specialists logged Other Time. See OIG IRF: Data Analysis; OIG IRF: Interview of Paralegal 12, Tr. 306-27, 652-78, 1426-68, 1843-46. This could occur, for example, if a paralegal received little to no assignments during his regular hours of 6:00 AM to 2:30 PM, causing him to log Other Time, and then at 2:35 PM, received a new assignment – because the manager required all assignments to be completed the same day they are given, the employee was required to work overtime to complete the assignment. See *id.*

## 2. Telework Arrangements – The PTAB “Hoteling Program”

The PTAB “Hoteling Program” is available to Paralegal Specialists and Supervisory Paralegal Specialists and allows employees to perform the majority of their work from home (telework).<sup>183</sup> During the time frame in question, the hoteling program was governed by a set of agreements between the Union and the PTAB (Telework Agreements).<sup>184</sup> The provisions relevant to this investigation are nearly identical between the agreements. Under the program, employees are generally required to work at PTAB offices only two days per two-week pay period.<sup>185</sup> Employees became eligible for the program after spending at least two years in their current position.<sup>186</sup> Participation is voluntary and contingent on maintaining a “Fully Successful” performance rating.<sup>187</sup> Prior to participating in the program, employees must complete a certification and training process.<sup>188</sup> Management is permitted to suspend or terminate an employee’s participation in the program based on business needs or the employee’s performance or conduct.<sup>189</sup> Additionally, management reserves the right to terminate the program as a whole at any time due to operational needs.<sup>190</sup>

Employees who participate in the Hoteling Program are expected to be accessible and available during work hours.<sup>191</sup> As such, they are required to use online collaboration tools and check and respond appropriately to voicemail and e-mail periodically throughout the workday.<sup>192</sup> Furthermore, employees “must work on tasks directly related to their job functions as defined in their performance appraisal plan . . . or on other tasks specifically assigned and/or approved by their supervisors.”<sup>193</sup> Additionally, employees “must ensure that personal responsibilities do not interfere with [the] performance of official duties.”<sup>194</sup>

Pursuant to the Telework Agreements, employees are required to provide their supervisors with their work schedules and advance notification of any schedule changes.<sup>195</sup> The Telework

<sup>183</sup> See OHR Documents, *supra*, at Ex. 3-4; Senior Manager 1 Documents #2, *supra*, at Ex. 2 at 7, and Ex. 4. See also Senior Manager 2 Documents, *supra*, at Ex. 2.

<sup>184</sup> See Senior Manager 1 Documents #2, *supra*, at Ex. 4 (pilot hoteling agreement signed in January 2009); Senior Manager 2 Documents, *supra*, at Ex. 2 (amended pilot hoteling agreement signed in March 2009); OHR Documents, *supra*, at Ex. 4 (hotelings agreement signed in August 2010); see also OHR Documents, *supra*, at Ex. 3 (modifying the hoteling agreement’s requirement to work at USPTO offices once per week to twice per two-week pay period), Ex. 5 (affording hoteling participants the option to change their official duty station to their home address, thereby eliminating the requirement to work at USPTO offices twice per two-week pay period); Senior Manager 1 Documents #2, *supra*, at Ex. 4 (affording Supervisory Paralegal Specialists the option to participate in the hoteling program). A pilot version of the agreement was signed in January 2009 and amended in March 2009. *Id.* at Ex. 4; Senior Manager 2 Documents, *supra*, at Ex. 2. Subsequently, a final, non-pilot agreement was signed in August 2010. OHR Documents, *supra*, at Ex. 4. The provisions relevant to this investigation are nearly identical in all versions of these agreements. See Senior Manager 1 Documents #2, *supra*, at Ex. 4; Senior Manager 2 Documents, *supra*, at Ex. 2; OHR Documents, *supra*, at Ex. 4.

<sup>185</sup> See OHR Documents, *supra*, at Ex. 3.

<sup>186</sup> See *id.* at Ex. 4 at 3; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 3.

<sup>187</sup> See OHR Documents, *supra*, at Ex. 4 at 3; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 3.

<sup>188</sup> See Senior Manager 4 Interview, *supra*, at Tr. 386-434; OHR Documents, *supra*, at Ex. 4 at 11; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 11; Managing Judge 1 Interview, *supra*, at Tr. 431-64; Chief Judge 2 Interview, *supra*, at Tr. 698-713.

<sup>189</sup> See OHR Documents, *supra*, at Ex. 4 at 5; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 5.

<sup>190</sup> See OHR Documents, *supra*, at Ex. 4 at 1; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 1.

<sup>191</sup> See OHR Documents, *supra*, at Ex. 4 at 2, 5; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 2, 4.

<sup>192</sup> See OHR Documents, *supra*, at Ex. 4 at 2, 5; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 2, 4.

<sup>193</sup> See OHR Documents, *supra*, at Ex. 4 at 10; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 10.

<sup>194</sup> See OHR Documents, *supra*, at Ex. 4 at 10; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 11.

<sup>195</sup> See OHR Documents, *supra*, at Ex. 4 at 11; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 11.

Agreements further state that employees who do not work a set schedule each week must, for each day worked, notify their supervisor when they will start work and how many hours they intend to work that day.<sup>196</sup> For work events that require physical attendance at PTAB offices, such as meetings, lectures, and training, employees will generally be given advance notice of at least two business days.<sup>197</sup> Employees must adjust their schedules to attend these events.<sup>198</sup>

The Hoteling Program was initially a pilot program formed by an agreement between the PTAB and the Union. The first telework agreement was executed in January 2009 with Chief Judge 1 being the PTAB's primary signatory.<sup>199</sup> PTAB employees who episodically teleworked also had to take a training class before they could telework.<sup>200</sup>

### **3. Enhanced Hoteling Flexibility – “50 Mile Radius Agreement” Option**

The “50 Mile Radius Agreement” is another telework agreement with the Union that provides enhanced flexibility to employees that participate in the PTAB's Hoteling Program.<sup>201</sup> Under the agreement, hoteling employees may voluntarily change their official government duty station to their home address.<sup>202</sup> Participating employees acknowledge that the “option is primarily for [their] convenience and benefit.”<sup>203</sup> The option is approved for all employees who meet the requirements of the Hoteling Program and reside within 50 miles of the USPTO headquarters in Alexandria, Virginia.<sup>204</sup> Employees who participate in the option are no longer required to report to PTAB offices twice per two-week pay period.<sup>205</sup> However, employees are still “required to report to [PTAB offices] to meet all program and performance plan requirements, to attend training, to attend meetings, . . . and as otherwise required by the [PTAB].”<sup>206</sup>

### **4. Chief Judge 2's Perceptions of the Telework Programs<sup>207</sup>**

Chief Judge 2 told the OIG that, when he became the PTAB's Chief Judge in May 2011, he was “surprised to learn that the [PTAB] actually is in a circumstance where 90% of the paralegals telework.”<sup>208</sup> Describing this as “a shock,” Chief Judge 2 stated,

I've never worked at a place where some particular group of employees having a function vital to the success of an organization have as many as 90% of the people teleworking. I was shocked because I was unaccustomed to seeing anything like that. I was

<sup>196</sup> See OHR Documents, *supra*, at Ex. 4 at 11-12; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 12.

