



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



Contents

Chapter 1: Introduction	1
I. Executive Summary	1
II. Scope and Methodology	4
III. Organization of the Report	4
Chapter 2: Background	5
I. Overview of the PTAB	5
II. Backlog	5
III. America Invents Act	6
IV. Legal and Regulatory Overview	7
V. Allegation to be Resolved	7
Chapter 3: Analysis	10
I. Facts	10
A. Structure of the PTAB	10
B. Role of Paralegal Specialists	12
C. Role of the Paralegal Specialist Union	15
1. Part-time Employment, Furloughs, and Reductions-in-Force	15
2. Job Duties and Details	15
D. Role of Supervisory Paralegal Specialists	16
E. Performance Evaluations and Performance-Based Bonuses	18
1. Paralegal Specialists	18
2. Supervisory Paralegal Specialists	20
F. Flexible Work Schedules and Telework Programs	21
1. Flexible Work Schedules – “Increased Flexitime Policy”	21
2. Telework Arrangements – The PTAB “Hoteling Program”	23
3. Enhanced Hoteling Flexibility – “50 Mile Radius Agreement” Option	24
4. Chief Judge 2’s Perceptions of the Telework Programs	24
5. Paralegal Specialists’ and Supervisory Paralegal Specialists’ Understanding of the Relevant Telework Policies	25
G. Fiscal Year 2009 Hiring Plan and Execution	26
H. Lack of Work and Other Time	28
I. Substantial Bonuses Awarded to Employees Despite the Levels of Other Time	34

- J. PTAB Management Aware of Paralegal Specialists’ Use of Other Time 38
- K. Management’s Initial Efforts to Address Other Time Usage..... 44
- L. Changes Sparked by the OIG Referral..... 51
- M. Cost of the Mismanagement to the PTAB 63
- II. Analysis..... 67
 - A. PTAB Incurred Gross Waste in Poorly Executing Its Hiring Plan and Failing to Timely Address the Other Time Problem. 67
 - B. Although Aware of the Waste, Supervisors and Management Ignored the Problem and Even Rewarded the Employees Committing the Waste. 69
 - C. Paralegal Specialists Likely Violated Telework Rules in Logging Other Time. 71
 - D. Paralegals and Managers Violated Regulations, Executive Orders, and Policies in Failing to Report the Waste. 73
- Chapter 4: Conclusions and Recommendations 75**
 - I. Findings..... 75
 - II. Conclusions..... 75
 - III. Recommendations 76

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 2013.¹

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 I3-1077-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

¹ 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.² 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.³ The organization is headed by a Chief Judge and consists of various administrative patent judges, patent attorneys, and support staff, including Paralegal Specialists.⁴ The PTAB was formerly called the Board of Patent Appeals and Interferences (BPAI).⁵

II. Backlog

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

Table I. Backlog of PTAB Cases by Year⁶

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

² 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.

³ See USPTO, *About the PTAB*, 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”

⁴ See *About the PTAB*, *supra*.

⁵ 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*].

⁶ 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.⁷ That increase, in turn, caused a proportionate surge in appeals submitted to the PTAB.⁸ As the volume of appeals grew, the PTAB's judicial staffing level remained essentially flat, resulting in a growing backlog of cases.⁹ PTAB personnel, including Paralegal Specialists, were aware of this backlog during the time period in question for this report,¹⁰ and PTAB management periodically communicated with staff regarding the status of the backlog.¹¹

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.¹² The AIA also renamed the BPAI as the PTAB and placed increased duties and responsibilities on the organization.¹³ Major provisions, including the PTAB's additional duty to review AIA-related cases, became effective in September 2012.¹⁴

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

⁷ 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*].

⁸ See *id.* at 1.

⁹ See *id.* at 5.

¹⁰ 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*].

¹¹ 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").

¹² See America Invents Act §§ 3, 7.

¹³ See *id.* §§ 3(j), 7.

¹⁴ 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 (last visited July 22, 2014).

¹⁵ See America Invents Act § 11; *OIG AIA Report*, *supra*.

appeal fees from \$1,260 to \$2,800 – an increase of 122%.¹⁶ Some of the new fees became effective in March 2013, while others became effective in January 2014.¹⁷

IV. Legal and Regulatory Overview

Under federal law, all federal employees are required to “disclose waste, fraud, abuse, and corruption to [the] appropriate authorities.”¹⁸ 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.”¹⁹ 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.”²⁰ 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”²¹

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.²² The complaint further alleged that Other Time meant “employees [we]re doing nothing,” despite the PTAB’s backlog of cases.²³

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.²⁴ The whistleblower

¹⁶ 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 [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.

¹⁷ See 78 Fed. Reg. at 4212.

¹⁸ 5 C.F.R. § 2635.101(b)(11) (2014); Exec. Order No. 12674 § 101(k).

¹⁹ DOC Department Administrative Order 207-10 (3.01), (3.04).

²⁰ DOC Department Administrative Order 202-751, App. B.

²¹ DOC Department Administrative Order 207-10 (3.04).

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

²³ See *id.*

²⁴ 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.²⁵

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.²⁶ 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.²⁷ 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.²⁸ Additionally, the whistleblower related that, despite PTAB management's instruction, PTAB employees were still logging Other Time as of May 17, 2013.²⁹ The OIG forwarded this complaint to the USPTO for incorporation into the USPTO's administrative inquiry.³⁰

In July 2013, the USPTO provided the OIG with a report of its inquiry.³¹ 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?"³² 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**.³³

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.³⁴ The USPTO estimated that it paid \$4,289,424 in wages for this Other Time.³⁵ 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."³⁶

²⁵ See *id.*

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

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

²⁸ See *id.*

²⁹ See *id.*

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

³¹ See *USPTO Response*, *supra*.

³² See *id.* at 2.

³³ *Id.* at 6.

³⁴ See *id.* at 4.

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

³⁶ 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.³⁷

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.

³⁷ *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.³⁸ The PTAB was led by a Chief Judge, who supervised two Vice Chief Administrative Patent Judges (Vice Chief Judges).³⁹ 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.⁴⁰ The Administrative Officer was responsible for non-legal administrative functions, including information technology, procurement, and human resources.⁴¹ 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.⁴² The line-level judges were organized by subject matter and a Lead Judge headed each team.⁴³

Reporting to each Support Administrator was a senior-grade Supervisory Paralegal Specialist (referred to as Senior Managers⁴⁴) who, in turn, supervised several lower-grade Supervisory Paralegal Specialists (referred to as such or as first-line Supervisory Paralegal Specialists).⁴⁵ Each Supervisory Paralegal Specialist was in charge of a team of Paralegal Specialists.⁴⁶ The Paralegal Specialist teams were organized by the subject matter of the patent cases they reviewed.⁴⁷ Division 1's teams included the Biotechnology Team, Computers Team, Contested Cases

³⁸ 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*].

³⁹ 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.

⁴⁰ 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.

⁴¹ See *Senior Manager 5 Interview, supra*, at Tr. 517-25.

⁴² 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.

⁴³ 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.

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

⁴⁵ 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*].

⁴⁶ 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).

⁴⁷ 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.⁴⁸ Division 2's teams included the Chemical Team, Communications and Electrical Team, and Mechanical and Business Methods Team.⁴⁹ These team names were the same as those for the judges.⁵⁰ However, despite their names, the Paralegal Specialist teams did not require knowledge or expertise in their designated subject matter.⁵¹ Thus, the team names were merely a management vehicle to divide Paralegal Specialists into smaller units.⁵²

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).⁵³ From April 2005 until he retired on January 1, 2011, Chief Judge 1 served as Chief Judge.⁵⁴ Chief Judge 1 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.⁵⁵ Following Chief Judge 1's retirement in January 2011, a Vice Chief Judge (Managing Judge 1) served as Acting Chief Judge until May 2011.⁵⁶ During those months, he also retained his position of Vice Chief Judge.⁵⁷ In May 2011, Chief Judge 2 became Chief Judge.⁵⁸ All of the employees at the PTAB ultimately reported to the Chief Judge.⁵⁹ See Appendix A for organizational charts.

Managing Judge 1 told the OIG that during Chief Judge 1's tenure as Chief Judge, the PTAB's administrative functions reported directly to Chief Judge 1.⁶⁰ Managing Judge 1 stated, however, that Chief Judge 1 later changed the organizational structure so that certain administrative functions fell within the purview of the Vice Chief Judges.⁶¹ Chief Judge 1 made this change over the objections of the two Vice Chief Judges, including Managing Judge 1, who directly supervised dozens of judges at the time.⁶² Subsequent to this change, one of the two Vice Chief Judges resigned, leaving Managing Judge 1 as the sole Vice Chief Judge who directly supervised upwards of 100 PTAB employees.⁶³ After Chief Judge 1 retired, Managing Judge 1 continued to be the sole Vice Chief Judge while acting temporarily as Chief Judge, essentially filling the role of

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

⁴⁹ See *id.* (PTAB organizational chart, effective Aug. 29, 2010).

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

⁵¹ 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*].

⁵² See *Outside Consulting Firm Report*, *supra*, at 27, 48.

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

⁵⁴ See OIG IRF: Second Set of Documents Received from Office of Human Resources [hereinafter *OHR Documents II*]; *Managing Judge 1 Interview*, *supra*, at Tr. 147-60, 165-75. Managing Judge 1 recalled beginning his role as Acting Chief Judge in 2010. *Id.* at Tr. 147-60, 165-75.

⁵⁵ See Case Notes 39 and 42 (attempts to interview Chief Judge 1).

⁵⁶ See *OHR Documents II*, *supra*; *Chief Judge 2 Interview*, *supra*, Tr. 82-92; *Managing Judge 1 Interview*, *supra*, at Tr. 86-98, 147-60.

⁵⁷ See *OHR Documents II*, *supra*; OIG IRF: *Chief Judge 2 Interview*, *supra*, at Tr. 82-92; *Managing Judge 1 Interview*, *supra*, at Tr. 86-98, 147-60.

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

⁵⁹ See *Managing Judge 1 Interview*, *supra*, at Tr. 318-21.

⁶⁰ See *id.* at Tr. 345-91.

⁶¹ See *id.*

⁶² See *id.*

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

the top three managerial positions at the PTAB simultaneously until Chief Judge 2 became Chief Judge in May 2011.⁶⁴

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 51.⁶⁵ 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.⁶⁶

Table 2. Judge, Paralegal Specialist, and First-Line Supervisory Paralegal Specialist Staffing By Fiscal Year⁶⁷

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.⁶⁸ 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.⁶⁹ 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.⁷⁰ After the judges

⁶⁴ See *Managing Judge 1 Interview, supra*, at Tr. 411-21.

⁶⁵ OIG IRF: Data Analysis, *supra*.

⁶⁶ 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.

⁶⁷ 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.

⁶⁸ 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*].

⁶⁹ *Paralegal 3 Interview, supra*, at Tr. 470-78.

⁷⁰ *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 style⁷¹ and verified citations.⁷² 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.⁷³ The Paralegal Specialists also uploaded opinions to the eFOIA system⁷⁴ and, on occasion, performed legal research.⁷⁵ Paralegal Specialists did not generate their own work; they relied on others, particularly judges, to give them work.⁷⁶

Paralegal Specialists used computers to perform most of their work.⁷⁷ 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).⁷⁸

According to several Paralegal Specialists interviewed by the OIG, they believed that they possessed the skills necessary to accomplish the tasks assigned,⁷⁹ although a couple of them noted that they did not receive enough training to do the AIA cases.⁸⁰ Some asked for more responsibility, such as drafting opinions.⁸¹ A Senior Manager noted to the OIG that more than 15 Paralegal Specialists had law degrees,⁸² 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

⁷¹ *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.

⁷² *Paralegal 3 Interview, supra*, at Tr. 452-57.

⁷³ 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.

⁷⁴ *Id.* at Tr. 648.

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

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

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

⁷⁸ 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.

⁷⁹ 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).

⁸⁰ *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).

⁸¹ 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.

⁸² 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.⁸³ 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.⁸⁴ He stated that the PTAB's plan was "to close [the gap] through training."⁸⁵ More than one manager noted that these new paralegals were "overqualified."⁸⁶

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.⁸⁷ At the time of his interview, a Senior Manager stated that management was currently training the Paralegal Specialists on AIA.⁸⁸ 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."⁸⁹

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.⁹⁰ 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.⁹¹ 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.⁹² 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.⁹³ Management did not create this position.⁹⁴

⁸³ See [REDACTED]

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

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

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

⁸⁷ 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).

⁸⁸ *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).

⁸⁹ *Manager 1 Interview, supra*, at Tr. 4161-69.

⁹⁰ 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.

⁹¹ 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).

⁹² *Paralegal 2 Interview, supra*, at Tr. 650-58.

⁹³ *Senior Manager 2 Interview, supra*, at Tr. 2724-65.

⁹⁴ *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).⁹⁵ The Labor Agreement, which also covered other non-managerial, “nonprofessional employees” of the USPTO,⁹⁶ 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.⁹⁷ 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.⁹⁸ Additionally, prior to commencing such procedures, the USPTO must have first determined whether any employees would have voluntarily converted to part-time employment.⁹⁹ Furloughs of more than 30 calendar days were considered RIFs.¹⁰⁰

The USPTO was required to notify the Union of any proposed RIF as far in advance as possible.¹⁰¹ 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.¹⁰² 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.¹⁰³

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.¹⁰⁴ 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.¹⁰⁵

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

⁹⁵ 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).

⁹⁶ See *id.* at Ex. 5 at 6.

⁹⁷ See *id.* at Ex. 5 at 25.

⁹⁸ See *id.*

⁹⁹ See *id.* at Ex. 5 at 73.

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.* at Ex. 5 at 67-68.

¹⁰⁵ See *id.*

¹⁰⁶ 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.¹⁰⁷ If there were too few volunteers, first consideration was to be given to the most qualified junior employee.¹⁰⁸

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.”¹⁰⁹ There were eight Supervisory Paralegal Specialists each year between Fiscal Years 2009 and 2013.¹¹⁰ 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.¹¹¹ One of the Supervisory Paralegal Specialists stated that she also answered the AIA telephone line and completed spreadsheets with case details.¹¹² 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.¹¹³

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.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ Some Supervisory Paralegal Specialists and

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ *Senior Manager 1 Interview, supra*, at Tr. 1130-45.

¹¹⁰ See OIG IRF: Data Analysis, *supra*.

¹¹¹ *Senior Manager 1 Interview, supra*, at Tr. 1151-58.

¹¹² *Manager 1 Interview, supra*, at Tr. 1031-37, 1087-97.

¹¹³ [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”).

¹¹⁴ *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).

¹¹⁵ *Manager 2 Interview, supra*, Tr. 508-13.

¹¹⁶ See *Manager 1 Interview, supra*, at Tr. 1119-24.

¹¹⁷ 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.¹¹⁸

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."¹¹⁹ 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."¹²⁰ 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.¹²¹ 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.¹²² In fact, evidence showed that they relied on their Paralegal Specialists to inform them of times when they were not working.¹²³

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.¹²⁴ 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."¹²⁵

¹¹⁸ 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.

¹¹⁹ *Chief Judge 2 Interview, supra*, at Tr. 989-1041.

¹²⁰ *Id.* at Tr. 1012-30.

¹²¹ *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.*

¹²² 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.

¹²³ 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.

¹²⁴ *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).

¹²⁵ *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 30.¹²⁶ Paralegals' performance appraisals were formulaically determined primarily by how quickly and accurately they completed tasks.¹²⁷ These appraisals, known as production-based performance appraisals plans (production-based PAPs)¹²⁸ comprised the following four weighted elements: quality (30%), productivity (30%), timeliness (20%), and customer service (20%).¹²⁹ 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.”¹³⁰ 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.¹³¹ A score of 460 to 500 was Outstanding.¹³² 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.¹³³

The “quality” element was rated according to a Paralegal Specialist's “error rate” with respect to the work products produced by the Paralegal Specialist.¹³⁴ 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.¹³⁵ The PAP included a list of tasks and the number of pre-defined work units for each task.¹³⁶ Production time did not include hours charged to Other Time or other non-production time codes.¹³⁷ The “timeliness” element was rated according to how quickly tasks

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

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

¹²⁸ 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*].

¹²⁹ See *Manager 4 Documents, supra*, at Ex. 3.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² 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.*

¹³³ OIG IRF: Data Analysis, *supra*.

¹³⁴ 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.*

¹³⁵ 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.*

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

¹³⁷ See *id.*

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

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 time¹⁴⁰ or by intentionally working when a supervisor was not available to provide assignments.¹⁴¹ 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.¹⁴² 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.¹⁴³ By manipulating the assignment system in this manner, Paralegal Specialists could avoid work, while causing no change in their productivity statistics.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ Employees who worked less than 1,250 hours but more than 600 in their job functions were eligible for a pro-

¹³⁸ 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.*

¹³⁹ 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.*

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

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

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

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

¹⁴⁴ See, e.g., *id.*

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

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

¹⁴⁷ 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.¹⁴⁸ Employees who worked less than 600 hours in their job functions were not eligible for an award.¹⁴⁹

The Labor Agreement stated that USPTO “will not prescribe nor permit a predetermined distribution of ratings.”¹⁵⁰ 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].”¹⁵¹ All relevant supplementary agreements noted that all applicable Labor Agreement provisions applied, including the provision on budgetary limitations.¹⁵²

The PTAB’s Administrative Officer calculated the performance bonus for each Paralegal Specialist.¹⁵³ The Chief Judge gave the final approval for all employees.¹⁵⁴ 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%).¹⁵⁵ For each element and for the overall rating, the supervisors could be appraised as Unacceptable, Marginal, Fully Successful, Commendable, or Outstanding.¹⁵⁶ The ratings were determined by the supervisors’ manager and approved by the Support Administrator.¹⁵⁷ 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.¹⁵⁸ These bonus amounts, however, were flexible and not fixed.¹⁵⁹ The Chief Judge gave the final approval for these bonuses.¹⁶⁰ As discussed below, Supervisory Paralegal Specialists received a total of \$120,523.55 in bonuses from Fiscal Year 2009 to Fiscal Year 2013.

¹⁴⁸ 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.

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

¹⁵⁰ See *id.* at Ex. 5 at 87.

