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TOP NEWS STORIES

PATENT OFFICE SCRUTINY HOLDS LESSONS FOR ALL FEDERAL MANAGERS

The U.S. Patent and Trademark Office (USPTO), a 'Best Place to Work' front-runner and model for telework in government, has received significant media scrutiny lately, raising issues about managing a mobile and remote workforce, time and attendance certification, among others.

An inspector general report and media reports about the issues at USPTO came out in late July and August, after Congress had left for recess, but oversight and hearings on the issues raised in the reports are all but guaranteed.

Both Rep. Darrell Issa (R-CA), chairman of the House Oversight and Government Reform Committee, and Rep. Frank Wolf (R-VA), chairman of the House Commerce, Justice, Science and Related Agencies Appropriations subcommittee, have separately written Commerce Secretary Penny Pritzker about the issues and called for congressional investigations.

"Despite patent examiners generally receiving salary at the top of the federal pay scale – some making $148,000 a year – it appears the telework program is not serving its intended purpose to produce more efficiency. The waste, fraud, abuse and mismanagement described by the Post is unacceptable," Issa wrote in his letter to Secretary Pritzker.

"The employees that have been abusing telework and committing time fraud should be fired today. So too should the senior USPTO managers who sought to hide these troubling findings in the report provided to the inspector general," Wolf said in his letter to Secretary Pritzker. "I am also asking that you refer these individuals and all relevant findings to the Justice Department for prosecution for any fraud that has taken place. If the department determines criminal fraud has occurred, they should be prosecuted to the full extent of the law," Wolf continued.

The management problems at USPTO came to light based on media coverage in *The Washington Post* of an inspector general report on paralegals at the Patent Trial and Appeal Board (PTAB), a component of USPTO, being paid for work while teleworking while in reality there was little work to be accomplished and managers directed employees to bill idle time under an "Other Time" pay code.

The IG report on the PTAB found that agency managers, including its senior-most personnel, were aware of the problems the IG was investigating but took little action to stop the offending behavior. The IG documented over $5 million in salary and performance awards paid to paralegals and other employees over a five year period, with some paralegals charging over half of their time to the "Other Time" pay code described by one senior manager as the "I don't have work but I'm going to get paid code."

The IG report also documented that some PTAB managers felt they were unable to address the "Other Time" productivity issues of their employees, fearing a conflict with the employee's union. The IG report also documents the reticence of agency managers to utilize employee connectivity software that maintains

communication and provides for oversight of productivity of remote workers for fears of being perceived as "Big Brother," despite the fact that employees specifically agreed in telework agreements to the agency and managers having access to such information. Further, agency managers reported to the IG that they could not eliminate or reduce the amount of performance awards paid to employees, even those with substantial "Other Time" billing, due to their understanding, or lack-thereof, of labor agreements, in addition to fears of being subject to EEO or union complaints for attempting to address the "Other Time" issue.

Also documented by the IG was confusion among employees and supervisors of telework policies. The misunderstandings came from the different levels of policy, including laws passed by Congress, Commerce Department policy, USPTO and component policies, and the collective bargaining agreement (CBA) with the union.

The IG recommended clear training for all employees, supervisors, and managers on telework to ensure full understanding of, and compliance in the future with, those rules. Also recommended were a look at the effectiveness of PTAB's management and workforce model and the agency-union labor agreement.

A second report in *The Washington Post* highlighted differences between a draft and final administrative inquiry conducted by USPTO management into claims of time and attendance abuse by patent examiners working under the USPTO's telework and hoteling programs.

The *Post* article suggests that the draft version, at 32 pages, offers greater detail into the reality of a management and culture problem at the agency. USPTO officials said the draft version was just a draft, and that the 16 page final administrative report is more accurate because it did not include information that could not be substantiated.