<sup>197</sup> See OHR Documents, *supra*, at Ex. 4 at 5, 11; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 5, 11.

<sup>198</sup> See OHR Documents, *supra*, at Ex. 4 at 11; Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 11.

<sup>199</sup> See Senior Manager 1 Documents #2, *supra*, at Ex. 4 at 15.

<sup>200</sup> See Senior Manager 4 Interview, *supra*, at Tr. 386-434.

<sup>201</sup> See OHR Documents, *supra*, at Ex. 5.

<sup>202</sup> See *id.* at Ex. 5 at 1.

<sup>203</sup> See *id.*

<sup>204</sup> See *id.* at Ex. 5 at 2.

<sup>205</sup> See *id.*

<sup>206</sup> See *id.*

<sup>207</sup> The OIG requested to speak with Former Chief Judge 2 about the PTAB, but Former Chief Judge 2 declined the request. Because he is no longer a federal employee, the OIG cannot require him to provide a statement or participate in an interview.

<sup>208</sup> See Chief Judge 2 Interview, *supra*, at Tr. 970-78.

also somewhat shocked because I wasn't quite sure . . . how that kind of arrangement necessarily facilitated the specific work of [the PTAB], which has a fundamental component of interactivity.<sup>209</sup>

Chief Judge 2 told the OIG that he therefore doubted whether telework was effective for the PTAB.<sup>210</sup> According to Chief Judge 2, some of his Senior Managers, who did not telework and who were physically present at PTAB offices, exhibited a lack of responsiveness and "diligence," which aggravated his concerns.<sup>211</sup> He stated that he questioned whether his ability to manage was "further disabled" because "because most people aren't even here."<sup>212</sup>

Chief Judge 2 inquired a number of times, including when he first joined the PTAB as Chief Judge, with PTAB managers and possibly USPTO managers about ending the telework programs.<sup>213</sup> However, in response to his inquiries, he was told that the telework programs could not be ended, and attempts to do so would face a "huge obstacle" with the Union and with having sufficient office space for the employees.<sup>214</sup> Realizing his "inability to change" the telework programs, Chief Judge 2 tried to increase the number of times Paralegal Specialists had to be physically present at PTAB offices to account for what they were doing.<sup>215</sup> According to Chief Judge 2, his efforts achieved "limited success."<sup>216</sup> When interviewed by the OIG, Chief Judge 2 stated that he has "far less" concerns now than he had in 2011 and 2012, largely due to a change in PTAB management, especially with respect to who oversees PTAB paralegals.<sup>217</sup>

### **5. Paralegal Specialists' and Supervisory Paralegal Specialists' Understanding of the Relevant Telework Policies**

The OIG's interviews with relevant witnesses revealed that Paralegal Specialists had a limited understanding of the rules governing the types of activities they could pursue while teleworking. Some described rules about when they could work each day<sup>218</sup> and how to handle technical problems.<sup>219</sup> Few noted that they were not permitted to use the equipment for "personal use,"<sup>220</sup> and only one stated that they were not permitted to pursue personal activities such as

<sup>209</sup> *Id.* at Tr. 978-82, 1068-72.

<sup>210</sup> *See id.* at Tr. 1202-05.

<sup>211</sup> *See id.* at Tr. 1153-57, 1177-213.

<sup>212</sup> *See id.* at Tr. 1194-213.

<sup>213</sup> *See id.* at Tr. 978-82, 1068-82, 1303-13, 2817-33.

<sup>214</sup> *See id.* at Tr. 984-87, 1269-313, 2817-33.

<sup>215</sup> *See id.* at Tr. 989-97.

<sup>216</sup> *See id.* at Tr. 993-1010.

<sup>217</sup> *See id.* at Tr. 1168-73, 1215-61.

<sup>218</sup> Some Paralegal Specialists only responded that they were required to work 80 hours over two weeks and could not work outside of the hours of 5:30 am and 10:00 pm. *See, e.g., Paralegal 6 Interview, supra*, Tr. 406-20; *Paralegal 2 Interview, supra*, at Tr. 313-62 (noting the maxiflex schedule, but not any specific telework rules when asked what Paralegal Specialists could and could not do while teleworking); *Paralegal 10 Interview, supra*, at Tr. 194-96, 254-63 (explaining that Paralegal Specialists are supposed to "adher[e] to [their] hours" pursuant to their flex schedule; providing times they can work each day). However, one Paralegal Specialist stated to the OIG that there were not any rules that discuss what Paralegal Specialists could "do in [their] home[s] while [they were] on government time." *Paralegal 6 Interview, supra*, at Tr. 406-28.

<sup>219</sup> They were required to come in to the office or take annual leave if they had technical problems. *See Paralegal 3 Interview, supra*, at Tr. 349-55. *But see Paralegal 9 Interview, supra*, at Tr. 1084-88 (stating that if one's computer is not working, there is not a rule requiring one to take leave or go into the office to work).

<sup>220</sup> *See, e.g., Paralegal 6 Interview, supra*, at Tr. 421-23; *Paralegal 10 Interview, supra*, at Tr. 192-94.

laundry and running errands while teleworking on government time.<sup>221</sup> Similarly, in interviews with the OIG, few Supervisory Paralegal Specialists testified that Paralegal Specialists must work, not pursue personal activities, while hoteling on government time.<sup>222</sup> After discussing the fact that some Paralegal Specialists watched television, did laundry, and conducted other personal activities while hoteling, Supervisory Paralegal Specialists stated that such activities were not permitted while teleworking and Paralegal Specialists had no reason to think that such activities were permissible.<sup>223</sup>

### G. Fiscal Year 2009 Hiring Plan and Execution

In September 2008, Chief Judge I and Managing Judge I planned to concurrently hire new judges, patent attorneys, and Paralegal Specialists during the upcoming fiscal year to deal with the PTAB's growing backlog of cases.<sup>224</sup> In their request to the USPTO for hiring authorization, they specifically noted that the organization needed new Paralegal Specialists to support the new judges and attorneys.<sup>225</sup> Subsequently, the USPTO granted the authorization to hire 19 Paralegal Specialists, 10 judges, and 22 patent attorneys.<sup>226</sup>