¹⁵¹ See *id.* at Ex. 5 at 92.

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

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

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

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

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

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

¹⁵⁸ See *id.* at Tr. 2603-38.

¹⁵⁹ See *id.*

¹⁶⁰ 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.¹⁶¹ The combined effect of the three programs afforded extensive flexibility in scheduling and teleworking. Managing Judge I 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.¹⁶²

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.¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵ The USPTO has one core hour: between 1:00 PM to 2:00 PM each Tuesday.¹⁶⁶

Employees can work a maximum of 12 hours per day, excluding the required unpaid 30-minute meal break.¹⁶⁷ Hours worked on a particular day do not need to be worked continuously; employees may clock-in and clock-out during the day.¹⁶⁸ Time is to be reported in 15-minute increments, and employees are responsible for keeping track of their own time.¹⁶⁹ 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.”¹⁷⁰

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

¹⁶² *USPTO Response*, *supra*, at Ex. 8.

¹⁶³ 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*].

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

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

¹⁶⁶ 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.*

¹⁶⁷ 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).

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

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

¹⁷⁰ 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.¹⁷¹ Employees must “coordinate their work schedules to ensure that necessary office coverage is maintained.”¹⁷² 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.”¹⁷³ In such cases, the USPTO will give reasonable advance notice, and employees will be expected to adjust their schedules accordingly.¹⁷⁴ Furthermore, “[m]odifications may be required to ensure internal and external customer needs are met.”¹⁷⁵ Participation in the IFP is voluntary and contingent upon a “Fully Successful” performance rating.¹⁷⁶ Some employees, such as those whose presence is required during normal business hours, may not be eligible to participate in the IFP.¹⁷⁷

In practice, evidence showed that the IFP had occasionally hindered Paralegal Specialists’ productivity.¹⁷⁸ 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.¹⁷⁹ 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.”¹⁸⁰ 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.¹⁸¹ 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.”¹⁸²

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

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

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

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

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

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

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

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

¹⁷⁹ See *id.*

¹⁸⁰ [REDACTED]

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

¹⁸² 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).¹⁸³ During the time frame in question, the hoteling program was governed by a set of agreements between the Union and the PTAB (Telework Agreements).¹⁸⁴ 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.¹⁸⁵ Employees became eligible for the program after spending at least two years in their current position.¹⁸⁶ Participation is voluntary and contingent on maintaining a “Fully Successful” performance rating.¹⁸⁷ Prior to participating in the program, employees must complete a certification and training process.¹⁸⁸ 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.¹⁸⁹ Additionally, management reserves the right to terminate the program as a whole at any time due to operational needs.¹⁹⁰

Employees who participate in the Hoteling Program are expected to be accessible and available during work hours.¹⁹¹ As such, they are required to use online collaboration tools and check and respond appropriately to voicemail and e-mail periodically throughout the workday.¹⁹² 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.”¹⁹³ Additionally, employees “must ensure that personal responsibilities do not interfere with [the] performance of official duties.”¹⁹⁴

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

¹⁸³ 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.

¹⁸⁴ 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 (hoteling 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.

¹⁸⁵ See *OHR Documents, supra*, at Ex. 3.

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

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

¹⁸⁸ 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.

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

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

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

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

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

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

¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ Employees must adjust their schedules to attend these events.¹⁹⁸

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 I being the PTAB's primary signatory.¹⁹⁹ PTAB employees who episodically teleworked also had to take a training class before they could telework.²⁰⁰

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.²⁰¹ Under the agreement, hoteling employees may voluntarily change their official government duty station to their home address.²⁰² Participating employees acknowledge that the “option is primarily for [their] convenience and benefit.”²⁰³ 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.²⁰⁴ Employees who participate in the option are no longer required to report to PTAB offices twice per two-week pay period.²⁰⁵ 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].”²⁰⁶

4. Chief Judge 2's Perceptions of the Telework Programs²⁰⁷

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.”²⁰⁸ 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

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

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

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

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

²⁰⁰ See *Senior Manager 4 Interview, supra*, at Tr. 386-434.

²⁰¹ See *OHR Documents, supra*, at Ex. 5.

²⁰² See *id.* at Ex. 5 at 1.

²⁰³ See *id.*

²⁰⁴ See *id.* at Ex. 5 at 2.

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ 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.

²⁰⁸ 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.²⁰⁹

Chief Judge 2 told the OIG that he therefore doubted whether telework was effective for the PTAB.²¹⁰ 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.²¹¹ He stated that he questioned whether his ability to manage was “further disabled” because “because most people aren't even here.”²¹²

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.²¹³ 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.²¹⁴ 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.²¹⁵ According to Chief Judge 2, his efforts achieved “limited success.”²¹⁶ 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.²¹⁷

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 day²¹⁸ and how to handle technical problems.²¹⁹ Few noted that that they were not permitted to use the equipment for “personal use,”²²⁰ and only one stated that they were not permitted to pursue personal activities such as

²⁰⁹ *Id.* at Tr. 978-82, 1068-72.

²¹⁰ *See id.* at Tr. 1202-05.

²¹¹ *See id.* at Tr. 1153-57, 1177-213.

²¹² *See id.* at Tr. 1194-213.

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

²¹⁴ *See id.* at Tr. 984-87, 1269-313, 2817-33.

²¹⁵ *See id.* at Tr. 989-97.

²¹⁶ *See id.* at Tr. 993-1010.

²¹⁷ *See id.* at Tr. 1168-73, 1215-61.

²¹⁸ 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.

²¹⁹ 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).

²²⁰ *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.²²¹ 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.²²² 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.²²³

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.²²⁴ 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.²²⁵ Subsequently, the USPTO granted the authorization to hire 19 Paralegal Specialists, 10 judges, and 22 patent attorneys.²²⁶

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.²²⁷ According to two Senior Managers, Chief Judge I wanted to hire as many employees as he could before the hiring freeze took effect.²²⁸ The Senior Managers therefore

²²¹ *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").

²²² 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.

²²³ 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).

²²⁴ 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.

²²⁵ See *Managing Judge 1 Documents #1, supra*, at Ex. 2, at 6.

²²⁶ 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.

²²⁷ 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.

²²⁸ 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.²²⁹ The hiring initiative proceeded quickly, and 17 candidates were deemed suitable and selected for employment.²³⁰ 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.²³¹ One Senior Manager stated to the OIG that he even “begged” Chief Judge I not to hire the two additional candidates.²³² Ultimately, however, all 19 candidates were hired in Fiscal Year 2009.²³³

The impending hiring freeze subsequently took effect.²³⁴ One new judge had been hired by that point.²³⁵ 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.²³⁶ 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.²³⁷ The exception requests, however, were not granted.²³⁸

After Chief Judge I’s departure, Managing Judge I continued attempts at hiring more judges.²³⁹ 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.²⁴⁰ These attempts, however, were unsuccessful.²⁴¹ 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 2011.²⁴²

²²⁹ 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.

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

²³¹ 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.

²³² [REDACTED]

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

²³⁴ 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.

²³⁵ 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.

²³⁶ 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.

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

²³⁸ 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).

²³⁹ 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.

²⁴⁰ 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.

²⁴¹ 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.

²⁴² 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.²⁴³

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.²⁴⁴ One Senior Manager described this code as the “I don’t have work but I’m going to get paid code.”²⁴⁵ 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.²⁴⁶

Beginning in Fiscal Year 2009, after the hiring of 19 Paralegal Specialists in early 2009,²⁴⁷ 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 Year²⁴⁸

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

²⁴³ Senior Manager 4 Interview, *supra*, at Tr. 793-816.

²⁴⁴ 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.

²⁴⁵ Senior Manager 6 Interview, *supra*, at Tr. 885-89.

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

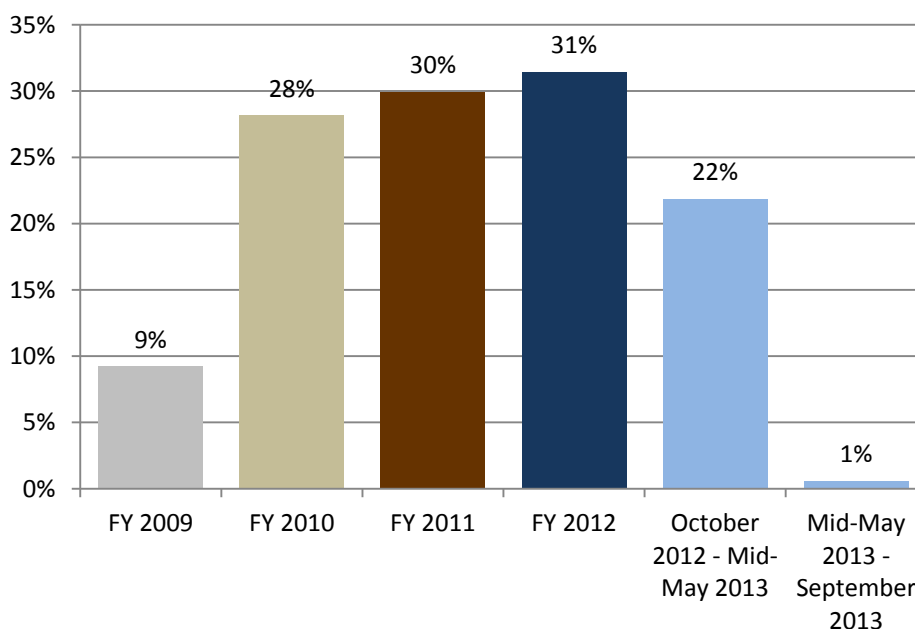
²⁴⁷ Paralegal 6 Interview, *supra*, at Tr. 598-610 (stating that “prior to 2009 [the workload] was pretty consistent . . . before they did the hiring blitz . . . Never had any . . . down time . . . [Then after the new Paralegal Specialists were hired,] it wasn’t as steady at times. And . . . then it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

²⁴⁸ 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).²⁴⁹

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 2012.²⁵⁰ 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.²⁵¹ See Figure 1.

Figure 1. Percent of Total Hours Logged as Other Time²⁵²



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 2011.²⁵³ 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 2012.²⁵⁴ The Paralegal Specialist with the third greatest average Other Time logged 53% of her time as Other Time in 2010, 35% in

²⁴⁹ *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.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *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.

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

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

2011, 54% in 2012, and 33% in 2013.²⁵⁵ 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 2013.²⁵⁶ 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.²⁵⁷ 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.²⁵⁸ 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.²⁵⁹

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.²⁶⁰

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.²⁶¹ 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

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ 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”).

²⁵⁸ See *Senior Manager 2 Interview, supra*, at Tr. 1287-99.

²⁵⁹ 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.”).

²⁶⁰ 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).

²⁶¹ 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.²⁶² 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.²⁶³ 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.”²⁶⁴ 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.²⁶⁵ 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.”²⁶⁶ Although a Senior Manager believed that the direction requiring Paralegal Specialists to obtain supervisory approval before logging Other Time did not occur until 2013,²⁶⁷ 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

²⁶² *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.

²⁶³ *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”).

²⁶⁴ *Paralegal 9 Interview, supra*, at Tr. 955-59.

²⁶⁵ *Senior Manager 5 Interview, supra*, at Tr. 1277-87.

²⁶⁶ *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”).

²⁶⁷ 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.²⁶⁸ 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.²⁶⁹

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.²⁷⁰

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.²⁷¹ At least one

²⁶⁸ 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).

²⁶⁹ 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”).

²⁷⁰ 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).

²⁷¹ *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.²⁷²

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,²⁷³ 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.²⁷⁴ 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.²⁷⁵

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."²⁷⁶ Another Senior Manager stated that he believed that they were probably playing poker.²⁷⁷ 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.²⁷⁸ A Senior Manager stated to the OIG that some were probably watching television, reading books, and doing chores.²⁷⁹ Another Senior Manager stated that she also believed that they may have been watching television, doing laundry, and surfing the web.²⁸⁰ 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."²⁸¹ Another Supervisory Paralegal Specialist believed that the Paralegal Specialists were probably watching television and relaxing.²⁸² 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."²⁸³

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

²⁷³ *Managing Judge 1 Interview, supra*, at Tr. 740-43.

²⁷⁴ OIG IRF: Data Analysis, *supra*.

²⁷⁵ 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).

²⁷⁶ *Senior Manager 5 Interview, supra*, at Tr. 1752-64.

²⁷⁷ *Managing Judge 1 Interview, supra*, at Tr. 2170-73.

²⁷⁸ *Senior Manager 4 Interview, supra*, at Tr. 2017-67.

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

²⁸⁰ See *Senior Manager 2 Interview, supra*, at Tr. 2269-87.

²⁸¹ *Manager 3 Interview, supra*, at Tr. 1783-93.

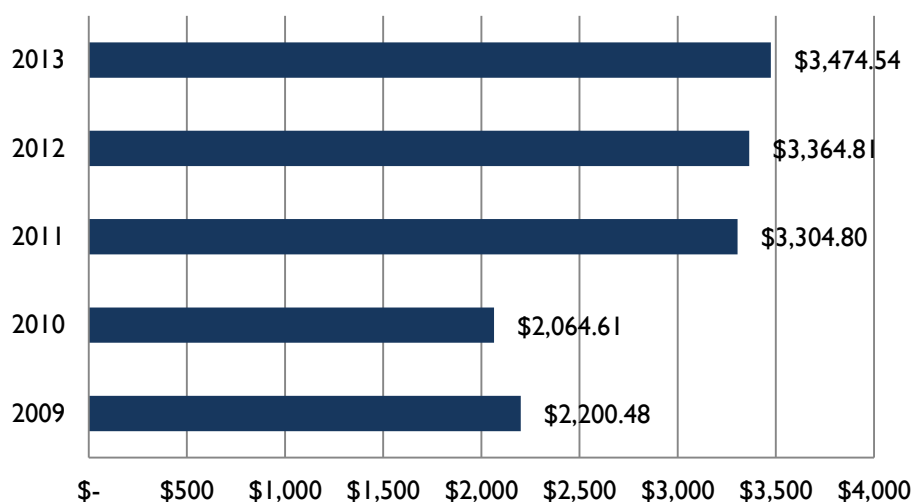
²⁸² *Manager 1 Interview, supra*, at Tr. 3364-03.

²⁸³ *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 2013.²⁸⁴ 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).²⁸⁵ See Figures 2 and 3.

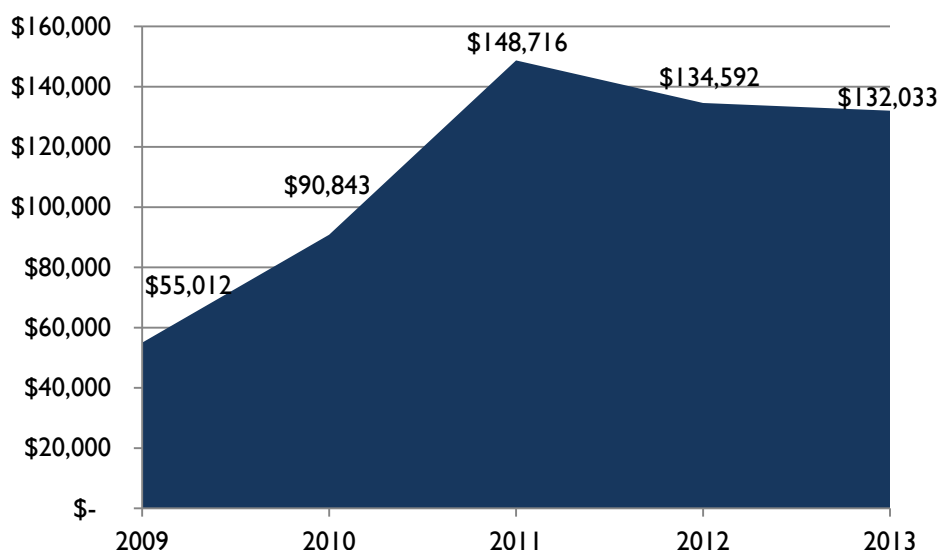
Figure 2. Average Paralegal Specialist Bonuses by Fiscal Year²⁸⁶



²⁸⁴ OIG IRF: Data Analysis, *supra*.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

Figure 3. Total Bonuses Paid to Paralegal Specialists by Fiscal Year²⁸⁷

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).²⁸⁸ 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 Year²⁸⁹

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 2013.²⁹⁰

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

²⁸⁷ *Id.*

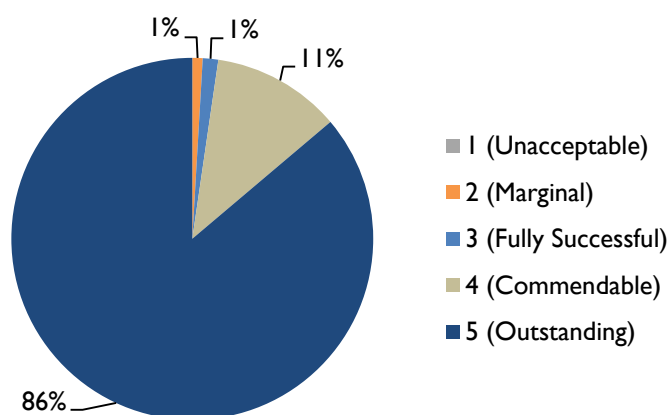
²⁸⁸ *Id.* Supervisory Paralegal Specialists did not receive bonuses in 2010. *Manager I Interview, supra*, at Tr. 4527-45.

²⁸⁹ OIG IRF: Data Analysis, *supra*.

²⁹⁰ OHR Documents II, *supra*.

amount of Other Time.²⁹¹ A Senior Manager stated that the PTAB “didn’t have a choice” to pay the bonuses, “whether it[was] a strict . . . entitlement from the union agreement, or just past practice.”²⁹² Members of management explained to the OIG that they believed the Paralegal Specialists were entitled to these bonuses because they received high ratings.²⁹³ Data showed that 86% of all Paralegal Specialists obtained the highest rating possible from Fiscal Year 2009 through Fiscal Year 2013 despite the large amounts of Other Time during those years.²⁹⁴ See Figure 4.