Both the draft and final administrative inquiry raised many of the same issues, although with different levels and types of details, including concerns about time and attendance representation by employees, questions about how supervisors should certify employees' time and attendance reports, "Big Brother" concerns related to management utilizing employee computer records to assess the accuracy of time and attendance reports, poor policies on how frequently remote workers should check in with their supervisor, and concerns over "end-loading," a practice where employee would leave large chunks of work to be accomplished at the end of productivity periods, making it difficult for supervisors to monitor the quality of the work.

Similar to the issues raised in the IG report, the administrative inquiry identified deficiencies in training and understanding of agency policy for employees, supervisors, and managers exacerbated the problems at USPTO. The administrative inquiry recommended more training for supervisors on various policies, as well as better guidance on time and attendance monitoring and certification.

For instance, the administrative report also found the agency lacked a clear policy to guide supervisors on how to certify the time and attendance of employees. When supervisors sought to take action against employees, higher-level managers pushed back on granting access to pull computer usage records, over fears of being perceived as "Big Brother" and causing issues with the union. Moreover, senior agency leadership did not want the agency's spot as a 'Best Place to Work' to be jeopardized, some interview quotes included in the draft version of the administrative inquiry said.

GOOD NUMBERS IN FEDERAL RETIREMENT PROCESSING AND FEDERAL HIRING FOR AUGUST

There was some good news in August's reporting for federal employees. The Office of Personnel Management (OPM) made a small dent in the backlog of federal retirement claims. Eric Katz of GovExec reported, "OPM

received 8,702 retirement applications last month, and processed 9,225. The backlog of outstanding claims dropped by about 500 to 13,097."

In general, OPM has made progress on the backlog of retirement claims this year. Jack Moore of Federal News Radio reported in June, "The Office of Personnel Management cut the longstanding backlog of pending retirement claims by more than a third in the first half of 2014."

The federal workforce also grew in August. According to the latest numbers from the Bureau of Labor Statistics, the federal workforce netted 3,000 jobs in August. This slight uptick comes after a steep drop of over a year, as seen in the chart in this GovExec article. Josh Hicks of the Washington Post has also reported that, "the federal workforce has been dwindling since 2011."

In addition to this uptick, a recent poll by George Washington University revealed that about 73 percent of respondents to the poll said they would encourage young people to consider a career in the civil service. Hopefully, this indicates better times for federal hiring to come.

PRE-DECISIONAL INVOLVEMENT RESOURCES FROM THE LABOR-MANAGEMENT NATIONAL COUNCIL

The National Council on Federal Labor-Management Relations has posted new tools and resources on pre-decisional involvement (PDI) on the council website.

PDI is a key component of President Obama's Executive Order (E.O.) 13522, "Creating Labor-Management Forums to Improve Delivery of Government Services."

"E.O. 13522 sets forth a policy that federal employees and their union representatives are a source of "essential ideas and information" regarding the functioning of government and the objective of delivering quality government services to the American people. To accomplish this objective, Section 3 of the E.O. calls for agencies to involve employees and their union representatives in pre-decisional discussions concerning all workplace matters to the fullest extent practicable without regard to whether those matters are negotiable subjects under federal labor law," states the council FAQ on PDI and E.O. 13522.

Essentially, PDI entails having discussions between employees, union representatives, and agency management and decision-makers prior to decisions being made, with the goal of reducing the likelihood for disputes regarding employment issues.

To facilitate PDI, the council released PDI checklists to assist labor-management relations and forums. The resources have been vetted through use at agencies at both the national and local level.

The council also released a PDI outcomes interactive module with three different possible outcomes of a scenario with labor and management entering into PDI with the shared expectation that they are going to try to reach a common understanding and then capture the mutual understanding in a written agreement.

More PDI resources, and additional resources to improve labor-management relations, can be accessed on the National Council on Federal Labor-Management Relations website.

FROM THE HILL

SENATE BILL WOULD REQUIRE LOCAL PUBLIC INPUT ON SOCIAL SECURITY OFFICE CLOSURES

Legislation introduced in the Senate prior to the August recess would require the Social Security Administration (SSA) to first obtain local public feedback prior to determining whether to close field offices, among other provisions.