The evidence showed that Chief Judge I became aware of an impending USPTO-wide hiring freeze and was concerned that he would not be able to hire any new personnel for the foreseeable future.<sup>227</sup> According to two Senior Managers, Chief Judge I wanted to hire as many employees as he could before the hiring freeze took effect.<sup>228</sup> The Senior Managers therefore

<sup>221</sup> Paralegal 3 Interview, *supra*, at Tr. 328-36; see also Paralegal 9 Interview, *supra*, at Tr. 396-07 (stating that Paralegal Specialists were "basically supposed to act like [they were] in the office. [They were] supposed to not be distracted by other things going on in [their] home[s] . . . be that laundry or [their] kid[s] or TV, any of the above"); Paralegal 10 Interview, *supra*, at Tr. 187-96 (stating that Paralegal Specialists were not supposed to do "tasks for home when you're at work").

<sup>222</sup> See, e.g., Senior Manager 2 Interview, *supra*, at Tr. 280-89 (stating hours and days Paralegal Specialists can work), 576-80 (noting that Paralegal Specialists were not permitted to watch television and should be working); Manager 3 Interview, *supra*, at Tr. 623-69 (stating that if Paralegal Specialists have an equipment problem, they have to go into the office or use leave); Manager 1 Interview, *supra*, at Tr. 622-799 (stating that Paralegal Specialists cannot watch kids while teleworking, can only work from their remote station, have to call in by 10:00 am if they are not teleworking); Manager 4 Interview, *supra*, at Tr. 384-92, 431-36 (stating that if Paralegal Specialists have computer problems, they have to report that and if it will last a long time, come in to the office; explaining the hours within which each Paralegal Specialist can work each day). More than one Supervisory Paralegal Specialist also stated that her Paralegal Specialists were required to notify her of their work schedules. See, e.g., Manager 3 Interview, *supra*, at Tr. 629-43; Manager 4 Interview, *supra*, at Tr. 347-51.

<sup>223</sup> See also Manager 3 Interview, *supra*, at Tr. 2320-402 (stating that she had no indication that her Paralegal Specialists did not understand that they were not allowed to go shopping on government time); Manager 2 Interview, *supra*, at Tr. 1952-77 (stating that his Paralegal Specialists would have had no reason to think they could read books or do laundry while logging Other Time and were not permitted to do so); Manager 1 Interview, *supra*, at Tr. 3622-23, 3648-57 (stating that although Paralegal Specialists probably read books and watched television while logging Other Time, there was "no reason for them to think" reading a book was allowed while logging Other Time, but also stated that they were never told they could not watch television).

<sup>224</sup> See Managing Judge 1 Documents #1, *supra*, at Ex. 2; Senior Manager 4 Interview, *supra*, at Tr. 783-89; Managing Judge 1 Interview, *supra*, at Tr. 1365-69, 1501-05, 1796-1810.

<sup>225</sup> See Managing Judge 1 Documents #1, *supra*, at Ex. 2, at 6.

<sup>226</sup> See *id.* at Exs. 2, 18; USPTO Response, *supra*, at Ex. 3, 7; Senior Manager 5 Interview, *supra*, at Tr. 1055-1135; Senior Manager 1 Interview, *supra*, at Tr. 1529-42; Managing Judge 1 Documents #2, *supra* (e-mail from Senior Manager 5 on February 19, 2009). Note that the PTAB does not directly hire judges; rather, after receiving funding authorization from the USPTO, the PTAB selects judges it deems qualified for the position, and then submits their names to the Secretary of the U.S. Department of Commerce for appointment. See Chief Judge 2 Interview, *supra*, at Tr. 391-401.

<sup>227</sup> See USPTO Response, *supra*, at Ex. 3; Managing Judge 1 Interview, *supra*, at Tr. 1796-1806, 1826-1903; OIG IRF: Review I of Electronic Documents Received from USPTO, Exs. 8, 12.

<sup>228</sup> See Senior Manager 5 Interview, *supra*, at Tr. 1055-1135; Senior Manager 4 Interview, *supra*, at Tr. 896-908.

coordinated the hiring initiative for the 19 Paralegal Specialist positions.<sup>229</sup> The hiring initiative proceeded quickly, and 17 candidates were deemed suitable and selected for employment.<sup>230</sup> The evidence showed, however, that Chief Judge I wanted to hire as many Paralegal Specialists as possible and forced the hiring of two additional Paralegal Specialists over strenuous objections from Senior Managers, including the hiring official, about the qualifications of the two additional candidates.<sup>231</sup> One Senior Manager stated to the OIG that he even “begged” Chief Judge I not to hire the two additional candidates.<sup>232</sup> Ultimately, however, all 19 candidates were hired in Fiscal Year 2009.<sup>233</sup>

The impending hiring freeze subsequently took effect.<sup>234</sup> One new judge had been hired by that point.<sup>235</sup> Several PTAB’s managers told the OIG that the judges had not been hired due to judge hiring procedures, which are more complex and lengthy than Paralegal Specialist hiring procedures.<sup>236</sup> Chief Judge I and Managing Judge I submitted requests for exceptions to the hiring freeze, detailing the PTAB’s case backlog and the amount of lost revenue from not having more judges on staff.<sup>237</sup> The exception requests, however, were not granted.<sup>238</sup>

After Chief Judge I’s departure, Managing Judge I continued attempts at hiring more judges.<sup>239</sup> Managing Judge I interviewed candidates and submitted selection packages via the Director of the USPTO to the Secretary of Commerce, who must approve the hiring of judges.<sup>240</sup> These attempts, however, were unsuccessful.<sup>241</sup> Although a few full-time line-level judges were hired between January 2009 and November 2011, they were all backfills for departed judges, and significant hiring of new judges did not occur until the end of 2011.<sup>242</sup>

<sup>229</sup> See *Managing Judge I Documents #1*, *supra*, at Ex. 2, p. 6, and Ex. 18; *USPTO Response*, *supra*, at Ex. 3, 7; *Senior Manager 5 Interview*, *supra*, at Tr. 1055-1135; *Senior Manager 1 Interview*, *supra*, at Tr. 1529-42.

<sup>230</sup> See *Managing Judge I Documents #1*, *supra*, at Ex. 18; *Senior Manager 1 Interview*, *supra*, at Tr. 1533-42.