**Figure 4. Paralegal Performance Ratings
FY 2009 through 2013²⁹⁵**



However, two Paralegal Specialists who had received Marginal ratings received bonuses in 2009 and 2010 worth \$2,181 and \$992, respectively.²⁹⁶

Other evidence indicated that management may have been able to forego or prorate bonuses. For example, one Senior Manager recalled a discussion among senior management in which they stated, “although we’re not obligated to provide bonuses, we’re still going to.”²⁹⁷ Another Senior Manager stated to the OIG that, if management did not give a Paralegal Specialist a bonus, and he or she had received a 500 performance rating, “there would have been issues . . . [w]ith EEO complaints . . . and/or [U]nion complaints,” suggesting that PTAB management

²⁹¹ See, e.g., *Senior Manager 5 Interview, supra*, at Tr. 2514-36; *Managing Judge 1 Interview, supra*, at Tr. 2909-15; *Chief Judge 2 Interview, supra*, at Tr. 2793-809.

²⁹² *Senior Manager 1 Interview, supra*, at Tr. 3629-50.

²⁹³ See, e.g., *Manager 1 Interview, supra*, at Tr. 4385-408 (because the Paralegal Specialists reached certain numerical goals, they were entitled to bonuses under their PAP); see also *Chief Judge 2 Interview, supra*, at Tr. 2793-809 (explaining that Managing Judge 1 and Senior Manager 5 told him “what we are required to pay in the way of bonuses is the subject of a union agreement”); *Managing Judge 1 Interview, supra*, at Tr. 2909-12 (stating his understanding that bonuses for Paralegal Specialists are “mandated by the union agreement”).

²⁹⁴ OIG IRF: Data Analysis, *supra*.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Senior Manager 1 Interview, supra*, at Tr. 3645-50.

elected to pay bonuses to avoid litigation or Union conflicts.²⁹⁸ This Senior Manager further stated that management had not considered the argument that the Paralegal Specialists should not have received bonuses in light of the fact that they were already getting full-time pay to essentially work part-time.²⁹⁹

The evidence showed that Supervisory Paralegal Specialists rarely used the Other Time code during this period, if at all.³⁰⁰ Given that their the Paralegal Specialists (the supervisors' subordinates) were logging so much Other Time, and the Supervisory Paralegal Specialists spent a significant portion of their time assigning and correcting the paralegals' work, the OIG inquired whether the Supervisory Paralegal Specialists had enough work to occupy a full-time schedule. The responses indicated that they did not. For example, one Supervisory Paralegal Specialist stated that from 2011 to 2013, "because of all the non-production time, there was [sic] a lot of times, to be honest . . . where [she] was just sitting . . . at [her] desk with nothing to do[,] . . . absolutely nothing to do" and that "it made for a long and boring day."³⁰¹ When asked whether this was typical among supervisors, she replied, "some had more [downtime] than others."³⁰² Additionally, a Senior Manager informed the OIG that the Supervisory Paralegal Specialists had free time, and although he instructed the Supervisory Paralegal Specialists to "do more quality checking" during this time, the data showed that they likely did not.³⁰³

²⁹⁸ *Senior Manager 4 Interview, supra*, at Tr. 2259-66.

²⁹⁹ *Id.* at Tr. 2322-31.

³⁰⁰ See, e.g., *Manager 1 Interview, supra*, at Tr. 3334-36 (answering that Supervisory Paralegal Specialists do not use the Other Time code).

³⁰¹ *Manager 3 Interview, supra*, at Tr. 1366-71, see also *id.* at Tr. 1491-93 ("I just felt really bad because I'm sitting at my desk, staring at my computer with no work to do. And it just drove me crazy because it made my day so long."), 2031-38 ("But if I didn't have anything to do, . . . what am I supposed to do if I have no work? If I had no work, nothing to assign, no projects, the judges are not turning any work . . . my job is dictated by the work that I receive from the judges.").

³⁰² *Manager 3 Interview, supra*, at 1373-76.

³⁰³ *Senior Manager 1 Interview, supra*, at 2419-23. He explained that when supervisors check decisions, they keep a record, and when they check other work product, they only record the errors. *Senior Manager 1 Interview, supra*, at 2446-60. During the time frame in question, the amount of checking of decisions did not increase,³⁰³ and the error rates did not increase. *Senior Manager 1 Interview, supra*, at 2516-17. A Supervisory Paralegal Specialist also opined that errors did not increase over time. See *Manager 3 Interview, supra*, at Tr. 661-67.

J. PTAB Management Aware of Paralegal Specialists' Use of Other Time

The evidence showed that it was well-known throughout the PTAB organization, including by the Chief Judges, that Paralegal Specialists were recording large amounts of Other Time.³⁰⁴ One Senior Manager told the OIG that he “knew there was an issue [with Paralegal Specialists logging a lot of Other Time] because . . . [his] understanding was, it was essentially . . . open knowledge amongst management.”³⁰⁵ He also informed the OIG that the lack of work for Paralegal Specialists and Other Time was a “known issue” as far back as 2009 when management learned that they would not be allowed to hire the additional judges and patent attorneys they had hoped to hire, although “there wasn’t a lot of discussion on it.”³⁰⁶

E-mails between PTAB employees also confirmed that other members of PTAB management were aware of the Other Time problem as early as 2009.³⁰⁷ For example, Senior Manager 1 informed other Senior Managers, including the Administrative Officer, in July 2009 that work would be “thin in the coming weeks” and sought direction regarding how much Other Time Paralegal Specialists could log each day.³⁰⁸ In response, a Senior Manager informed the Administrative Officer that approximately 20% of the Paralegal Specialists and Legal Instrument Examiners (LIEs)³⁰⁹ had recorded Other Time in pay period 13.³¹⁰ Similarly, in an e-mail from

³⁰⁴ See, e.g., *Senior Manager 5 Interview, supra*, at Tr. 1499-500 (“It was . . . my understand . . . that it was well known that there was an issue [of a lot of Other Time].”); *Senior Manager 6 Interview, supra*, at Tr. 2776-83 (Supervisory Paralegal Specialists “were just as aware of what was going on as anybody else”); see also *Paralegal 6 Interview, supra*, at Tr. 909-12 (stating that the Paralegal Specialists logged Other Time without seeking permission because management “knew the situation . . . the work wasn’t steady.”); *Senior Manager 1 Interview, supra*, at Tr. 2088-99 (management did not have meetings discussing Other Time until late in the 2009 through 2013 timeframe and his perception was that “senior leaderships was aware” of the large amount of Other Time, and his supervisors were not “getting direction on how to proceed”); *Senior Manager 2 Interview, supra*, at Tr. 1831-54, 2008-13 (the supervisors “just kind of got used to the slowness” and “it was just kind of . . . known” that there was not enough work; after Former Chief Judge 2 left the PTAB, “admin was looking at the T&A” and everyone knew about the large amount of Other Time being logged); *Manager 3 Interview, supra*, at Tr. 2292-301, 1500-04 (When asked if she spoke with her supervisor about the fact that there was so much Other Time, one Supervisory Paralegal Specialist responded that she “didn’t have to tell [her supervisor] there was so much ‘other’ time, she already knew” and when they discussed it, her supervisor told her that she needed “to keep [her] staff busy,” the Supervisory Paralegal Specialist’s response to that was “I can’t keep my staff busy with work that I don’t have.”); *Manager 4 Interview, supra*, at Tr. 1555-75, 2211-20 (her supervisors “every – we were all aware of [the lack of work];” “we could all see [the Other Time]” being logged); *Paralegal 9 Interview, supra*, at Tr. 856-79 (the general consensus was that “[t]here was not much to do”).

³⁰⁵ *Senior Manager 5 Interview, supra*, at Tr. 1515-20; *Senior Manager 1 Interview, supra*, at Tr. 2088-99 (his perception was that “senior leaderships was aware” of the large amount of Other Time being logged).

³⁰⁶ *Senior Manager 5 Interview, supra*, at Tr. 1847-85; see also *Senior Manager 1 Interview, supra*, at Tr. 2088-99, 3172-78 (“senior leaderships was aware” of the large amount of Other Time being logged as early as the spring 2009).

³⁰⁷ OIG IRF: SM Documents, *supra* (Aug. 4, 2010, e-mail from Senior Manager 5 to other PTAB administrators). Another e-mail from January 2011 also shows their awareness. *Id.* (in a January 24, 2011, e-mail, after a manager inquires whether the PTAB could hire additional Paralegal Specialists, Senior Manager 5 informs other Senior Managers that “there is no reason (by the numbers) to do any kind of recruitment at this time” and states that in the last pay period, that particular group had 11% Other Time, “i.e., no real work to do.”).

³⁰⁸ *Id.* (May 8, 2013, e-mail from Senior Manager 5 to Managing Judge 2 attaching a July 1, 2009, e-mail from Senior Manager 1 to the former Administrative Officer, Senior Manager 5, Senior Manager 4, and other management).

³⁰⁹ Between Fiscal Years 2009 and 2012, there were between five and seven LIEs. OIG IRF: Data Analysis. Between Fiscal Years 2009 and 2013, LIEs worked on entering information, such as paneling assignments, in various computer systems; electronically providing judges with eWFs; mailing docketing notices; and preparing eWFs. *Managing Judge 1 Documents #2, supra* (attachment to July 16, 2013, e-mail from Managing Judge 1 to Senior Manager 6 and Chief Judge 2).

³¹⁰ OIG IRF: SM Documents, *supra* (May 8, 2013, e-mail from Senior Manager 5 to Managing Judge 2 attaching a July 9, 2009, e-mail from Senior Manager 5 to the former Administrative Officer).

October 2009, Senior Manager 5 informed Senior Managers that a Paralegal Specialist had logged more than 31 hours of Other Time in the last pay period.³¹¹

E-mail evidence also shows that management continued to be aware of the problem as the years progressed. In an e-mail from August 2010, Senior Manager 5 suggested that another Senior Manager use a Paralegal Specialist for a particular project “[s]ince we’ve probably still got a lot of paralegals who are using ‘[O]ther [T]ime.’”³¹² In January 2011, Senior Manager 5 noted to other Senior Managers that because the PTAB had 110 lawyers, it only needed 23 paralegals “based on the 4:1 lawyer: paralegal ratio; i.e., we’ve got an overage of 14 paralegals, or additional direct support for another 56 lawyers.”³¹³ See Figure 5.

³¹¹ *Id.* (October 6, 2009, e-mail from Senior Manager 5 to other PTAB Senior Managers).

³¹² *Id.* (August 4, 2009, e-mail from Senior Manager 5 to other PTAB Senior Managers).

³¹³ *Id.* (January 24, 2011, e-mail from Senior Manager 5 to other PTAB Senior Managers). When asked whether the PTAB had a goal ratio of Paralegal Specialists to judges, the Chief Judge informed the OIG that the number of Paralegal Specialists that existed at the time before he was Chief Judge “contemplated an increase in the number of judges.” *Chief Judge 2 Interview, supra*, at Tr. 565-93.

Figure 5.³¹⁴

[REDACTED]

From: [Senior Manager 5]
Sent: Monday, January 24, 2011 3:42 PM
To: [Senior Manager]
Cc: [Senior Manager]
Subject: Paralegal Staffing

[Senior Manager]

BLUF [Bottom Line Up Front]: (As background for [Senior Manager]) you said [Senior Manager] was asking about possible recruitment actions for a paralegal to support petitions, as well as potential backfills for his losses in [the] Case Management [Teams], and I told you I'd do a quick look at the numbers to see if any kind of recruitment actions, or if we really needed to backfill Case Mgt [teams].

The short answer: no, there is no reason (by the numbers) to do any kind of recruitment at this time; it may make sense to backfill some of the losses to Case Mgt [teams], however, those backfills should come from within the current staff.

BACKGROUND:
Including the 2 attorneys starting Monday, we'll have 110 lawyers writing/drafting decisions and 37 paralegals in direct support roles (i.e., not working in Case Mgt [teams]). After [Paralegal Specialist]'s departure from Case Mgt [teams], they'll have 8 paralegals assigned.

In PPO1 (last pay period), Case Mgt [team] had 11% (possibly) of its time as "Other Time" (that might actually be higher), i.e., no real work to do. If [Paralegal Specialist] had not been there, and all of the time he recorded for legal work, in the PP they may have had 0 hours "Other Time" as an office. Since [REDACTED] left Case Mgt, they have averaged 23% "Other Time". That might not be indicative of the future because that included the Thanksgiving and Christmas holiday timeframes, but it does tell me that, at least for the moment, they're not overworked. If they do lose one more (i.e., [Paralegal Specialist], or someone else, does leave) and go down to 7 paralegals assigned, they might well start getting stretched. You indicated as well that [Senior Manager] is seeing the workload on the rise for Case Mgt. That would also argue to backfill some of Case Mgt's losses. Again, those backfills should come from within BPAI, not through external recruitment. (See next.)

With 110 lawyers, we only need 23 paralegals in direct support of their work based on the 4:1 lawyer:paralegal ratio; i.e., we've got an overage of 14 paralegals, or additional direct support for another 56 lawyers. We are trying to hire for 50 lawyers for this year, and as [Managing Judge 1] said this morning, if he finds 50 candidates for judges (and none of them are existing PAs), that direct support overage could get eaten away very quickly! Still, until we see those numbers of lawyers starting to actually materialize, it makes no sense that I can see to recruit new paralegals.

In thinking about recruiting for the petitions paralegal, the only reason I could see to not use existing staff would be if the position was going to be graded for a GS-12 paralegal, which I wouldn't see happening (or possible to justify).

If/when [Senior Manager] does bring this to [Managing Judge 1], I'm obviously happy to sit down with whomever to discuss (or earlier, if you'd like).

[Senior Manager 5]

In June 2011, in evaluating a separate issue, the same Senior Manager informed other Senior Managers that Paralegal Specialists in one of the teams were logging between 45% and 55% of

³¹⁴ *OIG IRF: SM Documents, supra* (January 24, 2011, e-mail) (redactions applied by the OIG).

their time to Other Time.³¹⁵ In September 2011, a Senior Manager asked Senior Manager 5 for a “report on the amount of paralegal [O]ther [T]ime that was being used from bi-week to bi-week.”³¹⁶ Senior Manager 5 responded that there was an average of 36.7% of Other Time across the PTAB over the past four pay periods, identified Other Time by specialty group, and stated that the numbers indicate that PTAB could process more than 500 decisions per pay period without additional resources.³¹⁷ He included the Vice Chief Judge on the e-mail.³¹⁸

In May 2012, Senior Manager 5 informed the same group of managers by e-mail of the high levels of Other Time – over the past six pay periods, one team had an average of 76% of Other Time, another above 50%.³¹⁹ In late September 2012, Chief Judge 2 and other Senior Managers discussed by e-mail the impact of Other Time.³²⁰ E-mails from early 2013 also showed that Senior Manager 5 was tracking Other Time figures for management.³²¹

Evidence established that even the Chief Judges knew of the Other Time problem. Chief Judge I, who was Chief Judge from 2009 until he retired on January 1, 2011, declined the OIG’s requests to be interviewed. However, interviews with PTAB witnesses and e-mails established that he was also aware of the Other Time problem. For example, a Senior Manager informed the OIG that Chief Judge I and other Senior Managers had meetings about the lack of work.³²² One of Chief Judge I’s direct reports informed the OIG that Chief Judge I had authorized the use of Other Time, and so he knew of the existence of the issue.³²³

In his interview with the OIG, Chief Judge 2 originally stated that he recalled having “discussions about [O]ther [T]ime and paralegal use of it” in 2013.³²⁴ Later in his interview, he stated that he first looked at Other Time when a Senior Manager informed him of some of the individuals’ or teams’ Other Time sometime between mid-2012 and when the OIG sent the PTAB the complaints in early 2013.³²⁵ However, e-mail evidence showed that he learned of the Other Time problem at least as early as September 15, 2011. In particular, in response to an e-mail on that date from top management providing Other Time figures over the past four pay periods and stating that “if we have almost 40% of [O]ther [T]ime, we need to take action . . . This is a real problem,” Chief Judge 2 wrote, “I completely agree with you.”³²⁶ He stated to the OIG

³¹⁵ OIG IRF: Review II of Electronic Documents Received from USPTO (June 16, 2011, e-mail from Senior Manager 5 to other PTAB Senior Managers).

³¹⁶ *Id.* (September 16, 2011, e-mail from Senior Manager 5 to PTAB management).

³¹⁷ *Id.* (September 16, 2011, e-mail from Senior Manager 5 to PTAB management).

³¹⁸ *Id.* (September 16, 2011, e-mail from Senior Manager 5 to PTAB management).

³¹⁹ *Id.* (May 21, 2012, e-mail from Senior Manager 5 to PTAB management).

³²⁰ *Id.* (September 26, 2012, e-mail from Senior Manager 5 to PTAB management).

³²¹ See, e.g., *id.* (January 4, 2013, e-mail from Senior Manager 5 to PTAB management; January 4, 2013, e-mail from Senior Manager 5 to PTAB management; January 18, 2013, e-mail from Senior Manager 5 to PTAB management; February 4, 2013, e-mail from Senior Manager 5 to PTAB management; February 12, 2013, e-mail from Senior Manager 5 to PTAB management).

³²² *Senior Manager 4 Interview, supra*, at Tr. 1432-64.

³²³ *Managing Judge 1 Interview, supra*, at Tr. 2351-64. Although Managing Judge 1 originally stated that Former Chief Judge 2 may not have been aware of the great extent of Other Time being logged, Managing Judge 1 recognized that Former Chief Judge 2 “bypasse[d] the chain of command all the time” and so may have asked a Senior Manager to run the numbers without the managing Judge’s knowledge. *Id.* at Tr. 2361-82.