The legislation, the Social Security Access Act of 2014 (S. 2742) was introduced by Sens. Chuck Schumer (D-NY), Mark Begich (D-AK), and Bill Nelson (D-FL).

In addition to requiring local feedback prior to the closure, consolidation, or limitation of public access to SSA field or hearing offices, it would also require the SSA to detail for Congress its long-term strategic vision for local services, publish on the agency website the most recent annual reviews of offices slated for closure, provide a live chat function on the agency's website, and provide waivers or reduced fees for low-income beneficiaries seeking fee-based services.

The bill has received the support of AARP and the American Federation of Government Employees (AFGE), which represents many SSA employees.

The future of the SSA was also examined by the National Academy of Public Administration (NAPA), which released a report, Anticipating the Future: Developing a Vision and Strategic Plan for the Social Security Administration for 2025-2030, in July of 2014.

The NAPA Panel examining the issue "call for SSA to provide quality service through virtual channels (e.g., online, phone, videoconference) while continuing to provide personal service delivery options as necessary and appropriate; design user-friendly service delivery channels that become customers' choice for conducting most transactions; become more nimble, such as improving data access, development of a more agile workforce, and expanding use of shared support services to enable more rapid response to changing customer needs; and exercise leadership and sustained focus on implementing the strategy," according to a summary. "Congress must provide continuing support to SSA in the form of adequate budgets and policy refinements that may allow SSA to further streamline service delivery," the summary also states.

It is unclear if the Senate will take up the legislation or NAPA's proposed recommendations when it returns from August recess.

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DOLLARS & SENSE

PHASED RETIREMENT: FROM AN EMPLOYEE'S PERSPECTIVE (PART ONE)

In my opinion, Phased Retirement won't be for everyone. I'm guessing most folks won't be interested at all. However, if I was considering part-time employment at the end of my Federal career, I would consider Phased Retirement instead. Phased Retirement is certainly better than just switching from full time to part time Federal employment… especially if I don't have a private sector job lined up upon retirement from Federal service.

Minimum Requirements

Keep in mind, whether you are CSRS or FERS, you are unable to apply for Phased Retirement until you have reached your minimum retirement age (MRA) and have at least 30 years of Federal service creditable towards retirement. The CSRS MRA is age 55. The FERS MRA is dependent upon your year of birth, but falls somewhere between the age of 55 and 57. Click HERE to identify your specific MRA under FERS.

If you don't have 30 years of Federal service creditable towards retirement, but you have at least 20, you could apply for Phased Retirement on or after the age of 60.

In addition to the age & service requirements mentioned above, you must have been a full time Federal employee for the last 3 years. So if you are already eligible to retire and you were considering part time employment soon, you may want to wait until Phased Retirement becomes available at your agency. Otherwise, you would have to switch back to a full time schedule and work another 3 years before you could qualify for Phased Retirement.

Finally, employees subject to mandatory retirement (such as law enforcement officers, firefighters and air traffic controllers) are not eligible to apply for Phased Retirement.

Again, I probably wouldn't consider Phased Retirement if I have a full time private sector job lined up upon separation from Federal service… nor would I consider Phased Retirement if I just wanted to retire and stop working all together. Sometimes, when you're done… you're done.

Phased Retirement versus Regular Part Time Employment

But if you are considering working part time as a Federal employee before separating for retirement, then you should certainly talk to your supervisor about Phased Retirement. In this situation, I think the employee has the most negotiating power. Although you cannot force your agency to approve your application for Phased

Retirement, they cannot prevent you from just separating for a regular voluntary retirement. In other words, if they need or want you around a little longer, they may be willing to negotiate and approve your Phased Retirement application. Otherwise, the worst they can do is say NO.

Before you consider applying for Phased Retirement, you would want to know what your overall NET "take home" pay will look like while receiving half your agency pay and half of your earned retirement from OPM. This will help you to determine whether you can even afford to do this. Your agency retirement office should be able to help you with obtaining these estimates. As you can imagine, the NET "take home" pay of a Phased Retiree will be different from that of a full time employee or a regular retiree.