<sup>231</sup> See *Senior Manager 5 Interview*, *supra*, at Tr. 1055-1113; *Senior Manager 4 Interview*, *supra*, at Tr. 851-93, 1018-40; *Senior Manager 1 Interview*, *supra*, at Tr. 1529-62, 1605-63, 3811-43; *Managing Judge I Interview*, *supra*, at Tr. 1858-1903.

<sup>232</sup> [REDACTED]

<sup>233</sup> See *USPTO Response*, *supra*, at Ex. 3, 9; *Senior Manager 4 Interview*, *supra*, at Tr. 791-816.

<sup>234</sup> See *USPTO Response*, *supra*, at Ex. 3; *Senior Manager 5 Interview*, *supra*, at Tr. 1895-1904, 2013-19; *Senior Manager 4 Interview*, *supra*, at Tr. 791-816; *Senior Manager 1 Interview*, *supra*, at Tr. 664-68; *Managing Judge I Interview*, *supra*, at Tr. 1970-78.

<sup>235</sup> See *USPTO Response*, *supra*, at Ex. 3; *Senior Manager 5 Interview*, *supra*, at Tr. 1895-1904, 2013-19; *Senior Manager 4 Interview*, *supra*, at Tr. 791-816; *Senior Manager 1 Interview*, *supra*, at Tr. 664-68; *Managing Judge I Interview*, *supra*, at Tr. 1970-78.

<sup>236</sup> See *USPTO Response*, *supra*, at Ex. 3; *Senior Manager 4 Interview*, *supra*, at Tr. 791-816; *Managing Judge I Interview*, *supra*, at Tr. 1804-17.

<sup>237</sup> See *Managing Judge I Documents #1*, *supra*, at Ex. 1, 9, 11-12; *Managing Judge I Interview*, *supra*, at Tr. 1501-05.

<sup>238</sup> See *Managing Judge I Documents #1*, *supra*, at Ex. 11, 14; *USPTO Response*, *supra*, at Ex. 3, 7; *Managing Judge I Interview*, *supra*, at Tr. 1370-82, 1501-37, 1818-23; *Chief Judge 2 Interview*, *supra*, at Tr. 284-360; *Managing Judge I Documents #2*, *supra* (e-mail to Senior Manager 5, among others).

<sup>239</sup> See *Managing Judge I Documents #1*, *supra*, at Ex. 1, 5-8, 11, 13-15, 17-18; *Managing Judge I Interview*, *supra*, at Tr. 1970-78; *Chief Judge 2 Interview*, *supra*, at Tr. 284-334.

<sup>240</sup> Administrative patent judges are appointed by the Secretary of Commerce in consultation with the Director of the USPTO. See *Managing Judge I Documents #1*, *supra*, at Ex. 8, 13-15; *USPTO Response*, *supra*, at Ex. 3; *Managing Judge I Interview*, *supra*, at Tr. 1812-17.

<sup>241</sup> See *Managing Judge I Documents #1*, *supra*, at Ex. 11, 14; *USPTO Response*, *supra*, at Ex. 3, 7; *Managing Judge I Interview*, *supra*, at Tr. 1370-82, 1501-37, 1818-23; *Chief Judge 2 Interview*, *supra*, at Tr. 284-360.

<sup>242</sup> See *Managing Judge I Documents #1*, *supra*, at Ex. 11, 14; *USPTO Response*, *supra*, at Ex. 3, 7; *Managing Judge I Interview*, *supra*, at Tr. 1370-82, 1501-37, 1818-23; *Chief Judge 2 Interview*, *supra*, at Tr. 284-360; OIG IRF: Review I of Electronic Documents Received from USPTO, Ex. 2-4, 11, 15-24.

When asked why the PTAB did not hire judges before the Paralegal Specialists, one Senior Manager informed the OIG that it was “a lot easier to hire paralegals than . . . judges” because judge hires need to be approved by the Secretary of the Department of Commerce and Paralegal Specialists can be hired directly by the PTAB and its Human Resources employees.<sup>243</sup>

#### H. Lack of Work and Other Time

Evidence showed that, if Paralegal Specialists did not have work to do during their scheduled workday, they were to log their time as “Other Time” (code A00131) in webTA, the PTAB’s time and attendance program.<sup>244</sup> One Senior Manager described this code as the “I don’t have work but I’m going to get paid code.”<sup>245</sup> One of Chief Judge I’s direct reports informed the OIG that Chief Judge I had directed Paralegal Specialists to record “nonproduction time” using this code.<sup>246</sup>

Beginning in Fiscal Year 2009, after the hiring of 19 Paralegal Specialists in early 2009,<sup>247</sup> the amount of Other Time hours logged by Paralegal Specialists increased dramatically. Those hours declined to and remained at or near zero after approximately May 20, 2013, when PTAB managers instructed employees to work on special projects, as explained further below. See Table 3.

**Table 3. Other Time Logged by Paralegal Specialists by Fiscal Year<sup>248</sup>**

Fiscal Year	Other Time (A00131) Hours	Number of Paralegals
2009	8,141	51
2010	28,243.25	49
2011	27,013.75	46
2012	25,947.75	41
2013	11,096.25	38

OIG found that over 43,000 hours of Other Time were recorded while Chief Judge I served as Chief Judge from Fiscal Year 2009 until he retired in January 2011 (approximately 43% of the

<sup>243</sup> Senior Manager 4 Interview, *supra*, at Tr. 793-816.

<sup>244</sup> See, e.g., Paralegal 6 Interview, *supra*, at Tr. 862-68 (explaining that Paralegal Specialists used the Other Time code when they “didn’t have any other work . . . there was not work coming in, you didn’t have any work, you completed all your work . . . and it’s what’s called ‘down time’ or ‘down period,’ that’s when you would use it”); Paralegal 3 Interview, *supra*, at Tr. 805-12 (stating that the Other Time code was to be used “when you’re not doing anything”); Manager 2 Interview, *supra*, at Tr. 1395-97, 1417-22 (stating that Paralegal Specialists were to log Other Time when they did not have work assigned); Manager 1 Interview, *supra*, at Tr. 3302-03 (stating that Paralegal Specialists “used that non-production time [code in webTA] when they didn’t have any work”); Paralegal 2 Interview, *supra*, at Tr. 981-87.

<sup>245</sup> Senior Manager 6 Interview, *supra*, at Tr. 885-89.

<sup>246</sup> See Managing Judge 1 Interview, *supra*, at Tr. 1654-61, 2351-59.

<sup>247</sup> Paralegal 6 Interview, *supra*, at Tr. 598-610 (stating that “prior to 2009 [the workload] was pretty consistent . . . before they did the hiring blitz . . . Never had any . . . down time . . . [Then after the new Paralegal Specialists were hired,] it wasn’t as steady at times. And . . . then it was . . . points where it wasn’t any”).