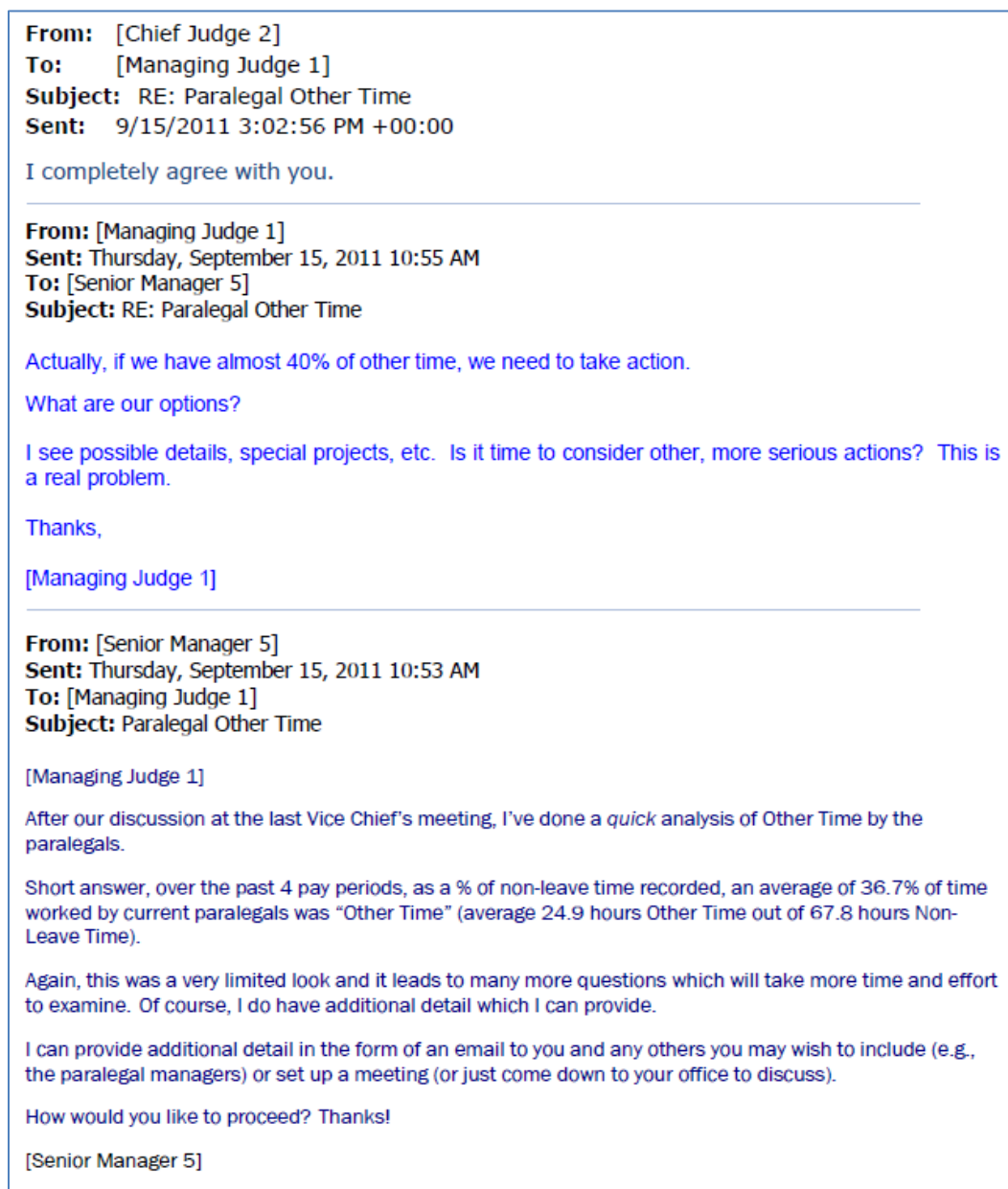
³²⁴ *Chief Judge 2 Interview, supra*, at Tr. 1752-90.

³²⁵ *Id.* at Tr. 2164-81.

³²⁶ OIG IRF: Review II of Electronic Documents Received from USPTO (September 15, 2011, e-mail from Chief Judge 2 to Managing Judge 1).

that he relied on his staff to inform him of the problem.³²⁷ See Figure 6. Managing Judge 1, the Acting Chief Judge between Chief Judge 1 and Chief Judge 2, told the OIG that, although he was aware that paralegals were logging Other Time because Chief Judge 1 had permitted them to do so, he had not recognized that it was a “huge problem” until September 2011.³²⁸

Figure 6.³²⁹



³²⁷ *Chief Judge 2 Interview, supra*, at Tr. 2207-15 (“As to . . . what that [Other Time] meant and its . . . significance or possible cures . . . I le[ft] it as [PTAB management’s] responsibility to illuminate that, especially since my familiarity with the term ‘[O]ther [T]ime’ was quite minimal.”).

³²⁸ *Managing Judge 1 Interview, supra*, at Tr. 1701-75, 2345-47.

³²⁹ OIG IRF: Review II of Electronic Documents Received from USPTO (September 15, 2011, e-mail) (redactions applied by the OIG).

The evidence also showed that it was largely understood that certain teams were busier than others.³³⁰ For example, Senior Managers stated to the OIG that the mechanical and electrical teams were the busiest, followed by the chemical and the biotech teams.³³¹ In theory, the teams were supposed to shift work to other teams if they had excess work.³³² In practice, however, employees interviewed stated to the OIG that the Supervisory Paralegal Specialists did not seem to shift the work in this manner.³³³

Although the evidence established that the PTAB's senior-most management, including the Chief Judges during the relevant time period, knew of the Other Time problem, there was no evidence that executives outside of the PTAB knew of the problem. In interviews with the OIG, the former USPTO Director and the former USPTO Deputy Director (who later was the Acting USPTO Director) during the relevant time period stated that they were not aware of the Other Time problem.³³⁴ They stated that the problem was not reported to them, and they were not aware of any problems pertaining to PTAB Paralegal Specialists.³³⁵ In his interview with the OIG, the former USPTO Director stated that prior to the interview, he was "totally unaware" of any Other Time problems at the PTAB.³³⁶ In her interview with the OIG, the former USPTO Deputy Director stated that she first learned of the Other Time problem shortly after the USPTO responded to the OIG's referral of the whistleblower complaints.³³⁷ Upon learning of the problem and reading the response letter, she was "crushingly disappointed."³³⁸ Furthermore, she would have expected PTAB managers to report the problem to her before the OIG even became involved.³³⁹

³³⁰ See, e.g., *Senior Manager 1 Interview, supra*, at Tr. 2974-83 (management knew that some specialties received more cases than others); *Manager 4 Interview, supra*, at Tr. 1430-46 (electrical teams were busier than the biotech teams); *Paralegal 2 Interview, supra*, at Tr. 547-49 (responding that certain groups did more work than others); see also *Paralegal 7 Interview, supra*, at Tr. 753-65 (stating that she was aware that the biotech team was very slow).

³³¹ *Senior Manager 4 Interview, supra*, at Tr. 1411-24; *Senior Manager 1 Interview, supra*, at Tr. 1851-66 (electrical teams were the busiest, followed by mechanical, and then the others – business methods, chemical, and biotech). See also *Senior Manager 5, supra*, at 1336-46 (generally believed the electrical and mechanical teams were busiest, and the biotech, business methods, and perhaps chemical teams were less busy); *Paralegal 10 Interview, supra*, at Tr. 703-20 (electrical and mechanical teams were very busy, but the biotechnology and chemical teams "had almost no work").

³³² *Senior Manager 4 Interview, supra*, at Tr. 1389-410.

³³³ See, e.g., *Paralegal 7 Interview, supra*, at Tr. 677-725 (management "wanted everybody to work on their team," management did not want the teams to reallocate work when teams were very busy and others were not); *Senior Manager 6 Interview, supra*, at 2863-67 ("they could have done better [to] share resources"), 2869-84, 2968-3017 (stating "the extent of the problem probably was magnified because they didn't take advantage enough of sharing amongst teams"); *Manager 3 Interview, supra*, at Tr. 1423-83 (stating that her group would have had far less Other Time had the work been more evenly distributed).

³³⁴ See OIG IRF: Interview of Undersecretary of Commerce for Intellectual Property and Director of the USPTO [hereinafter *USPTO Director Interview*]; OIG IRF: Interview of Deputy Undersecretary of Commerce for Intellectual Property and Deputy Director of the USPTO, Tr. 46-71 [hereinafter *USPTO Deputy Director Interview*].

³³⁵ See *USPTO Director Interview, supra*; *USPTO Deputy Director Interview, supra*, at Tr. 72-88.

³³⁶ See *USPTO Director Interview, supra*.

³³⁷ See *USPTO Deputy Director Interview, supra*, at Tr. 46-71.

³³⁸ See *id.* at Tr. 159-62.

³³⁹ See *id.* at Tr. 163-66.

K. Management's Initial Efforts to Address Other Time Usage

The evidence established that, although PTAB management knew that Paralegal Specialists were logging significant amounts of Other Time and the work was unevenly distributed, PTAB management took little action. Managers who oversaw the Paralegal Specialists told the OIG that they did not instruct the Supervisory Paralegal Specialists to ask the Paralegal Specialists what they were actually doing while logging Other Time and did not recall anyone asking the Paralegal Specialists what they were doing.³⁴⁰ In addition, there is no evidence that managers reported to senior management their concerns about what the Paralegal Specialists were doing while logging Other Time.³⁴¹ One Senior Manager stated that he “just never thought of [what they were doing while logging Other Time].”³⁴² Another stated that no one asked the Paralegal Specialists what they were doing because managers had the attitude that “if I don’t have something to give them, then it’s not my business what they’re doing.”³⁴³ Chief Judge 2 stated to the OIG that he “can say for sure, [he] spent next to no time thinking about what they were doing” while logging Other Time.³⁴⁴ According to Chief Judge 2, the question in his mind was not “What are they doing?” but rather “Why aren’t we getting them work?”³⁴⁵ He stated:

I don’t want to know whether people were watching TV or walking or – or exercising. To me, it’s entirely irrelevant, because I know – I don’t want to think about what they shouldn’t be doing. I know what they should have been doing.³⁴⁶

³⁴⁰ See, e.g., *Senior Manager 6 Interview, supra*, at Tr. 1413-1422 [hereinafter *Senior Manager 6 Interview*] (Senior Manager 6 did not ask Paralegal Specialists or any supervisors what the paralegals were doing when logging Other Time); *Senior Manager 4 Interview, supra*, at Tr. 2068-78 (he never asked Paralegal Specialists or asked anyone else to ask the Paralegal Specialists what they were doing when logging Other Time); *Senior Manager 5 Interview, supra*, at Tr. 1814-20 (he never asked any supervisors what Paralegal Specialists were doing while logging Other Time, and no one to his knowledge asked them this question); *Senior Manager 1 Interview, supra*, at Tr. 2407-18, 2618-25 (he never called a Paralegal Specialist or supervisor to inquire what Paralegal Specialists were doing while logging Other Time); *Senior Manager 2 Interview, supra*, at Tr. 2293-300 (she did not think to ask the Paralegal Specialists what they were doing while logging Other Time; she was always busy although she recognized the Paralegal Specialists were not); *Managing Judge 1 Interview, supra*, at Tr. 2157-211 (stating that he did not believe there would be a purpose to asking what they were doing while logging Other Time because there was no work to give them, and he did not recall anyone asking them what they were doing); *Manager 3 Interview, supra*, at Tr. 2242-48 (Supervisory Paralegal Specialist did not ask her Paralegal Specialists what they did while they were logging Other Time because she could not ask them about how they spent those hours – “because that means then the next thing you know I’m going to be accused of harassing them;” she could only ask them “anything . . . if they took too long to turn a case around”); *Manager 2 Interview, supra*, at Tr. 1620-58 (did not ask his Paralegal Specialists what they were doing when logging Other Time; did not know if it was appropriate to ask them); *Manager 1 Interview, supra*, at Tr. 3342-53 (never asked her Paralegal Specialists to keep a list of what they were doing while logging Other Time); *Manager 4 Interview, supra*, at Tr. 2221-45 (did not ask her Paralegal Specialists to keep a record of what they were doing while logging Other Time and did not recall supervisors asking her to do so).

³⁴¹ See, e.g., *Manager 3 Interview, supra*, at Tr. 1809-13 (stating that she did not report to her supervisors her concern that they may have been pursuing personal activities while logging Other Time).

³⁴² *Senior Manager 4 Interview, supra*, at Tr. 2078.

³⁴³ *Senior Manager 5 Interview, supra*, at Tr. 1821-26.

³⁴⁴ *Chief Judge 2 Interview, supra*, at Tr. 2424-25; see also *id.* at Tr. 2380-89 (stating also that because he “thought there was no need for it to exist, [he] gave next to no thought, really, . . . to what they might be doing with the time. And even the things I thought they might be doing with the time, or that the time properly would be used for, I gave that relatively little thought as well, because even those things seemed to me immediately trumped by our mountain of work.”)

³⁴⁵ *Id.* at Tr. 2407-10.

³⁴⁶ *Id.* at Tr. 2761-65.

The evidence showed that members of management took little action because they largely believed that the Other Time problem would disappear as soon as they were able to hire judges.³⁴⁷ For example, when Senior Manager 5 informed Managing Judge 1 in September 2011 that paralegals had logged an average of 36.7% Other Time over the past four pay periods,³⁴⁸ Managing Judge 1 responded that they “need[ed] to take action” and asked whether it was “time to consider other, more serious actions.”³⁴⁹ Senior Manager 5 responded, however, that “[in the] long-term, . . . this will resolve itself, if we get the judges that we’re asking for.”³⁵⁰ In addition to managers’ belief that the Other Time problem would disappear when more judges joined PTAB, management chose to retain Paralegal Specialists because they believed the Paralegal Specialists had “exceptional qualifications” and because they expected an increased workload and responsibilities for the PTAB once the AIA was implemented.³⁵¹

PTAB management attempted to develop some projects to help Paralegal Specialists fill their free time. The evidence showed, however, that many of these were never implemented. For example, while Chief Judge 1 was Chief Judge, various members of the management team discussed instituting “enhanced prepping,” which would have required Paralegal Specialists to take extra steps in creating the eWVs, including highlighting specific portions and adding further footnotes and information.³⁵² Senior Managers informed the OIG that this idea was ultimately rejected because either Human Relations or Labor Relations informed someone in management that it would require further Union negotiations and so would not be “quick and easy,” and some of the judges did not want the enhanced prepping.³⁵³ The management group also considered having Paralegal Specialists provide updates on specific cases that had entered the

³⁴⁷ See, e.g., *Senior Manager 5 Interview, supra*, at Tr. 2454-65 (explaining that the waste was allowed to continue for so many years because management did not realize the scope of the problem and the belief that PTAB would be permitted to hire more judges and “gainfully employ[]” the Paralegal Specialists; the judges were “on the horizon”); *Senior Manager 1 Interview, supra*, at Tr. 3190-96 (speculating that management believed the Other Time problem would be short-lived and hiring more judges “would take care” of the problem); *Managing Judge 1 Interview, supra*, at Tr. 1740-44 (stating that the Other Time problem was not on his “radar [as] something [he] was particularly concerned about . . . We[we]re trying to hire judges . . . It[would] go away once we hire judges”); *Senior Manager 2 Interview, supra*, at Tr. 2027-30 (stating that she thought “everybody just thought it was okay to use [O]ther [T]ime until the work came in . . . until we hired the new judges”).

³⁴⁸ *OIG IRF: SM Documents, supra* (September 15, 2011, e-mail from Senior Manager 5 to Managing Judge 1).

³⁴⁹ *Id.* (September 15, 2011, e-mail from Senior Manager 5 to Managing Judge 1).

³⁵⁰ *Id.* (September 15, 2011, e-mail from Senior Manager 5 to Managing Judge 1). Although evidence showed that management believed that the hiring of judges would resolve the Other Time problem, it is unclear that such hiring would have an immediate impact on the workload of the Paralegal Specialists given that, according to testimony and e-mail evidence, it took approximately nine months to more than one year for newly-hired judges to “come up to full speed.” *Managing Judge 1 Interview, supra*, at Tr. 2590-617; *OIG IRF: Review I of Electronic Documents Received from USPTO, Ex. 3, 4, 18-19, 21*. “[S]ometimes [hiring new judges even] ha[d] a negative effect [on the backlog] because you ha[d] to train them, and it t[ook] . . . your experienced judges offline to train the new judges.” *Managing Judge 1 Interview, supra*, at Tr. 2590-600.

³⁵¹ See *Managing Judge 1 Documents #1, supra*, at Ex. 16; *USPTO Response, supra*, at Ex. 3, 7, 9, App. B. For example, Managing Judge 1 stated that the last group of Paralegal Specialists hired were the most productive, and he wanted “to keep these people because they’re good for the board, and maybe we’ll get judges.” *Managing Judge 1 Interview, supra*, at Tr. 1746-54. One Senior Manager informed the OIG that there was resistance to encouraging Paralegal Specialists to take details because “some of [the] best paralegals were going out, supporting other parts of the office . . . so [they would] . . . lose the strength of [their] best,” and particularly when they received the new wave of AIA work. See *Senior Manager 6 Interview, supra*, at Tr. 1829-43.

³⁵² *Senior Manager 4 Interview, supra*, at Tr. 1451-88.

³⁵³ See *id.* at Tr. 1490-521. One Senior Manager informed the OIG that the PTAB began a “pilot program” implementing the enhanced prepping project, but this project ended perhaps because of a “union problem” (“I don’t know if they thought the work was too difficult”) and because some of the judges did not like the project. *Senior Manager 2 Interview, supra*, at Tr. 1711-56.

federal litigation phase; however, the “problem [with that project] [wa]s when you only send about 50 cases of . . . yours . . . to the federal courts, there’s not a whole lot of work in that.”³⁵⁴

Another project that was not implemented was discussed in September 2012 as a result of a key member of the management team directing Senior Managers to get “somebody” to work on the USPTO “Director[’s]” project allowing them to search the text of unassigned docketed cases.³⁵⁵ A Senior Manager believed that the project could be completed in less than two pay periods and could eliminate Other Time during that time.³⁵⁶ However, a later e-mail indicates that Senior Managers pushed back on assigning Paralegal Specialists to this project because it was the end of the year, and they wanted “paralegals dedicated to decision processing” or else there may be “performance degradation.”³⁵⁷ Thus, the managers undertook the project themselves.

In addition, according to the evidence many of the projects that were implemented were accomplished very quickly.³⁵⁸ Some Paralegal Specialists were assigned to a project writing an article on the history of the PTAB.³⁵⁹ It was never published.³⁶⁰ In November 2012, a Senior Manager e-mailed other Senior Managers about using Paralegal Specialists who had high Other Time to prepare and send Oral Hearing Notices.³⁶¹ The Senior Managers responded that they did not have a problem with this project, as long as the AIA and interference work remained a priority.³⁶² The data indicates, however, that any projects implemented at the time did not significantly reduce Other Time.