But once I reach the age & service requirements mentioned above and I don't want to work full time anymore, if I can afford to switch from full time to part time, then I can certainly afford a Phased retirement. As a Phased Retiree, I would be getting paid (from OPM) for the days I'm no longer coming into work as a Federal employee.

Until OPM allows the agencies more flexibility on schedules, as a Phased Retiree, I'm working half time (getting half my agency pay) and I'm also receiving half of my earned pension (from OPM). That's more income than what the regular part time employee (working half time) would be receiving. In both situations, I could already be working part time in the private sector on the days that I'm no longer working as a Federal employee, if I chose to do so.

Also, once I switch from Phased Retirement to full retirement with OPM, the recomputed pension payable once I fully retire will never be less than what my pension would have been had I just retired to begin with. Once I fully retire, the recomputed pension may have a larger high-3 average salary and will certainly have additional service credit (including any applicable unused sick leave). In other words, 100% of a smaller pension payable if I fully retire in February 2015 will be smaller than 99% of a bigger pension payable when I fully retire later (but switch to Phased Retirement in February 2015 and fully retire in December 2015).

Before I commit to a Phased Retirement, I can request these estimates from my agency retirement office to verify this. In other words, using the example above, I can request two estimates from my agency… one using February 2015 as my date of separation for retirement… and the other using December 2015 as my date of retirement (working a half schedule from February through December). Unless you are CSRS with more than 41 years and 11 months of creditable service, you will see that the retirement that commences later will be larger than the retirement that commences sooner.

Maybe I don't want to work a full time schedule after February but I would like to maximize my lump sum annual leave payment by leaving Federal service later in the year. This also gives me a little bit more time to continue contributing to my TSP. That's a small example of why someone may consider using a Phased Retirement option when finishing a Federal career.

Two more benefits to consider becoming a Phased Retiree versus a regular part time Federal employee… the Federal Employees Health Benefits (FEHB) and the Federal Employees Group Life Insurance (FEGLI) programs.

<u>FEHB Considerations</u>

Although both Phased Retirees and regular part time Federal employees have their health insurance premiums withheld from their agency pay on a pre-tax basis, the agency will continue to pay for the same portion of the Phased Retiree's premium as if they were a full time employee. In other words, the Phased Retiree's health insurance premium amount won't change.

However, the regular part time employee's health insurance premium usually increases because most agencies back off on their share of the premium when a full time employee switches to part time. A part time Federal employee is taking home less money AND they are paying more for their Federal health insurance.

Once both are fully retired, they will pay the same rates that full time employees pay… on a monthly and post-tax basis with OPM of course.

FEGLI Considerations

If a Phased Retiree has Basic and Option B (up to 5 multiples of their salary) life insurance, the levels of these coverages are unaffected upon death. For example, if a Phased Retiree had $600,000 worth of FEGLI (Basic + 5 times his/her salary), $600,000 would still be payable to the appropriate beneficiaries, even if the Phased Retiree passed before separating for full retirement. Upon full retirement from Federal service, he/she could continue to keep these levels of coverage in retirement or reduce them to meet his/her needs.

But if a full time employee (with $600,000 of Basic and Option B coverage) switches to regular part time employment, the levels of these coverages are based on his/her actual schedule. Using this example, the FEGLI coverage would be reduced to $300,000 if the full time employee switched to a half time schedule. Also, upon retiring from regular part time employment, the FEGLI would remain at this lower level into retirement.

Stay tuned for more considerations in my next article…

This article was written by James Marshall. James Marshall is a federal retirement benefits specialist and the owner of Federal Retirement Planning LLC. For more information, please visit the Federal Retirement Planning LLC website.