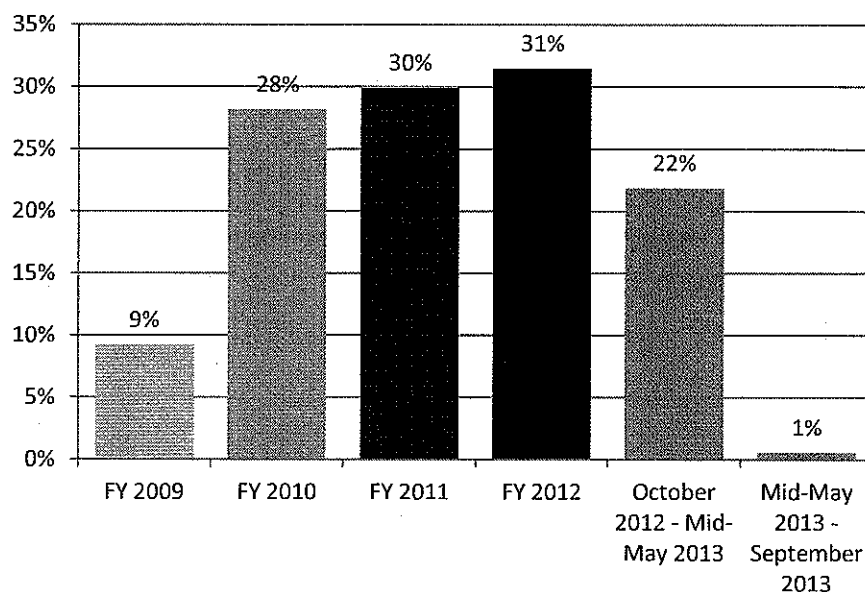
<sup>248</sup> OIG IRF: Data Analysis, *supra*. This table shows the total number of individuals who worked as paralegals at any given point during the year. Because relatively little Other Time was logged in Fiscal Year 2008, less than 350 hours, the OIG did not factor it into its analyses.



total Other Time); over 8,000 hours of Other Time were recorded while Managing Judge I served as Acting Chief Judge until the beginning of May 2011 (approximately 9% of the total Other Time); and over 48,000 hours of Other Time were recorded during Chief Judge 2's tenure through the end of Fiscal Year 2013 (approximately 48% of the total Other Time).<sup>249</sup>

The percentage of Other Time logged by Paralegal Specialists was significant. In Fiscal Year 2009, Paralegal Specialists logged approximately 9% of their time as Other Time; 28% in 2010; 30% in 2011; and 31% in 2012.<sup>250</sup> From the beginning of Fiscal Year 2013 through mid-May 2013, Paralegal Specialists logged approximately 22% of their time to Other Time, and from mid-May 2013 to September 2013, they logged approximately 1% of their time to Other Time.<sup>251</sup> See Figure 1.

**Figure 1. Percent of Total Hours Logged as Other Time<sup>252</sup>**



As an example, the Paralegal Specialist with the greatest average Other Time between Fiscal Years 2010 and 2013 logged 46% of her time as Other Time in 2010 and 60% of her time in 2011.<sup>253</sup> The Paralegal Specialist with the second greatest average Other Time logged 61% of her time as Other Time in 2010, 66% in 2011, and 13% in 2012.<sup>254</sup> The Paralegal Specialist with the third greatest average Other Time logged 53% of her time as Other Time in 2010, 35% in

<sup>249</sup> *Id.* Because the exact date on which Former Chief Judge 2 ceased being Chief Judge was unclear, we used his retirement date of January 1, 2011. Additionally, because Chief Judge 2 became Chief in early May 2011, we proportioned the amount of Other Time between him and the Acting Chief for that year.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* We divided Fiscal Year 2013 into two segments because in mid-May, after the OIG had referred the OIG hotline complaints to the PTAB, the PTAB began taking action to reduce Other Time to zero.

<sup>253</sup> *Id.* This employee did not work as a Paralegal Specialist with the PTAB in 2012 and 2013.

<sup>254</sup> *Id.* This employee did not work as a Paralegal Specialist with the PTAB in 2013.

2011, 54% in 2012, and 33% in 2013.<sup>255</sup> The Paralegal Specialists with the fourth greatest average Other Time logged 56% of his time as Other Time in 2010, 55% of his time as Other Time in 2011, 47% of his Time as Other Time in 2012, and 12% of his time as Other Time in 2013.<sup>256</sup> As discussed below, all of these employees received performance bonuses, despite their extensive non-productivity.

When asked why Paralegal Specialists had so much Other Time, Paralegal Specialists and their supervisors stated to the OIG that there was not enough work for the Paralegal Specialists.<sup>257</sup> The evidence showed that, although Chief Judge I hired 19 additional Paralegal Specialists in 2009, the PTAB was not able to hire the amount of judges desired before the hiring freeze was instituted that year.<sup>258</sup> As noted previously, Paralegal Specialists could not create their own work – they relied on others, and judges' opinions were one main source of work. Paralegal Specialists completed the work that they were given, and then waited for their next assignments.<sup>259</sup>

The evidence showed that some Paralegal Specialists believed that they were not required to inform their supervisors if they did not have any more assignments and simply logged Other Time after they completed their work. Several Paralegal Specialists told the OIG, for example, that their supervisors knew their workload and knew when the paralegals finished their assignments because of the way they submitted those assignments; therefore it was not necessary for the Paralegal Specialists to inform their supervisors when they ran out of work.<sup>260</sup>

The evidence also showed that Supervisory Paralegal Specialists did not always require their Paralegal Specialists to check in once finished with their assignments and before logging Other Time.<sup>261</sup> For example, one Supervisory Paralegal Specialist stated that it was more of a courtesy when Paralegal Specialists checked in with the supervisor when they were not busy, rather than

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> See, e.g., *Paralegal 5 Interview, supra*, at Tr. 1112-26 (explaining that Paralegal Specialists did not have enough work because there were not enough judges to provide work for the Paralegal Specialists that were hired); *Manager 3 Interview, supra*, at Tr. 2261 (stating that Paralegal Specialists "had 'other' time because they didn't really have a lot of work").

<sup>258</sup> See *Senior Manager 2 Interview, supra*, at Tr. 1287-99.

<sup>259</sup> See, e.g., *Paralegal 6 Interview, supra*, at Tr. 611-16, 707-10 (explaining that he waited for more work when he was finished with his work and he did not talk to his supervisor about his lack of work because "they knew. The work [wa]s generated . . . from them, so they have to know.").