Management also considered bringing all of the Paralegal Specialists to the office to organize interference files, including those from the warehouse, and the library.³⁶³ But, according to one Senior Manager, “there was always a reason why it was a really bad idea.”³⁶⁴

The OIG asked members of PTAB management whether they considered laying off Paralegal Specialists, converting some or asking some to convert to part-time employment, encouraging details, or having Paralegal Specialists with attorney licenses help draft opinions to reduce the amount of Other Time hours logged. Managers responded that they did not seriously consider a reduction-in-force as a solution because they believed they would eventually need the Paralegal Specialists and, in the words of one Senior Manager, because of “all the [U]nion

³⁵⁴ Senior Manager 4 Interview, *supra*, at Tr. 1526-31.

³⁵⁵ OIG IRF: SM Documents, *supra* (September 10, 2012, e-mail from Senior Manager 5 to PTAB management).

³⁵⁶ *Id.* (September 11, 2012, e-mail from Senior Manager 5 to PTAB management).

³⁵⁷ *Id.* (September 11, 2012, e-mail from Senior Manager 5 to PTAB management).

³⁵⁸ See, e.g., Senior Manager 4 Interview, *supra*, at Tr. 1532-40, 1563-66.

³⁵⁹ *Id.* at Tr. 1532-48; Paralegal Specialist 2 Interview, *supra*, at Tr. 1533-1640; Senior Manager 1 Interview, *supra*, at Tr. 2777-92.

³⁶⁰ See Paralegal 2 Interview, *supra*, at Tr. 1532-1640 (describing the article project and stating that “there was a group of us that worked on writing . . . an article about the history of the board. . . . which was never published”), 2129-31 (stating that she worked on the article project in 2011).

³⁶¹ OIG IRF: SM Documents, *supra* (November 9, 2012, e-mail from Senior Manager 5 to PTAB management).

³⁶² *Id.* (November 9, 2012, e-mail from Senior Manager 5 to PTAB management).

³⁶³ Managing Judge 1 Interview, *supra*, at Tr. 2234-48.

³⁶⁴ *Id.* at Tr. 2241-44

issues.”³⁶⁵ One key member of management similarly stated, “I would have been afraid of the [U]nion issues [I]t was never seriously considered.”³⁶⁶ A Senior Manager also stated that he believes there was a discussion on a reduction-in-force, but rejected that option because their best performers – those recently hired with law degrees – would have been most affected, and they did not want to lose that talent.³⁶⁷ Members of management also stated that they did not recall considering converting or asking Paralegal Specialists to volunteer to convert to part-time workers.³⁶⁸

Managing Judge 1 stated that, beginning in or around September 2011, he looked for detail opportunities for Paralegal Specialists³⁶⁹ and communicated with other “business units” of the USPTO to see whether they needed a detailee.³⁷⁰ Managing Judge 1 also stated that Paralegal Specialists did obtain details within the USPTO.³⁷¹ Similarly, a Senior Manager stated that, if management learned of detail opportunities, it would send “broadcast messages” to the paralegals.³⁷²

However, Paralegal Specialists interviewed by the OIG, including those who took details, largely stated that they were not asked to consider a detail before the PTAB received the OIG hotline referral in early 2013.³⁷³ Along these lines, more than one supervisor told the OIG that they did not inform Paralegal Specialists of detail opportunities because they were not told that they could or should do so.³⁷⁴ Additionally, Chief Judge 2 stated that he recalled discussing

³⁶⁵ See, e.g., *Senior Manager 4 Interview, supra*, at Tr. 1753-76; see also *Senior Manager 5, supra*, at Tr. 2382-413 (in 2009 or 2010 at the “very beginning” of the Other Time problem, management “abstract[ly]” discussed a RIF); *Managing Judge 1 Interview, supra*, at Tr. 3024-39 (a layoff was not “seriously entertained at any point” because management hoped to hire judges and it “didn’t make a whole lot of sense to fire them and then try and hire them”); *Chief Judge 2 Interview, supra*, at Tr. 1998-2001 (did not discuss having a reduction-in-force); *Senior Manager 2 Interview, supra*, at Tr. 1873-902 (stating that she “would have laid off people . . . if it [had been] up to [her]” and when this suggestion was raised by her and other Senior Managers, a Senior Manager responded, “We can’t do that;” it was not clear to the Senior Manager whether the Senior Manager responded in this manner because of the Union or because he expected work to increase).

³⁶⁶ *Senior Manager 4 Interview, supra*, at Tr. 1765-74.

³⁶⁷ *Senior Manager 1 Interview, supra*, at Tr. 2989-3017.

³⁶⁸ See, e.g., *Senior Manager 4 Interview, supra*, at Tr. 1706-1752 (he did not recall management discussing forcing or encouraging Paralegal Specialists to shift to part-time); *Senior Manager 5 Interview, supra*, at Tr. 1677-99; *Managing Judge 1 Interview, supra*, at Tr. 3019-23 (did not recall discussing shifting paralegals to part-time); *Manager 2 Interview, supra*, at Tr. 1342-44 (not aware if Paralegal Specialists were allowed to go part-time).

³⁶⁹ *Managing Judge 1 Interview, supra*, at Tr. 1770-1784. This statement is inconsistent with one key Senior Manager’s statement that no one discussed sending or encouraging Paralegal Specialists on details or moving Paralegal Specialists to other areas of the USPTO until after they received the complaints from the OIG in 2013. *Senior Manager 5 Interview, supra*, at Tr. 1623-26. Later this Senior Manager stated that he was not aware of anyone discussing shifting Paralegal Specialists to other departments permanently, rather than for details. *Id.* at Tr. 2334-40.

³⁷⁰ *Managing Judge 1 Interview, supra*, at Tr. 3012-15. One Paralegal Specialist stated that some Paralegal Specialists left in around 2010 or 2011 and were “encouraged to move out. I think they realized they had too many paralegals.” *Paralegal 10 Interview, supra*, at Tr. 899-909

³⁷¹ *Managing Judge 1 Interview, supra*, at Tr. 1980-90.

³⁷² *Senior Manager 4 Interview, supra*, at Tr. 1631-34.

³⁷³ See, e.g., *Paralegal 1 Interview, supra*, at Tr. 1134-36; *Paralegal 9 Interview, supra*, at Tr. 962-82 (no one spoke with her about going on a detail and she did not consider it because she “always thought of details as something that were available to people in higher positions”). One Paralegal Specialist recalled one e-mail that was sent to all Paralegal Specialists regarding a detail opportunity. *Paralegal 2 Interview, supra*, at Tr. 780-89.

³⁷⁴ *Manager 1 Interview, supra*, at Tr. 2531-39; *Manager 2 Interview, supra*, at Tr. 1331-41 (stating that the supervisor never called Paralegal Specialists to inform them of detail opportunities and was not told to encourage his Paralegal Specialists to look for details); see also *Manager 1 Interview, supra*, at Tr. 2624-30 (none of her supervisors told her to tell her Paralegal Specialists to look for details or other jobs).

encouraging Paralegal Specialists to take details during “[O]ther [T]ime discussions,” but that details did not make sense for 2012 through 2013 because “it’s only a matter of time before we need twice as many paralegals as we currently have.”³⁷⁵

Members of management stated to the OIG that they did not explore the idea that Paralegal Specialists with law degrees and attorney licenses could help draft opinions because they did not have a technical background,³⁷⁶ or because the managers believed that it would have created a problem with the Union.³⁷⁷ In explaining why Paralegal Specialists could not draft opinions, after noting that they did not have technical backgrounds, one key member of management added (1) it may have caused “a morale issue” because only Paralegal Specialists with law degrees would be involved in this task, and (2) it may have led a Paralegal Specialist to complain that he or she should be paid more and cause a desk audit.³⁷⁸ However, when asked whether any of these reasons were discussed, he responded that they were not “[b]ecause simply put . . . paralegals writing without a technical degree was – we never even came to that one.”³⁷⁹

Additionally, a Senior Manager stated that the Union would have had a problem with having Paralegal Specialists draft opinions because they were not hired to do this task, and if they had started doing this task, the Union would have “start[ed] going crazy over it.”³⁸⁰ She stated that the managers “had to be real careful about . . . what [they] gave the[Paralegal Specialists].”³⁸¹ However, again, she stated that there was not any discussion about this option³⁸² and management did not discuss it with the Union because “it wouldn’t have gotten past [Labor Relations],” which would have rejected the idea based on the Senior Manager’s previous experience.³⁸³

Similarly, a managing judge told the OIG that he did not recall discussing with other managers giving Paralegal Specialists the opportunity to help draft opinions to move the cases forward.³⁸⁴ But he stated that the patent attorneys, who are unionized, already performed that function, and the Paralegals Specialists could not become patent attorneys because the PTAB would have had to competitively offer those positions, which was not an option during the hiring freeze.³⁸⁵

Another Senior Manager also stated that discussions regarding this idea did not go anywhere and the “hang up” would have been the Union, although, again, they did not negotiate this with the Union.³⁸⁶ One Senior Manager stated that the Union would inform management that management could not do “[e]verything [it] tried to do,” often because the Union would argue

³⁷⁵ Chief Judge 2 Interview, *supra*, at Tr. 2021-48.

³⁷⁶ See, e.g., Senior Manager 1 Interview, *supra*, at Tr. 3022-31.

³⁷⁷ See, e.g., Senior Manager 2 Interview, *supra*, at Tr. 2100-04.

³⁷⁸ Senior Manager 4 Interview, *supra*, at Tr. 1818-1931.

³⁷⁹ *Id.* at Tr. 1932-40.

³⁸⁰ Senior Manager 2 Interview, *supra*, at Tr. 2108-12.

³⁸¹ *Id.* at Tr. 2125-26.

³⁸² *Id.* at Tr. 2121-23.

³⁸³ *Id.* at Tr. 2129-41.

³⁸⁴ Managing Judge 1 Interview, *supra*, at Tr. 3047-64.

³⁸⁵ *Id.*

³⁸⁶ Senior Manager 5 Interview, *supra*, at Tr. 2414-43.

that the activity was not within the Paralegal Specialists' PAP.³⁸⁷ She stated that the Union was "just a huge stumbling block to us" and voiced her frustration.³⁸⁸ A managing judge stated that he believed there was "resistance" by managers beneath him to dealing with the Union, and whether they did depended on "whether or not the order c[ame] through [from a more senior manager], just do it anyways."³⁸⁹ One Senior Manager stated that, throughout the relevant time frame, the PTAB did not change certain items related to the Paralegal Specialists' PAP "because it involved dealing with the bargaining unit and that was deemed as too hard."³⁹⁰ He stated that he believed that attitude came from the Chief Judge at the time."³⁹¹

According to one Senior Manager, the Other Time figures began "trending generally downwards" in late 2012.³⁹² Management interviewed by the OIG explained that Other Time hours were decreasing because more judges had been hired and the PTAB began receiving AIA cases, and so there was more work for Paralegal Specialists.³⁹³ According to Senior Manager 5, the first round of new judges hired after the hiring freeze were a couple of patent attorneys who had converted into judges in approximately December 2011.³⁹⁴ Managing Judge I also credited the reduction in Other Time to an incentive program that had been implemented for judges to finish more opinions³⁹⁵ and the fact that three of the Paralegal Specialists left the PTAB on details to other organizations.³⁹⁶ However, Other Time was still significant – as late as February 4, 2013, the PTAB estimated that the average amount of Other Time billed since the beginning of Fiscal Year 2013 was as high as 58% for one group, 47% for another, and 45% for a third.³⁹⁷

When discussing with the OIG why he thought the Other Time problem was not effectively addressed, Managing Judge I informed the OIG that from 2011 to 2013 top management was occupied with the task of implementing the AIA, including drafting new rules, launching a new information technology system to take in the cases, and hiring new judges.³⁹⁸ He stated that

³⁸⁷ See *Senior Manager 2 Interview, supra*, at Tr. 2142-51.

³⁸⁸ See *id.* at Tr. 2157-63.

³⁸⁹ *Managing Judge I Interview, supra*, at Tr. 3126-28. He also stated that the objections to dealing with the Union are "legitimate" – for example, when it would take two years to negotiate something that needed to be resolved more quickly. See *id.* at Tr. 3133-38.

³⁹⁰ See OIG IRF: Review II of Electronic Documents Received from USPTO, Ex. 14 (July 17, 2013, e-mail from Senior Manager I to Chief Judge 2).

³⁹¹ *Id.*

³⁹² See, e.g., OIG IRF: SM Documents, *supra* (December 17, 2012, e-mail from Senior Manager 5 to PTAB management).

³⁹³ See, e.g., *Senior Manager 2 Interview, supra*, at 2041-46. In his Official Statement regarding the complaints, Senior Manager 5 explained that Other Time was steadily declining since pay period 20 of 2012 when the PTAB first began receiving AIA cases. See *USPTO Response, supra*, at Ex. 7 (Official Statement of Senior Manager 5).

³⁹⁴ *Senior Manager 5, supra*, at Tr. 1923-52.

³⁹⁵ See *Managing Judge I Interview, supra*, at 2019-24, 2541-89 (beginning approximately two or three years ago, the bonus programs essentially provided quarterly cash bonuses to judges completing more decisions). In the first year of the bonus program, approximately 3,000 additional cases were issued. *Id.* at Tr. 2580-89. Although Managing Judge I stated that it is more cost-efficient for the PTAB to provide bonuses to judges than hire additional judges to accomplish the work, in the long-run he believed that it is better for the PTAB to hire more judges because "you can burn people out at this level of productivity," and he expects productivity of those judges receiving bonuses to drop eventually because "[n]obody can sustain the levels of some of these people are going at. It's a lot of voluntary overtime to make these levels." *Id.* at Tr. 2633-44.

³⁹⁶ *Id.* at 2538-44.

³⁹⁷ OIG IRF: SM Documents, *supra* (February 4, 2013, e-mail from Senior Manager 5 to PTAB management).

³⁹⁸ *Managing Judge I Interview, supra*, at Tr. 1302-61.

management was “really . . . wrapped around that axel completely and fully.”³⁹⁹ And according to Managing Judge 1, “at no point did anyone [in the three levels of management beneath him] say, hey, this [fact that Paralegal Specialists are using Other Time] is a really big problem,” and therefore he focused on his “other list of problems.”⁴⁰⁰

Chief Judge 2 similarly stated that he had too many problems on his plate during this time frame to make the Other Time problem his “own personal problem.”⁴⁰¹ He described his other problems as growing the number of judges by more than 100, for which he interviewed hundreds of candidates; growing the number of offices from one to six; traveling in connection with the AIA rulemaking; working his “normal judge job;” and working his “normal chief judge job.”⁴⁰² He stated that “one has to prioritize which next area of cure you get to” in this type of circumstance, and, in hindsight, he “kn[e]w this area of cure would not have come up for [him] sooner, in part, because, unlike some of these other areas,” it took him time to recognize that he did not “have confidence” in the information that he was getting from his senior staff regarding this problem.⁴⁰³ The Chief Judge continued to state that, even in hindsight, in light of the “enormous problems” that preceded the Other Time problem “and were tackled, [he] wouldn’t have accelerated it beyond those other things, because the consequence of not getting to the [O]ther [T]ime problem sooner is relatively few dollars in the grand scheme of what [PTAB] spend[s] and do[es].”⁴⁰⁴ He reasoned that, if he had not addressed the “other problems,” the PTAB would have failed to meet its “statutory obligations and our hiring, and all sorts of other things.”⁴⁰⁵

Chief Judge 2 told the OIG that he recognized that there was a lag between when he learned of the large amount of Other Time being logged by Paralegal Specialists and action being taken about this problem.⁴⁰⁶ He stated that, after hearing about this issue a second or third time, he thought, “[H]ow is this still a problem?”⁴⁰⁷ At that point, he “stress[ed]” to his staff the importance of resolving the problem in late 2012.⁴⁰⁸ The figures show, however, that Other Time did not significantly decrease in 2012 and did not do so until 2013, after the OIG referred the whistleblower complaints to the PTAB.

³⁹⁹ *Id.* at Tr. 2523-30.

⁴⁰⁰ *Id.* at Tr. 1637-44.

⁴⁰¹ *Chief Judge 2 Interview, supra*, at Tr. 2943-46.

⁴⁰² *Id.* at Tr. 2943-73.

⁴⁰³ *Id.* at Tr. 2962-73.

⁴⁰⁴ *Id.* at Tr. 2983-87.

⁴⁰⁵ *Id.* at Tr. 2989-92.

⁴⁰⁶ See *Chief Judge 2 Interview, supra*, at Tr. 2229-47.

⁴⁰⁷ *Id.* at Tr. 2243-47.

⁴⁰⁸ *Id.* at Tr. 2248-60.

L. Changes Sparked by the OIG Referral

The evidence showed that, once the OIG referred the anonymous complaints to the PTAB in early 2013, PTAB management, including Chief Judge 2, increased efforts to reduce Other Time. On May 6, 2013, Managing Judge 1 informed Senior Managers that he needed an “immediate plan for the reduction of paralegal use of [O]ther [T]ime down to zero,” and that “[t]his is top priority.”⁴⁰⁹ The next day Chief Judge 2 sent out an agenda of “STUFF TO COMPLETE” for the week of May 7, 2013, the first item being “Finalize plan to eliminate/reduce/equalize ‘Other Time.’”⁴¹⁰ In his e-mail, he also stated to Managing Judge 1, Managing Judge 2, and Senior Manager 5,

Who has the assignment to speak to [Senior Manager 4] to let him know that the **IG wants answers** and that this might not go to [sic] well for him and **others in the Board Administration** who are responsible for overseeing these things? What are the paralegals doing would seem to be a basic question. By the way, which individuals at the Board actually see the regular (?) numbers showing the amount of paralegal Other Time? Also this situation well might cause us to ask whether it really is acceptable to have nearly all of the paralegals working off-site where their activities cannot regularly be observed visually. Or is it simply that the telework circumstance left the administrators . . . with a heightened obligation to monitor the time usage?⁴¹¹

Managing Judge 2 again emphasized to Senior Managers the importance of reducing Other Time to Senior Managers in an e-mail titled “Other Time”: “The IG won’t wait. I need a status report today . . . This is SERIOUS. Testimony is being finalized.”⁴¹²

After receiving the OIG hotline complaints, the PTAB changed its organizational structure. Chief Judge 2 spoke of some of these changes in his interview with the OIG.⁴¹³ His testimony and e-mail address evidenced that he held the Senior Managers responsible for the Other Time problem. For example, in one e-mail he stated, “My belief is that the [senior-level Administrative Officer] and the Supervisory [P]atent Administrators are and were responsible, in the first instance, for managing the utilization, productivity and overall resource maximization of the BPAI/PTAB paralegal corps And, therefore, underutilization and mis-utilization, of

⁴⁰⁹ OIG IRF: SM Documents, *supra* (May 6, 2013, e-mail from Managing Judge 1 to PTAB management).