CASE LAW UPDATE

BOARD DENIES OPM PETITION FOR RECONSIDERATION OF DECISION GRANTING DSR ANNUITY TO EMPLOYEE WHO SERVED FINAL YEARS UNDER SETTLEMENT'S TERM APPOINTMENT

A Department of Interior ("DOI") employee was removed from his position in November of 2004 for unacceptable performance. The employee appealed his removal to the Merit Systems Protection Board ("MSPB"), but the DOI and the employee entered into a settlement agreement before an initial decision was reached. That settlement agreement provided that the employee would be "converted…to a four (4) year term appointment…as a Biologist (or other agreed upon position) beginning on January 12, 2005" and ending on January 12, 2009. The stated intent of this settlement provision was to provide the employee adequate time under current Office of Personnel Management regulations to receive a discontinued service ("DSR") annuity. At the expiration of the four-year term, the agency extended the employee's job for one additional year. In February 2010, the DOI cited the expiration of the employee's term and separated the employee from service. However, OPM denied the employee's application (in both an initial and reconsideration decision) for a DSR annuity after his separation, concluding that the settlement agreement "was an artifice designed to evade the statutory DSR requirements." The employee appealed OPM's reconsideration decision to the MSPB, and an administrative judge issued an initial decision reversing OPM's determination. On appeal to the full Board, the Board affirmed the administrative judge's decision. OPM filed a petition for reconsideration. On September 5, 2014, the Merit Systems Protection Board denied OPM's petition for reconsideration and affirmed its prior opinion as modified.

In OPM's petition for review, it argued that it has a statutory obligation to determine whether a separation from service is involuntary as defined by statute, and that the employee's entire period of federal service with DOI (five years) should not be counted towards his DSR annuity eligibility because true "term" positions may only last four years. OPM also asserted that the Board had misinterpreted precedent in *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529 (2003), narrowing it farther than it was meant to be read. According to OPM, the Federal Circuit's decision in *Eldredge v. Department of the Interior*, 451 F.3d 1337 (Fed. Cir. 2006) controls, and does not preclude OPM or the Board from finding the employee was not eligible for a DSR annuity. OPM also made a public policy argument, stating that if the Board upheld its decision, "agencies and employees will have an incentive to enter into similar settlement arrangements in the future, thus impermissibly shifting employment and litigation costs to the retirement fund and inequitably rewarding employees who performance is alleged to be unacceptable."

In response to OPM's argument that because the employee returned to work for five years, rather than four, none of those five years should be counted towards his years of service for the DSR annuity, the Board turned to 5 C.F.R. § 316.301, which states "an agency may make a term appointment for a period of more than 1 year but not more than 4 years to positions where the need for an employee's services is not permanent." But, as the Board points out, the statute also states that OPM "may authorize exceptions beyond the 4-year limit when the extension is clearly justified and is consistent with applicable statutory provisions." While OPM contended that DOI never asked permission to extend the employee's term position (making his service in a 5-year position *ultra vires* and therefore entirely voided), it did not provide any authority for this statement, and the Board therefore declined to adopt OPM's position. It also cited *Mitchell v. Merit Systems Protection Board*, 741 F.3d 81, 87 (Fed. Cir. 2104), stating that the "regulatory and statutory scheme requires the nature [of an employee's] appointment be judged at the outset, without regard to service ultimately completed." Because the employee was eventually removed due to the expiration of a term appointment, and because his SF-50 reflected as much, the Board concluded that the nature of the employee's appointment had not changed in the additional year he spent at DOI after the expiration of the term appointment.

The Board continued, opining that even if it were to accept OPM's argument that the employee's additional service beyond the initial four-year appointment without OPM's approval exceeded the scope of power granted to DOI, it could not countenance OPM's argued end, the voiding of all five years of the appointment. The Board pointed out that the employee, at the end of the four-year appointment and before the one-year extension, would already have been eligible for a DSR annuity, with over 22 years of federal service and over 50 years of age (where only 20 and 50 are necessary). Therefore, the Board observed, even if it were to discount the final year of service – the extension of the term – its conclusion would be the same: by the expiration of a term position, the employee had qualified for a DSR annuity.