<sup>260</sup> See, e.g., *Paralegal 3 Interview, supra*, at Tr. 565-68; *Paralegal 6 Interview, supra*, at Tr. 707-41 (stating to the OIG that Supervisory Paralegal Specialists knew when Paralegal Specialists had finished working on decisions because they had to e-mail the decisions to the supervisors when finished, and the Supervisory Paralegal Specialists knew when the Paralegal Specialists finished their other tasks because it would show in a particular case tracking system); 748-54 (stating that there was "no way they c[ould] not know [when they have work] because we . . . aren't able to get our own work, everything is assigned through them."); *Paralegal 7 Interview, supra*, at Tr. 927-48, 1650-79 (her supervisor knew what she was working on and when she finished her work, so it was "weird" to "send[] a person that gives you the work an email telling them you don't have any work"); *Paralegal 1 Interview, supra*, at Tr. 1282-91 (stating that during the "truly empty times," he stopped telling his supervisor that he had no work "because they kn[e]w [he] ha[d] no work"); *Paralegal 9 Interview, supra*, at Tr. 832-44 (she would not tell her supervisor "every time [she] had no work to do . . . because you got the sense that there wasn't anything to do . . . and you were just kind of annoying . . . to constantly be like 'I have nothing to do,'" the supervisors knew).

<sup>261</sup> See, e.g., *Manager 2 Interview, supra*, at Tr. 1005-43 (did not require paralegals to contact the supervisor when they did not have work to do from 2009 to 2013 because the supervisor generally knew because the supervisor was assigning them the work). Although one Supervisory Paralegal Specialist informed the OIG that she asked her Paralegal Specialists to check in when they did not have work, she stated that they did not always do so and sometimes she knew they were not busy. *Manager 4 Interview, supra*, at Tr. 1205-33.

an expectation, because the supervisor knew how much work they had.<sup>262</sup> Additionally, at least one Supervisory Paralegal Specialist asked Paralegal Specialists *not* to send e-mails when they finished their work because the supervisor knew their workload.<sup>263</sup> One Paralegal Specialist informed the OIG that her supervisor informed her that “there is not much work, and I know there is not much work, and you can stop calling me every day and telling me you have nothing to do because I know you have nothing to do.”<sup>264</sup> A Senior Manager informed the OIG that he did not believe the telework rules required Paralegal Specialists to inform their supervisors if they did not have work to do.<sup>265</sup> Another Senior Manager told the OIG that, although there probably was not a written rule on what Paralegal Specialists were permitted to do while logging Other Time, a “logical application” of the telework rules would be merely to require Paralegal Specialists to “check[] their computer every 15 minutes and say[], yeah, I’m here, I’m available, give me something to work on, I will work on it.”<sup>266</sup> Although a Senior Manager believed that the direction requiring Paralegal Specialists to obtain supervisory approval before logging Other Time did not occur until 2013,<sup>267</sup> the evidence suggested that it in July that Supervisory Paralegal Specialists were told that Paralegal Specialists were to inform their supervisors if they were out of work and that supervisors may deny use of Other Time if the

<sup>262</sup> *Manager 2 Interview, supra*, at Tr. 1155-68. Another Supervisory Paralegal Specialist stated to the OIG that some of her Paralegal Specialists would tell her that they needed work perhaps once a week or so, and others would not, and either way she would know because she could see what she assigned them. *Manager 1 Interview, supra*, at Tr. 2207-42.

<sup>263</sup> *Paralegal 2 Interview, supra*, at Tr. 481-530; *Paralegal 2 Documents, supra* (December 18, 2012, e-mail from a Supervisory Paralegal Specialist to a Paralegal Specialist informing the latter: “No need to notify me when work is done” in response to an e-mail from the Paralegal Specialist that she had completed her assigned work at 9:25 am). See also *Paralegal 7 Interview, supra*, at Tr. 859-95 (in the past, Paralegal Specialists were required to tell their supervisors if they did not have work, but “after a while . . . I guess it just faded out or something. Because they knew . . . why are we doing this? . . . I think . . . it used to get on the supervisors’ nerves, because they knew we didn’t have anything”).

<sup>264</sup> *Paralegal 9 Interview, supra*, at Tr. 955-59.

<sup>265</sup> *Senior Manager 5 Interview, supra*, at Tr. 1277-87.

<sup>266</sup> *Id.* at Tr. 1797-808. The evidence showed that a few Supervisory Paralegal Specialists asked their Paralegal Specialists at various points to check in before logging Other Time. OIG IRF: Review of Documents from Manager 4 (March 26, 2012, e-mail from Manager 4 to a group of Paralegal Specialists informing them to send her an e-mail when they are without work or requesting Other Time; August 4, 2009, e-mail from Manager 4 to a group of Paralegal Specialists stating that employees must “communicate/coordinate with their supervisor prior to being authorized to claim any amount of non-production time”).

<sup>267</sup> See *Senior Manager 1 Interview, supra*, at Tr. 2657-87. Evidence showed that in December 13, 2012, Paralegal Specialists were directed to inform their supervisors that they have run out of work before logging Other Time. OIG IRF: Review of Documents from Manager 4 (December 13, 2012, e-mail from Senior Manager 3 to Paralegal Specialists and PTAB management). The e-mail was sent to “add[] clarity for all employees concerned,” rather than to “change policy or procedure.” The Senior Manager wrote, “As a reminder to paralegals and LIEs on production, the use of Other Time is limited to those times when an employee has 1) run out of assigned work and 2) after informing the employees supervisor that they are out of work, the supervisor has no additional work to assign. This is the general guideline. To add specificity to the general guideline (the general guideline remains in full effect), effective Monday, 12/17/2012, if a paralegal has work on their [sic] docket at the end of the pay period, no Other Time may be claimed from the date the work was assigned through the end of the pay period . . .” OIG IRF: Review of Documents from Manager 4 (December 13, 2012, e-mail from Senior Manager 3 to Paralegal Specialists and PTAB management).