⁴¹⁰ *Id.* (May 7, 2013, e-mail from Managing Judge 1, Managing Judge 2, and Senior Manager 5).

⁴¹¹ *Id.* (May 7, 2013, e-mail from Managing Judge 1, Managing Judge 2, and Senior Manager 5).

⁴¹² *Id.* (June 25, 2013, e-mail from Managing Judge 2 to Senior Manager 1 and Senior Manager 2). See also *Managing Judge 1 Documents #2, supra* (on June 1, 2013, Managing Judge 2 forwards to Chief Judge 2 and Managing Judge 1 a June 1, 2013, e-mail from Managing Judge 2 to Senior Manager 2 stating, “It is critical that there be NO more ‘[O]ther [T]ime’ which makes this training and its implementation quite URGENT”).

⁴¹³ See, e.g., *Chief Judge 2 Interview, supra*, at Tr. 1221-39, 1322-546 (one Senior Manager’s “responsiveness and attention to detail at times left [him] not sure . . . we had quite the command of our situation here,” and his lack of confidence in another manager’s reporting left him concerned with his management of staff beneath him), 2699-750 (stating that there were individuals who “would have seen those reports [on Other Time] on a regular basis And it’s regrettable that, because they would see that and I wouldn’t, I wouldn’t have occasion to be alerted to the problem But . . . that makes the fact that those people would see it and not do anything about it an obstacle to my doing anything . . . about it.”).

that resource is something they need to justify.”⁴¹⁴ Managing Judge 1 confirmed to the OIG that Chief Judge 2 believed that the Other Time problem should have been resolved much earlier by the Senior Managers.⁴¹⁵ As a result, the existing third layer of supervision of the Paralegal Specialists – the Support Administrators – was removed, and the second-level supervisors started reporting to a Chief Clerk of the Board, who, in turn, reported to the newly created Board Executive.⁴¹⁶ Managing Judge 1 informed the OIG that, if the PTAB could have⁴¹⁷ decided to create the Board Executive position earlier, it is possible that the Other Time problem would have been identified faster.⁴¹⁸ He also recognized that the members of the organization could have been reshuffled so that one of the many managers could have focused more on the Paralegal Specialists.⁴¹⁹

In addition, a Senior Manager informed the OIG that he recognized that, although the Supervisory Paralegal Specialists did not create their own work, “they could have done better [to] share resources.”⁴²⁰ He believed that they

approached it . . . very parochially So [each would think] if nothing comes to my particular team’s mailbox, I then can’t . . . assign work to my paralegals “I couldn’t do anything” The extent they could have gone to another team supervisor and asked, “Hey, do you have any work available to help me out” – I think that’s perhaps where they failed I find it hard to believe that there was absolutely no work available amongst any of the teams. They could have done a better job.⁴²¹

⁴¹⁴ *Managing Judge 1 Documents #2, supra* (May 6, 2013, e-mail from Chief Judge 2 to his direct reports). Another managing judge stated to the OIG that he became “frustrated” with his administrative staff on issues unrelated to Other Time, but regarding “things to move the board forward,” such as creating a plan to open a new office. *Managing Judge 1 Interview, supra*, at Tr. 3230-72. He ultimately relying upon lead judges to accomplish these projects. *Id.* at Tr. 3233-40. For example, a lead judge ended up drafting the operating plan to open one of their new offices because “[n]ot one of [his] administrative staff would take the project.” *Id.* at Tr. 3270-80.

⁴¹⁵ *Managing Judge 1 Interview, supra*, at Tr. 3299-308.

⁴¹⁶ See *Senior Manager 6 Interview, supra*, at 3050-78, 3169-90; *Chief Judge 2 Interview, supra*, at Tr. 1221-39, 2848-55; *USPTO: Who We Are, supra*.

⁴¹⁷ It is not clear that the PTAB could have created such a position during the portion of the relevant time frame when there was a hiring freeze.

⁴¹⁸ *Managing Judge 1 Interview, supra*, at Tr. 2410-25.

⁴¹⁹ *Id.* at Tr. 2445-56.

⁴²⁰ *Senior Manager 6 Interview, supra*, at 2863-67. One Senior Manager stated to the OIG that he believed that the groups worked “very well” at coordinating amongst themselves if they needed help with extra work. *Senior Manager 1 Interview, supra*, at Tr. 1891-900. Although this manager did not have the perception that some Supervisory Paralegal Specialists would not share work because he was trying to keep his team’s Other Time lower, he stated that pride would cause some managers to not ask for help – “I can – my team can do this.” *Id.* at Tr. 1901-10. One Supervisory Paralegal Specialist stated to the OIG that the supervisors would e-mail each other if they had extra work and needed help. *Manager 1 Interview, supra*, at Tr. 3828-37.

⁴²¹ *Senior Manager 6 Interview, supra*, at 2869-84; see also *id.* at Tr. 2968-3017 (stating “the extent of the problem probably was magnified because they didn’t take advantage enough of sharing amongst teams Would that have solved the problems along with a closer check and a – a stronger message on ‘hey, let’s make sure you do it right?’ I think all those things would have contributed to it” and agreeing that if the work had been spread out more among the groups, there would have been less Other Time). One Supervisory Paralegal Specialist informed the OIG that her group would have had far less Other Time had the judges been more evenly distributed amongst the teams, rather than assigning judges to teams by discipline, which left her team with far fewer judges, and so far less work, than some of the other teams. *Manager 3 Interview, supra*, at Tr. 1423-83.

He would expect a “line employee” to argue that it was not his or her fault, not “any . . . level manager.”⁴²² According to the Senior Manager, however, supervisors should have been “doing A through Z to find ways to prevent” staff from having no work.⁴²³ Statements from other witnesses supported his assessment. For instance, one supervisor told the OIG that, before the changes in 2013, she believed that supervisors did not have “authority” to ask for assistance from another team when they ran out of work or needed help with excess work.⁴²⁴ Additionally, one Senior Manager informed the OIG that one supervisor was “aggressive” in assigning any available docketing work to her employees before other supervisors could do so, resulting in her team having far less Other Time than others.⁴²⁵ A Supervisory Paralegal Specialist similarly stated that sometimes that the supervisor would hold a few cases overnight to ensure the supervisor’s Paralegal Specialists have work the next day.⁴²⁶

Chief Judge 2 also stated to PTAB management in May 2013, “this situation well might cause us to ask whether it really is acceptable to have nearly all of the paralegals working off-site where their activities cannot regularly be observed visually. Or is it simply that the telework circumstance left the administrators . . . with a heightened obligation to monitor the time usage?”⁴²⁷ As noted previously, in his interview with the OIG, he stated that as early as when he first became the Chief Judge at the PTAB he questioned the effectiveness of having nearly all of the Paralegal Specialists telework.⁴²⁸ He also stated that “at various times, [he had] inquired at the agency – various and many times – as to whether [the PTAB] could end that . . . generally the response to that ha[d] been, no, we can’t end it, and even if we wanted to . . . there would be the huge obstacle of the discussions with the unions.”⁴²⁹ A Senior Manager also stated to the OIG that he believed “one of the things that could have been done [to reduce the amount of Other Time] was not have as many people on telework . . . and the reason I say that is just a personal observation that sometimes it is easier to have – spot projects done if someone is present.”⁴³⁰

⁴²² *Senior Manager 6 Interview, supra*, at Tr. 2885-91.

⁴²³ *Id.* at Tr. 3036-43.

⁴²⁴ *Manager 3 Interview, supra*, at Tr. 2625-42.

⁴²⁵ *Senior Manager 1 Interview, supra*, at 1705-50. Her manager stated that he is “sure” he had a conversation with her about this. *Id.* at Tr. 1751-55. She would assign the work late at night or really early in the morning, and, before her manager corrected her, she would assign work to herself to get work for her team. *Id.* at Tr. 1827-38.

⁴²⁶ See *Manager 2 Interview, supra*, at Tr. 1248-70.

⁴²⁷ *Managing Judge 1 Documents #2, supra* (May 7, 2013, e-mail from Chief Judge 2 to Managing Judge 2, Managing Judge 1, and Senior Manager 5). Managing Judge 2 responded that he did not believe telework was the problem, but “if we allow telework, we must have in [sic] place effective management. It is the supervisors who assign the work, review it and tabulate it.” *Managing Judge 1 Documents #2, supra* (May 7, 2013, e-mail from Managing Judge 2 to Chief Judge 2 and Managing Judge 1). A Senior Manager recognized one of the “dangers of telework” was that some employees would not work when they have work assigned. *Senior Manager 5 Interview, supra*, at Tr. 1766-79.

⁴²⁸ *Chief Judge 2 Interview, supra*, at Tr. 1077-82 (he was shocked because he “wasn’t quite sure how . . . that kind of arrangement necessarily facilitated the specific work of this board, which has a fundamental component of interactivity”); see also *id.* at Tr. 974-76 (“I was surprised to learn that the board actually is in a circumstance where 90 percent of the paralegals telework”); 1065-72 (“early on when [he] arrived . . . [he] was first shocked to learn of the amount of [teleworking]”).

⁴²⁹ *Id.* at Tr. 980-87; see also *id.* at Tr. 1088-129 (in 2012 he suggested teleworking was not “necessarily the arrangement [he] would opt for” because he questioned “the diligence” or responsiveness of some of his Senior Managers, which “left [him] uncertain as to what [he] could really know about . . . the diligence of the paralegals;” later qualifying that because he questioned the responsiveness of some of his Senior Managers, he had to use other sources to “get a sense of what was going on” and having Paralegal Specialists in the office “would [have] allow[ed] [him] . . . to get around some of that”).

⁴³⁰ *Senior Manager 5 Interview, supra*, at Tr. 2025-32.

On May 6, 2013, Managing Judge 2, who Chief Judge 2 tasked with heading the effort to reduce Other Time⁴³¹ e-mailed the Senior Managers to ask them to circulate “ideas for potential plans.”⁴³² Within a few hours, the Senior Managers had come up with multiple ideas, a few of which were eventually implemented.⁴³³ One Senior Manager suggested:

Create “busy work” for the paralegals. Certainly not a long term solution. The first idea that came to mind was have everyone go back say 2 years and conduct quality checks on all the eWFs they created (with no panel assigned). First verify that the eWFs are on the S: drive and then perform a check using the checklist I’m sure if we asked others we could come up with other busy work that we’d simply classify under the Legal Administration time code. Of course, this would require some management “setup” and maybe even training.⁴³⁴

An “Other Time Elimination Plan” document was drafted, which compiled many of the ideas circulated, including this eWF project, reassigning paralegals from a particular team, training paralegals on trial work, detailing paralegals, permanently reassigning LIEs, updating weekly the cases in litigation, reviewing old interferences for archive, and a reduction-in-force.⁴³⁵ Managing Judge 2 sent a version of this plan to Chief Judge 2 and Managing Judge 1 on May 7, 2013.⁴³⁶

The eWF “special project”⁴³⁷ was implemented on May 20, 2013,⁴³⁸ and, according to one Senior Manager, “eliminated” the Other Time.⁴³⁹ Paralegal Specialists were instructed to log

⁴³¹ See *Chief Judge 2 Interview, supra*, at Tr. 1855-82 (stating that he asked Managing Judge 2 to help Senior Manager 5 and Managing Judge 1 address the Other Time situation), 1894-98 (stating that Managing Judge 2, “whose role specifically was in the administration realm . . . began to provide me . . . [O]ther [T]ime reports”), 1944-63 (indicating that he discussed the reduction of Other Time with Managing Judge 2), 2229-61 (stating his recollection that he stressed resolving the Other Time problem with Managing Judge 2, Managing Judge 1, and Senior Manager 5); see also *Managing Judge 1 Interview, supra*, at Tr. 2694-2717 (stating that Managing Judge 2 had a number of feasible projects for Paralegal Specialists to work on in lieu of logging Other Time), 2719-21 (stating that Managing Judge 2 “had worked really hard with coming up with a list of projects” for Paralegal Specialists to work on in lieu of logging Other Time), 2722-41 (stating that Managing Judge 2 “was a welcome relief” who handled the implementation of projects for Paralegal Specialists to work in lieu of logging Other Time), 2750-73 (stating that Managing Judge 2 “had a very good eye for management, so I trusted [him or her] implicitly to take care of” projects for Paralegal Specialists to work on in lieu of logging Other Time).

⁴³² *OIG IRF: SM Documents, supra* (May 6, 2013, e-mail from Managing Judge 2 to PTAB management).

⁴³³ See *id.* (May 6, 2013, e-mails between PTAB management).

⁴³⁴ *Id.* (May 6, 2013, e-mail from Senior Manager 1 to PTAB management).

⁴³⁵ See, e.g., *id.* (May 7, 2013, e-mail from Senior Manager 5 to Managing Judge 2).

⁴³⁶ *Id.* (May 7, 2013, e-mail from Managing Judge 2 to Chief Judge 2 and Managing Judge 1).

⁴³⁷ One Supervisory Paralegal Specialist described a “special project” as “anything that wouldn’t have been associated with . . . processing a decision or an application.” *Manager 2 Interview, supra*, at Tr. 1470-73.

⁴³⁸ *OIG IRF: Review of Documents from Paralegal 4, Ex. 3* [hereinafter *Paralegal 4 Documents*] (May 17, 2013, e-mail from Senior Manager 1 to all Supervisory Paralegal Specialists with directions for the eWF special project); *OIG IRF: SM Documents, supra* (June 20, 2013, e-mail from Senior Manager 1 to Managing Judge 2, Senior Manager 2, and Senior Manager 5 stating that the eWF special project began on May 20, 2013). On July 2, 2013, one paralegal began working on a second project, which required her to enter panel information to the eWFs if the panel had been assigned. *Managing Judge 1 Documents #2, supra* (July 3, 2013, e-mail from Managing Judge 2 to PTAB management). On June 5, 2013, paralegals were trained for reexamination and trial work. See *id.* (June 25, 2013, e-mail from Managing Judge 2 to Managing Judge 1 providing the status of the Other Time reduction plan).

⁴³⁹ *Senior Manager 1 Interview, supra*, at Tr. 2946-53 (stating that his perception was that because the eWF project eliminated Other Time, management did not further pursue the other ideas).

their time on this project using the Legal Administration time code (L00131).⁴⁴⁰ Subsequently, on June 3, 2013, Managing Judge 2 informed all Supervisory Paralegal Specialists, their supervisors, and members of PTAB management, including Chief Judge 2, that “[t]he use of Other Time should be a rare exception. Accordingly, effective immediately, supervisors will be required to explain (to the Deputy Chief Judge) why [O]ther [T]ime was necessary and approved for an employee Also, effective immediately, a report (by pay period) of time codes utilized by employees should be prepared by the Managing Supervisory Paralegals . . . and provided to me.”⁴⁴¹ Managing Judge 1 informed the Supervisory Paralegal Specialists that “[t]here should be no [O]ther [T]ime. The projects that Managing Judge 2 assigned should be occurring in any unoccupied time.”⁴⁴² Similarly, Senior Manager 5 informed Senior Manager 1, “We would use Other Time only when we can’t find something more appropriate – and I think we’re going to be trying very hard to find something appropriate!”⁴⁴³ Paralegal Specialists and Supervisory Paralegal Specialists stated to the OIG that they understood that Paralegal Specialists were not permitted to use the Other Time code anymore.⁴⁴⁴

The data showed that Other Time plummeted to near zero after this project began on May 20, 2013, and hours previously logged to Other Time largely shifted to the Legal Administration code. The evidence showed that this shift was intentional – for example, Senior Manager 5 wrote to Managing Judge 1 that as of pay period 10 in 2013, Other Time “dropped to 0 . . . (which [sic] small blips here and there) and Legal Administration being used starting at that time Looking at the Board as a whole, it is looking about like I would expect it to be, with Legal Administration claimed being about equal to Other Time claimed previously.”⁴⁴⁵ The data support this statement:

⁴⁴⁰ *Paralegal 4 Documents, supra*, at Ex. 3 (May 17, 2013, e-mail from Senior Manager 1 to all Supervisory Paralegal Specialists).

⁴⁴¹ *OIG IRF: SM Documents, supra* (June 3, 2013, e-mail from Managing Judge 2 to Supervisory Paralegal Specialists and PTAB management, including Chief Judge 2); see also *Senior Manager 1 Interview, supra*, at 2657-87 (estimating that when the eVWF project was initiated was when Paralegal Specialists were given direction on not recording Other Time without supervisory approval).

⁴⁴² *OIG IRF: SM Documents, supra* (June 3, 2013, e-mail from Managing Judge 1 to Supervisory Paralegal Specialists and PTAB management, including Chief Judge 2).

⁴⁴³ *Id.* (June 4, 2013, e-mail from Senior Manager 5 to Senior Manager 1 and other PTAB management). After that point, Senior Manager 5 reported to Senior Manager 6 the “rationale” for any Other Time logged by Paralegal Specialists by pay period. See, e.g., *id.* (August 27, 2013, e-mail from Senior Manager 5 to Senior Manager 6 detailing the number of hours of Other Time logged in that pay period and the rationale for those hours; in this case, 5 1/4 hours of Other Time, two for a PTAB event and 2 1/4 likely for information technology problems).