The Board also distinguished *Parker v. Office of Personnel Management*, in which the Board held that OPM is conclusively bound by the terms of a settlement agreement to which it was not a party as long as the agreement is not an artifice designed to evade the statutory requirements for an annuity. According to the Board, the facts of *Parker* differ from the present case because in *Parker*, the employee did not actually serve any portion of the time the parties agreed to in the settlement agreement, and the settlement agreement's sole purpose was to give the appearance of requisite service, not provide an avenue for that service to be actually achieved. The Board observed that deciding in OPM's favor in this case based on *Parker* would significantly expand that decision, and OPM's authority.

Because the settlement agreement canceled what was, previously, an involuntary removal, rather than a non-removal action, the Board did not agree with OPM's assertion that an employee's resignation or retirement is deemed voluntary when effected pursuant to the terms of a settlement agreement and precludes the employee from re-litigating whether his separation was voluntary. Also, the Board noted, the general rule in OPM's Handbook (that a separation is not qualifying for a DSR annuity if an employee voluntarily leaves long-term employment for a short-term appointment) has been "strongly criticized" by the Federal Circuit due to its lack of cited authority.

The Board declined to decide how much time an employee must actually serve in a term position in order to qualify for a DSR annuity under similar facts, an issue which the Board did not find relevant in this case since the employee served almost the entire duration of his term employment.

Turning to OPM's public policy argument, the Board respectfully disagreed with OPM's characterization of the pernicious effects of settlement agreements which result in term appointments, stating that OPM's position could cause agencies and employees to avoid settlements which return employees to duty for "fear that years later OPM might deny an employee's application for retirement benefits because OPM believes that the employee should not have been returned to federal service." In a footnote, the Board countered OPM's position that an affirmation of the Board's finding could lead to back loaded litigation at the time of retirement rather than the time of the adverse action by stating that OPM's position could itself lead, hypothetically, to additional Board proceedings when employees file petitions for enforcement with the Board after not receiving the full benefits agreed to in a settlement.

For the above stated reasons, the Merit Systems Protection Board found that the employee was entitled to receive a DSR annuity under 5 U.S.C. § 8414(b)(1)(A).

You can read the full case, *Eller v. Office of Personnel Management*, here.

This case law update was written by Conor D. Dirks, associate attorney, Shaw Bransford & Roth, PC.

For thirty years, Shaw Bransford & Roth P.C. has provided superior representation on a wide range of federal employment law issues, from representing federal employees nationwide in administrative investigations, disciplinary and performance actions, and Bivens lawsuits, to handling security clearance adjudications and employment discrimination cases.

GEICO'S GOOD STUFF

UPDATES FOR OPM ALERT MOBILE APP ENABLE USE ON WORK DEVICES

GEICO's Good Stuff is a column series highlighting great stuff happening in the federal community.

The Office of Personnel Management (OPM) mobile application, OPM Alert, has been updated to allow "many more Federal employees and military personnel to access it," the agency said in a blog post.

The OPM Alert app provides status updates for federal government operations in the Washington, D.C. area.

Certain military and federal personnel had previously been unable to download the app because of security restrictions on their work devices. OPM has developed a download which makes the app accessible on more devices for users with a .gov, .mil, or si.edu email address.

For federal employees and military personnel in the D.C. area, the app is an easy way to have up-to-date status of the federal government at your fingertips.

You can download the app through the Apple, Google Play, Windows, and Blackberry App World stores.

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HEARD INSIDE THE BELTWAY

If you're in an agency that places employees on forced leave, beware: The law has changed, and how the Merit Systems Protection Board will adjudicate an appeal of such actions has dramatically shifted.

Debra Roth, Partner, Shaw Bransford & Roth P.C., in a Federal Times "Ask the Lawyer" column, "The new rules of enforced leave." Read the article for a basic understanding of how the law has changed.

WEEKLY LEADERSHIP REFLECTION

The urgent can drown out the important.

Marissa Mayer, current president and CEO of Yahoo!