Paralegal Specialists fail to do so.<sup>268</sup> However, some Paralegal Specialists interviewed informed OIG that even after this e-mail, they did not always inform their supervisors that they were out of work because the supervisors knew or should have known and they would have been contacting their supervisors constantly.<sup>269</sup>

The evidence showed that Paralegal Specialists who worked from home often conducted personal activities while logging Other Time. According to Paralegal Specialists interviewed by the OIG, PTAB paralegals engaged in the following activities while logging Other Time at home:

- watching television;
- sending and receiving personal e-mails;
- reading books, magazines, and the newspaper;
- doing chores in the home;
- exercising at home;
- performing volunteer work from home;
- doing laundry;
- using social media, such as Facebook;
- listening to the radio and watching television;
- browsing the internet;
- making personal phone calls; and
- shopping online.<sup>270</sup>

Such non-productivity was apparently not limited to employees working from home. For example, one Paralegal Specialist recalled that, when she was working in the PTAB office, a couple of Paralegal Specialists brought in Kindles to read during the workday.<sup>271</sup> At least one

<sup>268</sup> See, e.g., *OIG IRF: SM Documents, supra* (July 30, 2012, e-mail from Senior Manager 5 to PTAB management). Then in a December 2012 e-mail, a Senior Manager "add[ed] clarity" to this procedure when she informed the Paralegal Specialists that they were to inform their supervisors before logging Other Time. *Id.* (December 13, 2012, e-mail from Senior Manager 3 to Paralegal Specialists and other management). Specifically, Senior Manager 3, who is senior to Senior Managers 1 and 2, sent an e-mail "reminder" to all of the Paralegal Specialists in December 2012 stating that logging Other Time is "limited to those times when an employee has 1) run out of assigned work and 2) after informing the employee's supervisor that they are out of work, the supervisor has no additional work to assign. This is the general guideline," and effective 12/17/2012, "if a paralegal has work on their docket at the end of the pay period, no Other Time may be claimed from the date the work was assigned through the end of the pay period (this may be adjusted to the following duty day after the work was assigned depending upon the time of day the work was assigned.) . . . [example] Again, Other Time is only appropriate when an employee runs out of work and there is none to assign. This does not change policy or procedure. It adds clarity for all employees concerned." *Id.* (December 13, 2012, e-mail from Senior Manager 3 to Paralegal Specialists and other management).

<sup>269</sup> See, e.g., *Paralegal 3 Interview, supra*, at Tr. 565-68; *Paralegal 7 Interview, supra*, at Tr. 927-48, 1650-79 (her supervisor knew what she was working on and when she finished her work, so it was "weird" to "send[] a person that gives you the work an email telling them you don't have any work"); *Paralegal 1 Interview, supra*, at Tr. 1282-91 (stating that during the "truly empty times," he stopped telling his supervisor that he had no work "because they kn[e]w [he] ha[d] no work"); *Paralegal 9 Interview, supra*, at Tr. 832-44 (she would not tell her supervisor "every time [she] had no work to do . . . because you got the sense that there wasn't anything to do . . . and you were just kind of annoying . . . to constantly be like 'I have nothing to do,' the supervisors knew").

<sup>270</sup> See, e.g., [REDACTED] (e-mailed friends, read news, used social media, browsed the internet, did laundry); [REDACTED] (read magazines, chores); [REDACTED] (watched television, browsed the internet, did chores in the house); [REDACTED] (telephoned friends and relatives, e-mailed friends and relatives, browsed the internet, read magazines, listened to the television, did chores around the house, did dishes); [REDACTED] (listened to the radio, browsed the internet, read the news online); [REDACTED] (read a book, browsed the internet, shopped online, listening to the news, did the dishes and other "little ten minute tasks like that"); [REDACTED] (sent personal e-mail, performed volunteer work at home); [REDACTED] (did chores, watched television, browsed the internet, ran errands); [REDACTED] (used personal computer to handle banking, e-mailed friends, read the newspaper, walked the dogs, exercised at home).

<sup>271</sup> *Paralegal 2 Interview, supra*, at Tr. 1084-91.

Paralegal Specialist informed the OIG that they did not recall being directed on what they should not be doing when logging Other Time.<sup>272</sup>

Network log-on data further suggests that several Paralegal Specialists were not working while recording Other Time. Paralegal Specialists were required to sign on to their communicators when they were working,<sup>273</sup> which required them to access USPTO's virtual private network from home. However, an examination of data showing when Paralegal Specialists were logged on to the network showed some instances where Paralegal Specialists were logged in for less time than they recorded as Other Time in their webTA.<sup>274</sup> Some Paralegal Specialists confirmed to the OIG that this time differential reflected that they were not likely at their computers for some of the time they logged as Other Time.<sup>275</sup>

Several Supervisory Paralegal Specialists and PTAB management told the OIG that they understood that the Paralegal Specialists were largely not working when logging Other Time. For example, one Senior Manager stated that he would not have been "a bit surprised if there were people who were going out to the golf course."<sup>276</sup> Another Senior Manager stated that he believed that they were probably playing poker.<sup>277</sup> A key member of management agreed that the Paralegal Specialists were likely doing laundry, browsing the internet, or reading a book, and were probably not at their desk but doing other things around the house and checking periodically to make sure they were not assigned any work.<sup>278</sup> A Senior Manager stated to the OIG that some were probably watching television, reading books, and doing chores.<sup>279</sup> Another Senior Manager stated that she also believed that they may have been watching television, doing laundry, and surfing the web.<sup>280</sup> A Supervisory Paralegal Specialist informed the OIG that she "suspect[e]d they were shopping" and they may have "done things around their house" because "they're not going to sit at their desk and stare at their computer."<sup>281</sup> Another Supervisory Paralegal Specialist believed that the Paralegal Specialists were probably watching television and relaxing.<sup>282</sup> In fact, Chief Judge 2 stated to the OIG, "I almost don't blame [the Paralegal Specialists] for watching TV, because, I mean, you're sitting around for 800 hours."<sup>283</sup>

<sup>272</sup> See, e.g., *Paralegal 3 Interview*, *supra*, at Tr. 823-28.

<sup>273</sup> *Managing Judge 1 Interview*, *supra*, at Tr. 740-43.

<sup>274</sup> OIG IRF: Data Analysis, *supra*.

<sup>275</sup> See *Paralegal 2 Interview*, *supra*, at Tr. 1188-1262; *Paralegal 5 Interview*, *supra*, at Tr. 684-727; *Paralegal 7 Interview*, *supra*, at Tr. 1256-397 (but see 2778-830); see also *Manager 1 Interview*, *supra*, at Tr. 3495-3503; *Manager 2 Interview*, *supra*, at Tr. 1844-1920; *Manager 3 Interview*, *supra*, at Tr. 1866-74; *Manager 4 Interview*, *supra*, at Tr. 2262-2353; *Senior Manager 1 Interview*, *supra*, at Tr. 2569-2600; *Senior Manager 2 Interview*, *supra*, at Tr. 2414-22; *Senior Manager 5 Interview*, *supra*, at Tr. 1771-83; *Paralegal 5 Interview*, *supra*, at Tr. 707-26 (Paralegal Specialist informed the OIG that the Paralegal Specialist used to forward e-mail to a personal phone, logged out of the network, and after receiving work, would log back in to the network).