⁴⁴⁴ See, e.g., *Paralegal 6 Interview, supra*, at Tr. 1122-26; *Manager 3 Interview, supra*, at Tr. 2453-72 (Paralegal Specialists were told to stop using the Other Time code in webTA in 2013); *Paralegal 7 Interview, supra*, at Tr. 1398-505 (management told the Paralegal Specialists “whatever you do, do not use that code;” she does not use it anymore even when she has a gap between tasks); *Paralegal 1 Interview, supra*, at Tr. 1165-70 (Paralegal Specialists were told not to use the Other Time code anymore); *Paralegal 9 Interview, supra*, at Tr. 1089-12 (about one year ago, she was told to not use the Other Time code, even for computer down time).

⁴⁴⁵ *OIG IRF: SM Documents, supra* (July 15, 2013, e-mail from Senior Manager 5 to Managing Judge 1); see also *Paralegal 6 Interview, supra*, at Tr. 1103-121 (a Paralegal Specialist noted in an interview with the OIG that it seemed as though the L00131 was created to stop the Paralegal Specialists from using the Other Time code); *Senior Manager 5 Interview, supra*, at 2114-15 (L00131 “effectively replace[d]” A00131), *Manager 2 Interview, supra*, at Tr. 1488-95 (special projects were developed to prevent too much Other Time).

Figure 7. Other Time (A00131) vs. Legal Administration (L00131) Over Time⁴⁴⁶

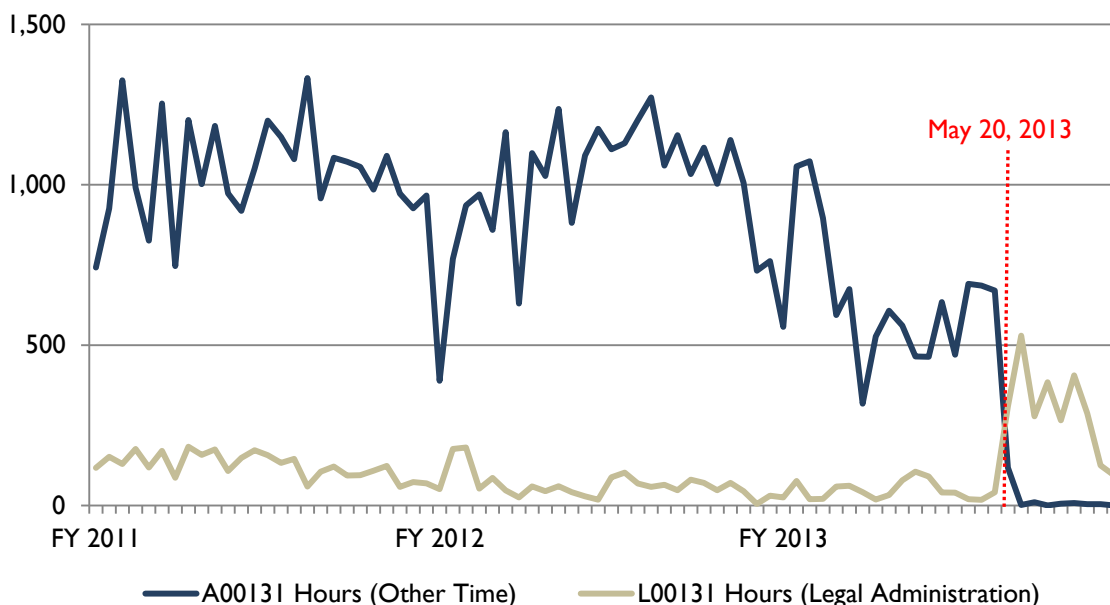
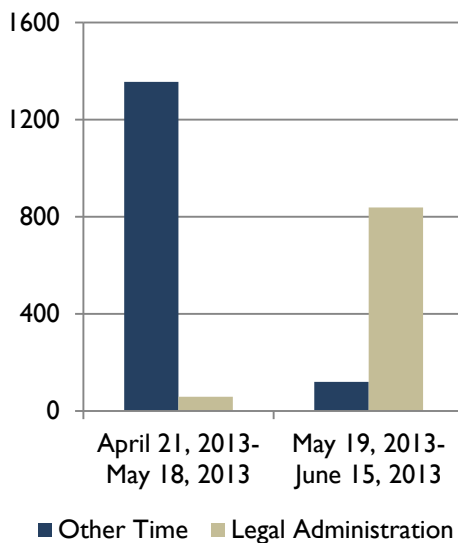


Figure 8 clearly shows the transfer in hours from one code to the next by contrasting the pay periods before and after the change:

Figure 8. Other Time v. Legal Administration⁴⁴⁷



In addition to creating special projects, which transferred a majority of the Other Time, PTAB management found and acted on detail opportunities after the OIG referred the whistleblower

⁴⁴⁶ OIG IRF: Data Analysis, *supra*.

⁴⁴⁷ *Id.*

complaints to the USPTO. For example, on June 3, 2013, after Managing Judge 1 learned that another division of the USPTO “is seeking some paralegals,” he e-mailed Managing Judge 2 and Senior Manager 5, “Let’s make it happen.”⁴⁴⁸

Although some members of PTAB management disagreed,⁴⁴⁹ several Paralegal Specialists and members of PTAB management informed the OIG that they viewed the special projects as “busy work.”⁴⁵⁰ For example, when asked whether the eWF project was really necessary or whether it was developed to merely fill Paralegal Specialists’ time, one Paralegal Specialist responded that he believed they developed the project to “have us have something to do” because in “all the years [the Paralegal Specialist has] been working [at the PTAB], . . . we never had to do that [type of review].”⁴⁵¹ Rather, witnesses told the OIG, the supervisors had checked the eWFs previously, and they believed it was odd that paralegals were suddenly checking the work.⁴⁵² Additionally, one manager noted that this eWF project is not being done anymore because “it’s not urgent” and the work is “cleanup.”⁴⁵³ Although she believed that the project would have to be completed again eventually, she recognized that it could take more than a year before they returned to it and that they may only do so because of her frustration and realization that there are too many errors in the eWFs.⁴⁵⁴ Despite a number of individuals classifying this project as busy work, one Senior Manager noted that, although management originally created the project to “eliminate [O]ther [T]ime,” “it probably turned out to [be] . . . of more value than we anticipated at first.”⁴⁵⁵

The “senior management specialist” who was tasked in July 2013 with resolving the “waste, fraud, abuse” and “help[ing to] address some of the problems at [the] PTAB” explained to the OIG that he was originally brought in to deal with the “paralegal operation . . . not being . . . fully utilized, properly managed.”⁴⁵⁶ However, he then realized that, “in order to deal with that, there’s other challenges of the supervisors, the staffing ratio, the training, the availability of other resources to do some of those things.”⁴⁵⁷ He told the OIG that, aside from asking how

⁴⁴⁸ OIG IRF: SM Documents, *supra* (June 3, 2013, e-mail from Managing Judge 1 to Managing Judge 2 and Senior Manager 5).

⁴⁴⁹ See, e.g., *Senior Manager 4 Interview, supra*, at Tr. 1602-06 (“it was not to find, ‘Let’s keep them busy’ . . . I mean, if you wanted to keep them busy, you’d farm them out to – on details and stuff like that,” which they “did do”); *Senior Manager 2 Interview, supra*, at Tr. 3202-15 (the eWF project was helpful because “[a]t some point there has to be a cleanup,” although if there had not been an Other Time problem, they may not have instituted the project at that time); *Managing Judge 1 Interview, supra*, at 2774-840 (stating that the eWF project was helpful, particularly in determining if a case can be dismissed based on actions taken in the years before the appeal is examined by a Judge); *Manager 3 Interview, supra*, at Tr. 2425-45 (originally agreeing that the eWF project was busy work, and then stating that “it could be viewed as busy work, but it was a worthwhile project”); *Manager 4 Interview, supra*, at Tr. 1130-35 (the special projects included “work . . . that needed to be done”).

⁴⁵⁰ See, e.g., *Senior Manager 1 Interview, supra*, at Tr. 2667-71 (referring to the eWF project as “busy work”); *Manager 1 Interview, supra*, at Tr. 3428-35 (stating that some of the special projects were “necessary work . . . and then some of them might have been just to keep them busy”); *Paralegal 9 Interview, supra*, at Tr. 881-88 (she was “given the impression that [the special projects on which the ex parte Paralegal Specialists were working] was almost manufactured work . . . and that my supervisors weren’t as interested in manufacturing work”); *Paralegal 10 Interview, supra*, at Tr. 487-99 (“on occasion” she felt that the projects were “manufactured to suck up time”). One Senior Manager recognized that “there [we]re paralegals on staff who believe[d] that that was not value added work,” and “[t]hat it was busy work.” *Senior Manager 5 Interview, supra*, at 2270-74.

⁴⁵¹ *Paralegal 6 Interview, supra*, at Tr. 1131-40.

⁴⁵² See *id.* at Tr. 1142-49.

⁴⁵³ *Senior Manager 2 Interview, supra*, at Tr. 1657-706.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Senior Manager 1 Interview, supra*, at Tr. 2719-25.

⁴⁵⁶ *Senior Manager 6 Interview, supra*, Tr. 355-88.

⁴⁵⁷ *Id.* at Tr. 392-99.

this situation could have happened, he never asked anyone why the Other Time waste was allowed to continue for four years.⁴⁵⁸

He also worked with a well-known outside consulting firm (Outside Consulting Firm), which conducted a workload/utilization analysis.⁴⁵⁹ Outside Consulting Firm found that the PTAB had a significant backlog of appeal cases, with current production rates being insufficient.⁴⁶⁰ Outside Consulting Firm also found that, from Fiscal Year 2010 to Fiscal Year 2013, the average utilization rate of all non-supervisory Paralegal Specialists was 60%.⁴⁶¹ The rate for Fiscal Year 2013 was approximately 15% higher than the rates for the other years and appeared to be the result of a decrease in non-production hours and an increase in production hours.⁴⁶² Outside Consulting Firm stated that the cause for this shift could not be confirmed, but may be due to actual increased production or to increased scrutiny on the use of Other Time.⁴⁶³ Furthermore, Outside Consulting Firm found that the amount of time allowed by the production-based PAP to complete tasks was not reflective of the actual amount of time spent completing those tasks.⁴⁶⁴ Additionally, Outside Consulting Firm found that the PTAB was positively reducing its case backlog, as the monthly average number of cases disposed of in Fiscal Year 2013 was slightly higher than the number of cases received.⁴⁶⁵

Outside Consulting Firm also found that the practice of organizing Paralegal Specialists into subject matter teams may not be the most effective organizational design, as Paralegal Specialists' knowledge of a technical area was not required.⁴⁶⁶ Additionally, the consulting firm concluded that Supervisory Paralegal Specialist-to-employee ratio of 1:4 was extremely low, especially in a work environment "where oversight [wa]s not of utmost importance."⁴⁶⁷ As a comparison, the benched-marked USPTO Central Re-exam Unit and Appeals Center had a combined supervisor-to-employee ratio of 1:23.⁴⁶⁸ Outside Consulting Firm further found that, based on current data and planned production levels, the PTAB's current number of Paralegal Specialists exceeded the number of Paralegal Specialists the PTAB will require through 2016, and possibly beyond.⁴⁶⁹

Senior Manager 6 explained to the OIG that he and management discussed Outside Consulting Firm's conclusion that the PTAB was at "70 percent capacity."⁴⁷⁰ They decided that "further investigation" was needed to determine (a) is the number accurate, and (b) if so, "what do we do?"⁴⁷¹ He stated that they decided that because the AIA work was "ramping up" and they

⁴⁵⁸ See *id.* at Tr. 1982-2055.

⁴⁵⁹ See *id.* at Tr. 420-21.

⁴⁶⁰ See *Outside Consulting Firm Report, supra*, at 3.

⁴⁶¹ See *id.* at 4.

⁴⁶² See *id.* at 3.

⁴⁶³ See *id.*

⁴⁶⁴ See *id.* at 5.

⁴⁶⁵ See *id.* at 6.

⁴⁶⁶ See *id.* at 7.

⁴⁶⁷ See *id.*

⁴⁶⁸ See *id.*

⁴⁶⁹ See *id.* at 8, 55.

⁴⁷⁰ See *Senior Manager 6 Interview, supra*, at Tr. 1741-48.

⁴⁷¹ See *id.* at Tr. 1760-64, 1780-88.

“need[ed] more and more assistance in that,” this 70% figure may be inaccurate and the PTAB needed the 30% excess capacity to tackle the additional work.⁴⁷²

When asked whether, after receiving the whistleblower complaints, he and other managers considered using Paralegal Specialists to write opinions, Senior Manager 6 stated that they did not believe that they could because of the Union and because the Paralegal Specialists did not have the technical backgrounds to do the work.⁴⁷³ However, they did not discuss with the Union representative or USPTO Labor Relations staff whether the Paralegal Specialists could undertake this task, and he did not recall whether they considered that clerks of federal courts draft opinions on patent claims without having technical backgrounds; rather, they focused on hiring additional judges and their patent attorney program.⁴⁷⁴ He stated that it was “too complicated and . . . perhaps too heavy of a lift at [that] point” to explore the possibility of having paralegals help draft opinions.⁴⁷⁵

Senior Manager 6 determined, however, that the paralegal PAP was “out of whack.”⁴⁷⁶ He explained that the Paralegal Specialists “out produce[d] the PAP” because the Paralegal Specialists could perform the work much faster than the PAP envisioned.⁴⁷⁷ Additionally, he stated that the PAP did not appropriately measure the quality of their work because they were only judged on reviews of a few cases rather than all of the cases.⁴⁷⁸ He also stated that he believed that, after receiving feedback from judges and supervisors on the Paralegal Specialists’ work,⁴⁷⁹ it “just seemed to [him] that . . . not all paralegals should be outstanding or displaying or exemplifying outstanding work.”⁴⁸⁰

Paralegal Specialists and managers also described the overall Outstanding performance rating level as too easily attainable.⁴⁸¹ Witnesses told the OIG that, even among Paralegal Specialists who attained the Outstanding level (overall point score of 460 to 500), there was some discontent about not receiving a perfect 500 score.⁴⁸² Also, despite most Paralegal Specialists receiving an Outstanding rating for the quality element, one Supervisory Paralegal Specialist stated that there were issues with the quality of the Paralegal Specialists’ work product.⁴⁸³ That Supervisory Paralegal Specialist expressed particular displeasure at the productivity element criteria, stating that they did not accurately distinguish higher performers from lower performers.⁴⁸⁴ As an example, the supervisor explained that one high-performing paralegal

⁴⁷² See *id.* at Tr. 1791-804.

⁴⁷³ See, e.g., *id.* at Tr. 2060-98.

⁴⁷⁴ See, e.g., *id.* at Tr. 2099-197.

⁴⁷⁵ See, e.g., *id.* at Tr. 2199-225.

⁴⁷⁶ See *id.* at Tr. 436-37.

⁴⁷⁷ See *id.* at Tr. 480-506.

⁴⁷⁸ See *id.* at Tr. 482-506; see also *Manager 1*, *supra*, at Tr. 4777-95 (although agreeing that management changed the PAP so not as many Paralegal Specialists would get bonuses this year, recognizing that the previous production-based PAP did not accurately reflect a Paralegal Specialist’s quality because it measured errors against all of the Paralegal Specialist’s activities rather than product reviewed).

⁴⁷⁹ See *Senior Manager 6 Interview*, *supra*, at Tr. 509-528.

⁴⁸⁰ See *id.* at Tr. 620-29.

⁴⁸¹ See, e.g., *id.* at Tr. 619-29, 703-12, 943-49, 2904-06; *Paralegal 1 Interview*, *supra*, at Tr. 2401-12; *Senior Manager 2 Interview*, *supra*, at Tr. 1417-23; *Paralegal 7 Interview*, *supra*, at Tr. 2735-53; *Manager 2 Interview*, *supra*, at Tr. 2437-58.

⁴⁸² See *Senior Manager 4 Interview*, *supra*, Tr. 2268-80.

⁴⁸³ See *Manager 3 Interview*, *supra*, at Tr. 1121-130.

⁴⁸⁴ See *id.*

achieved 300% of goal, while a lower-performing paralegal achieved 150%; both Paralegal Specialists had to be rated Outstanding for the productivity element.⁴⁸⁵

Thus, management worked to change the PAP to a “generic” PAP, rather than a production-based PAP until management could better understand the Paralegal Specialists’ new tasks and activities related to the AIA cases and determine more accurate metrics to assess performance.⁴⁸⁶ For example, Senior Manager 6 stated that he would like the quality element of the next PAP to “be based on work that’s reviewed,” so that if a Supervisory Paralegal Specialist reviewed five cases out of 100 and found five errors, the paralegal’s error rate would be five out of five, rather than five out of 100.⁴⁸⁷ Others interviewed had different views – they believed that Paralegal Specialists’ PAP was likely changed because too many Paralegal Specialists were obtaining Outstanding ratings,⁴⁸⁸ which was probably disfavored by management given the large amount of Other Time. As shown in Figure 4 above, 97% of Paralegal Specialists received four or five ratings from Fiscal Years 2009 through 2013.

Additionally, bonuses given to Paralegal Specialists at the end of the 2013 calendar year were pro-rated by the amount of Other Time logged. Senior Manager 6 informed the OIG that he had “struggled with on the one hand . . . paying them . . . not to do work And then at the end of the year, they’re also getting a bonus.”⁴⁸⁹ Thus, at the end of 2013, he changed the calculation: rather than give a bonus to every Paralegal Specialist who reached the 1,250 total hours threshold, he paid a bonus to the Paralegal Specialists who reached 1,250 hours *excluding* Other Time.⁴⁹⁰ When asked why management did not pro rate the bonuses in the earlier years, various members of management, including Chief Judge 2, stated that they did not know

⁴⁸⁵ See *id.*

⁴⁸⁶ See *Senior Manager 6 Interview, supra*, at Tr. 491-602, 754-82, 796-819.

⁴⁸⁷ *Id.* at Tr. 845-54.