<sup>276</sup> *Senior Manager 5 Interview*, *supra*, at Tr. 1752-64.

<sup>277</sup> *Managing Judge 1 Interview*, *supra*, at Tr. 2170-73.

<sup>278</sup> *Senior Manager 4 Interview*, *supra*, at Tr. 2017-67.

<sup>279</sup> See *Senior Manager 1 Interview*, *supra*, at Tr. 2284-98, 2368-84, 3368-405.

<sup>280</sup> See *Senior Manager 2 Interview*, *supra*, at Tr. 2269-87.

<sup>281</sup> *Manager 3 Interview*, *supra*, at Tr. 1783-93.

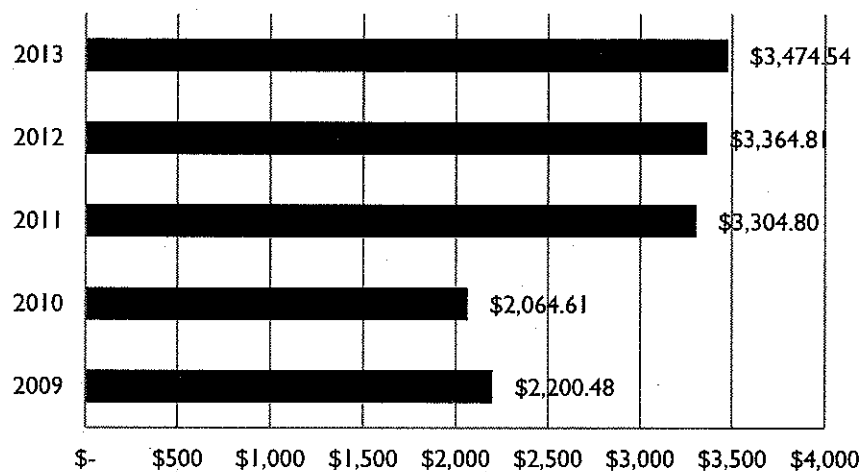
<sup>282</sup> *Manager 1 Interview*, *supra*, at Tr. 3364-03.

<sup>283</sup> *Chief Judge 2 Interview*, *supra*, at Tr. 2458-59.

### I. Substantial Bonuses Awarded to Employees Despite the Levels of Other Time

Despite the large amount of Other Time, most of the Paralegal Specialists received bonuses, totaling \$561,195.91 (\$2,922.90 average per Paralegal Specialist among those who received bonuses) from Fiscal Year 2009 through Fiscal Year 2013.<sup>284</sup> The average bonus for those who received bonuses was \$2,200.48 in Fiscal Year 2009 (26 Paralegal Specialists did not receive bonuses), \$2,064.61 in Fiscal Year 2010 (five Paralegal Specialists did not receive bonuses), \$3,304.80 in Fiscal Year 2011 (one Paralegal Specialist did not receive a bonus), \$3,364.81 in Fiscal Year 2012 (one Paralegal Specialist did not receive a bonus), and \$3,474.54 in Fiscal Year 2013 (all Paralegal Specialists received bonuses).<sup>285</sup> See Figures 2 and 3.

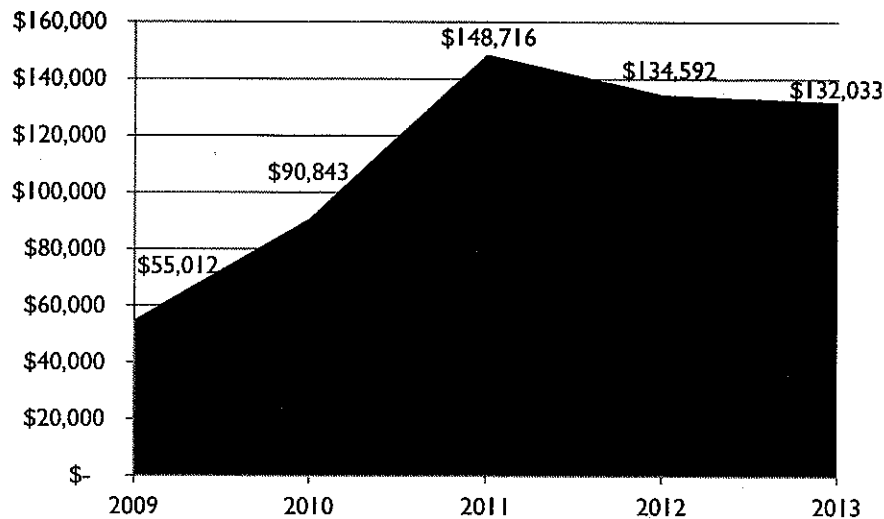
**Figure 2. Average Paralegal Specialist Bonuses by Fiscal Year<sup>286</sup>**



<sup>284</sup> OIG IRF: Data Analysis, *supra*.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

**Figure 3. Total Bonuses Paid to Paralegal Specialists by Fiscal Year<sup>287</sup>**

First-line Supervisory Paralegal Specialists also received bonuses – totaling \$120,523.55 between Fiscal Year 2009 and Fiscal Year 2013 (\$3,013.09 average per first-line Supervisory Paralegal Specialist among those who received bonuses).<sup>288</sup> The below table shows the number of Paralegals Specialists and first-line Supervisory Paralegal Specialists who received bonuses each year:

**Table 4. Bonuses Paid to Paralegal Specialists and First-Line Supervisory Paralegal Specialists by Fiscal Year<sup>289</sup>**

Fiscal Year	Number of Bonuses Awarded to Paralegal Specialists	Total Paralegal Specialists	Number of Bonuses Awarded to Supervisory Paralegal Specialists	Total Supervisory Paralegal Specialists
2009	25	51	7	8
2010	44	49	0	8
2011	45	46	8	8
2012	40	41	8	8
2013	38	38	8	8

Additionally, Senior Managers who oversaw paralegal operations received \$23,205 in bonuses in Fiscal Year 2009, \$27,464.00 in Fiscal Year 2011, \$13,327.39 in Fiscal Year 2012, and \$23,749 in Fiscal Year 2013.<sup>290</sup>

Members of management stated to the OIG that, because of the Paralegal Specialists' PAP and Labor Agreement, they could not eliminate or reduce the amount of bonuses despite the large

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* Supervisory Paralegal Specialists did not receive bonuses in 2010. *Manager I Interview, supra*, at Tr. 4527-45.

<sup>289</sup> OIG IRF: Data Analysis, *supra*.

<sup>290</sup> OHR Documents II, *supra*.