⁴⁸⁸ See, e.g., *Paralegal 6 Interview, supra*, at Tr. 1556-95 (stating that the PAP was changed likely because it resulted in inaccurate ratings); *Senior Manager 5 Interview, supra*, at Tr. 1238-48 (stating that it would not surprise him if management changed the PAP in 2013 because nearly all of the Paralegal Specialists were receiving Outstanding ratings); *Senior Manager 1 Interview, supra*, at Tr. 1419-27 (stating that the PAP was changed because “most everybody” was rated as Outstanding, which resulted in too many Outstanding ratings); *Senior Manager 2 Interview, supra*, at 1420-23 (stating that the PAP was changed “because it was too easy. Everybody was getting [O]utstanding.”); *Paralegal 1 Interview, supra*, at Tr. 1654-59, 2401-04 (stating that management abolished the production system because too many Paralegal Specialists were being rated Outstanding); *Paralegal 9 Interview, supra*, at Tr. 1602-09, 1646-47 (stating that the Paralegal Specialists were taken off of the production standard “because it was determined that too many people were outstanding” and the “I think the idea is to get the bonuses down”); see also *Manager 1 Interview, supra*, at Tr. 1352-96 (stating that even if Paralegal Specialists had many hours of Other Time, they would still receive the highest ratings because they finished the little amount of work they had in the right amount of time, which did not accurately reflect their performance); *Paralegal 7 Interview, supra*, at Tr. 2695-764 (stating that although she understood that management changed the PAP because they wanted Paralegal Specialists to slow down in order to reduce errors, she believed that they changed the PAP from production because too many Paralegal Specialists got bonuses). One Senior Manager stated that he understood that there was a “quality issue, particularly with decisions,” and the PAP did not accurately measure quality, but he would have just adjusted the production units, rather than move to a generic PAP. [REDACTED]

⁴⁸⁹ *Senior Manager 6 Interview, supra*, at Tr. 872-79.

⁴⁹⁰ *Id.* at Tr. 881-93, 1039-74. For example, if a Paralegal Specialist works 1,149 productive hours, to calculate his bonus, one would divide 1,149 by 1,250 and then multiply that figure by five percent of the Paralegal Specialist’s salary. See *id.* at 1096-102.

of and did not consider this option.⁴⁹¹ One Senior Manager stated that historically, calculating bonus figures had “always been out of [supervisors’] hands.”⁴⁹² Another stated that Paralegal Specialists’ bonuses could not have been previously altered “because they were meeting the criteria of their PAP,” but agreed that, if management reduced bonuses in 2013, management could have done so in the prior years.⁴⁹³ When asked whether there was anything that led him to believe that the bonuses could not have been pro-rated before this past occurrence, Senior Manager 6 responded, “[N]o.”⁴⁹⁴

Chief Judge 2 recognized that prior years’ high ratings and bonuses were inappropriate. In an e-mail to Senior Managers in July 2013 he wrote,

We need to ask ourselves not only, why were the performance evaluations all so ridiculously high, but also, why were they so high for so long without anybody saying this is absolutely ridiculous.

Similarly, we need to ask whether we approve bonuses in keeping with a particular formula without taking a step back to see whether it is truly appropriate to do so – regardless of union considerations. The people on Capitol Hill who grill senior officials and end their careers permanently don’t always extend sympathy for people who say they were following accepted practices or pre-existing deals when they proceeded to do something that most taxpayers/voters would find highly inappropriate. We have an obligation to scrutinize what we are doing and not merely to fall into existing patterns of behavior.⁴⁹⁵

Similarly, Supervisory Paralegal Specialists and their supervisors received lower bonuses at the end of 2013 because they were given lower ratings.⁴⁹⁶ When asked why, Senior Manager 6 stated that it was “hard for [him] to agree to a rating where all supervisors were [O]utstanding . . . as they had been year after year . . . I mean, again . . . they were just as aware of what was going on as anybody else.”⁴⁹⁷ He was also “hard-pressed for either one of [the Paralegal

⁴⁹¹ See, e.g., *Chief Judge 2 Interview, supra*, at Tr. 2793-809 (stating that when he started discussing the Other Time situation with managers, he consulted with Managing Judge 1 and Senior Manager 5 about not awarding bonuses to Paralegal Specialists and was told “what we are required to pay in the way of bonuses is the subject of a union agreement”); *Managing Judge 1 Interview, supra*, at Tr. 2993-3004 (stating that he “can’t answer” the question of why bonuses for Paralegal Specialists were not pro-rated prior to 2013); *Senior Manager 6 Interview, supra*, at Tr. 1162-75 (stating that nothing leads him or her to believe that that bonuses for Paralegal Specialists could not be pro-rated in the years prior to 2013); *Senior Manager 5 Interview, supra*, at Tr. 2509-33 (stating that Paralegal Specialists received bonuses based on their performance rating and their bargaining unit agreement), 2598-602 (stating that he felt as if he had no discretion over giving bonuses to Paralegal Specialists), 2640-67 (stating that he “thought it was kind of foolish” to give bonuses to Paralegal Specialists but believed, along with other managers, that “we don’t really have an option in the matter”).

⁴⁹² *Senior Manager 1 Interview, supra*, at Tr. 3687-707.

⁴⁹³ *Senior Manager 2 Interview, supra*, at Tr. 2869-70, 3096-152.

⁴⁹⁴ *Senior Manager 6 Interview, supra*, at Tr. 1162-74.

⁴⁹⁵ *Managing Judge 1 Documents #2, supra* (emphasis omitted) (July 17, 2013, e-mail from Chief Judge 2 to PTAB management).

⁴⁹⁶ See *Senior Manager 6 Interview, supra*, at Tr. 2726-83. One Senior Manager explained that the supervisors’ ratings were “dropped” on their PAPs – everyone with an Outstanding received a Commendable, for example. *Senior Manager 2 Interview, supra*, at Tr. 2859-65.

⁴⁹⁷ *Senior Manager 6 Interview, supra*, at Tr. 2726-83.

Specialists’] second-level supervisors to make a case that they should have been [O]utstanding.”⁴⁹⁸ This Senior Manager made the decision on these managers’ bonuses and Chief Judge 2 “signed off on [the bonuses].”⁴⁹⁹

More than one witness told the OIG that managers received lower performance ratings in 2013 in response to the OIG investigation, the Other Time, and the errors found in decisions.⁵⁰⁰ One witness stated to the OIG that a Senior Manager specifically stated to the employee that Other Time was a reason the employee was receiving a lower rating.⁵⁰¹ Another similarly stated that the individual was informed in the individual’s review that the individual’s rating was “marked down . . . because of all the ‘[O]ther’ [T]ime.”⁵⁰²

In an interview with the OIG, one Paralegal Specialist stated that there were still periods of downtime, usually at the beginning of the month, and the Paralegal Specialist filled that time with the eWF project.⁵⁰³ This Paralegal Specialist spent a full day the week before his OIG interview working on the special project.⁵⁰⁴ Overall, however, the Fiscal Year 2013 data and witness testimony indicated that Paralegal Specialists logged only minimal Other Time after May 2013 and were occupying any free time with projects management deemed helpful for the PTAB. Further, evidence indicated that management was in the process of determining how to best create a continuous and consistent flow of opinions from judges to Paralegal Specialists, which should reduce the amount of time each month that Paralegal Specialists are without work. For example, in July 2013, Senior Manager 4 suggested as a “long term goal” to “spread[] out . . . the [j]udges decisions” as it otherwise causes “most teams [to] have more [O]ther [T]ime at the beginning of the month than at the end of the month.”⁵⁰⁵

⁴⁹⁸ *Id.* at Tr. 2788-90.

⁴⁹⁹ *Senior Manager 2 Interview, supra*, at Tr. 2972, 3013-17.

⁵⁰⁰ [REDACTED] (describing lower performance ratings because of the OIG investigation, Other Time, and errors); [REDACTED] (describing lower performance rating because of the Other Time, “IG . . . complaint and everything else”).

⁵⁰¹ [REDACTED]

⁵⁰² [REDACTED]

⁵⁰³ *Paralegal 6 Interview, supra*, at Tr. 1480-90.

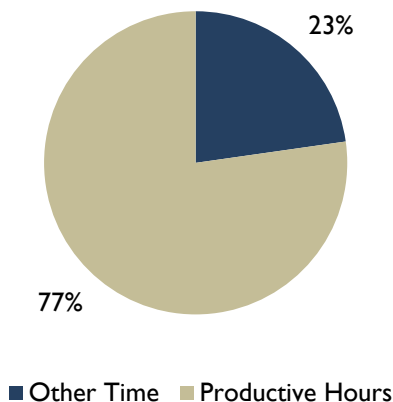
⁵⁰⁴ *Id.* at Tr. 1505-08; see also *Paralegal 11 Interview, supra*, at Tr. 2055-68 (stating that she only processed one case the day before her interview; there is still a workflow problem).

⁵⁰⁵ *Managing Judge 1 Documents #2, supra* (July 16, 2013 e-mail and attachment, from Senior Manager 4 to management, which was forwarded to Chief Judge 2 that same day). A Senior Manager agreed that judges tend to submit more cases for review at the end of the month, rather than the beginning, and also at March and September than at any other time of year. *Senior Manager 4 Interview, supra*, at Tr. 1206-14; see also *Senior Manager 1 Interview, supra*, at Tr. 1296-303 (stating that the beginning of each month is slower and the last week or ten days of each month judges submit more decisions); *Senior Manager 2 Interview, supra*, at Tr. 2540-43 (when asked whether judges tend to work hardest at the end of the month and the end of the quarter, responding “There’s a lot of that going on.”). A Senior Manager stated in his interview that recently “senior leadership has taken steps to try . . . [to] be more consistent” and to get judges to submit opinions more consistently throughout each month and may have added something to their PAP on this. *Senior Manager 1 Interview, supra*, at Tr. 1305-31.

M. Cost of the Mismanagement to the PTAB

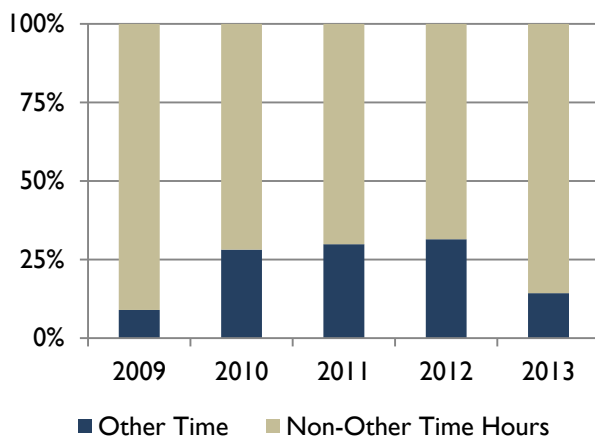
Because of the number of hours logged to Other Time, the PTAB incurred significant waste on employees not engaged in work activities. Paralegal Specialists logged approximately 23% of their time to Other Time between Fiscal Years 2009 and 2013. See Figure 9.

**Figure 9. Paralegal Hours
FY 2009 - 2013⁵⁰⁶**



Further, Other Time was a significant percentage of total time logged each year. See Figure 10.

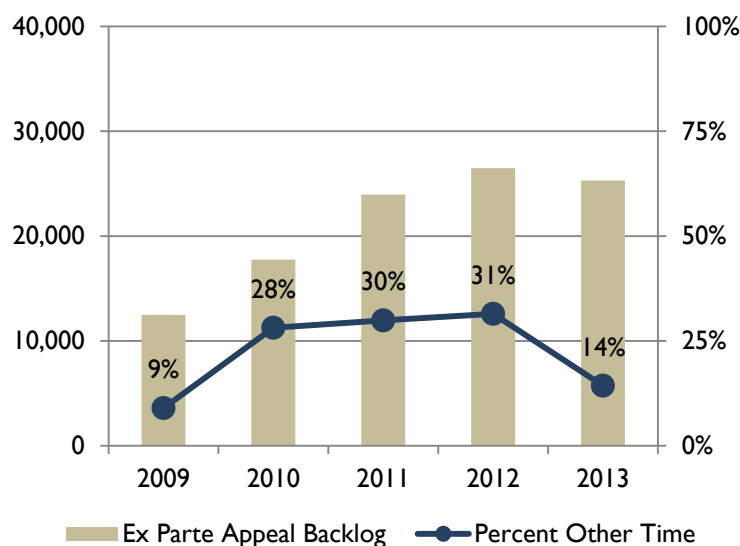
Figure 10. Other Time as a Percent of Total Hours⁵⁰⁷



Additionally, as the backlog increased, Other Time continued to increase until PTAB management worked to shift the Other Time hours to the Legal Administration code. See Figure 11.

⁵⁰⁶ OIG IRF: Data Analysis, *supra*.

⁵⁰⁷ *Id.*

Figure II. Appeal Backlog and Other Time⁵⁰⁸

According to the OIG's calculations, the monetary cost to the PTAB of this Paralegal Specialist Other Time was significant: approximately \$4,323,754.⁵⁰⁹ Including bonuses, that number jumps to approximately \$4,884,950. See Table 5.

Table 5. Wages and Bonuses Paid to Paralegal Specialists by Fiscal Year⁵¹⁰

Fiscal Year	Other Time Wages to Paralegal Specialists	Bonuses Paid to Paralegal Specialists
2009	\$318,871	\$55,012
2010	\$1,164,570	\$90,843
2011	\$1,169,443	\$148,716
2012	\$1,152,207	\$134,592
2013	\$518,663	\$132,033
Total	\$4,323,754	\$561,196
GRAND TOTAL (Paralegals Only)	\$4,884,950	

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.*

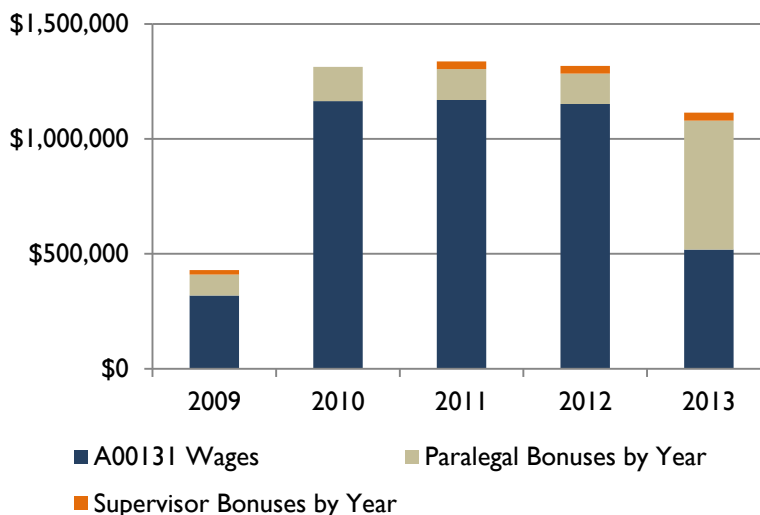
⁵¹⁰ *Id.* “[C]alculations[] conducted by the Human Resources . . . Specialist who conducted the inquiry” showed higher Other Time wages in years 2009 through 2012. *USPTO Response, supra*, at Appendix A (table of “PTAB Total Hours Charged to ‘Other Time’ by Paralegals by FY”).

Including the bonuses paid to the first-line Supervisory Paralegal Specialists and Senior Managers overseeing the paralegal functions,⁵¹¹ that monetary cost increases to approximately \$5.09 million, as shown in Table 6 and Figure 12:

Table 6. Wages and Bonuses Paid to PTAB Employees by Fiscal Year⁵¹²

Fiscal Year	Other Time Wages	Bonuses Paid to Paralegal Specialists and First-Line Supervisory Paralegal Specialists	Bonuses Paid to Certain Senior Managers
2009	\$318,871	\$74,352	\$23,205
2010	\$1,164,570	\$90,843	\$0
2011	\$1,169,443	\$182,284	\$27,464
2012	\$1,152,207	\$167,935	\$13,321
2013	\$518,663	\$166,305	\$23,749
Total	\$4,323,754	\$681,719	\$87,745
GRAND TOTAL	\$5,093,219		

Figure 12. The Cost of Other Time by Year⁵¹³



In addition to the Other Time wages and bonuses earned by these paralegals, if the two “extra” Paralegal Specialists had not been hired per Chief Judge I’s orders, the PTAB would have also

⁵¹¹ These Senior Managers include the second-line managers of the Paralegal Specialists and the Administrative Officer, who was involved in regularly tracking Other Time and in developing the PTAB’s plan to reduce Other Time following the OIG’s referral of the whistleblower complaints. Additionally, the Administrative Officer was involved in calculating performance-based bonuses for Paralegal Specialists and Supervisory Paralegal Specialists.

⁵¹² OIG IRF: Data Analysis, *supra*.

⁵¹³ *Id.*

saved over \$159,000 in wages for hours spent on activities not directly related to production between Fiscal Years 2009 and 2013.⁵¹⁴

Because it examined utilization, as opposed to waste, Outside Consulting Firm calculated 115,158.25 hours were underutilized from 2010 through 2013. See Table 7 below. In calculating the amount of non-production time for utilization analysis purposes, Outside Consulting Firm added Other Time to time charged to the following codes: corporate initiatives, alternative dispute resolution services, Equal Employment Opportunity counseling, awards and recognition, continuity of operations planning, Employee Assistance Program counseling, volunteer employee organizations, contingent activities, Union representative consultations, background investigations, Union meetings, management meetings, and grievance presentations.⁵¹⁵ In performing its waste calculations, the OIG did not include these activities because treating some or all of these activities as non-production could create the impression that they are not important and lead management to discourage its staff from performing such activities. Outside Consulting Firm's calculations of the total amount of paralegal non-production time are listed in the table below.⁵¹⁶

Table 7. Outside Consulting Firm's Calculations of Paralegal Non-Production Time⁵¹⁷

Fiscal Year	Non-Production Hours
2009	Not Included in Firm's Report
2010	37,785.75
2011	35,615.75
2012	29,058.25
2013*	12,698.50
Total*	115,158.25

* Through May 2013

The OIG replicated Outside Consulting Firm's analysis to calculate the amount of wages paid for non-production, as defined by Outside Consulting Firm.⁵¹⁸ The OIG was also able to expand the analysis to include Fiscal Year 2009 and all of Fiscal Year 2013. The OIG found the following:

⁵¹⁴ *Id.*

⁵¹⁵ See *Outside Consulting Firm Report, supra*, at 19, unlabeled table of time codes appended to the numbered pages of the report.

⁵¹⁶ See *id.* at 21.

⁵¹⁷ See *id.*

⁵¹⁸ In doing so, the OIG worked with the USPTO to make necessary adjustments to the data for accuracy purposes.

Table 8. OIG Replication of Outside Consulting Firm's Calculations of Paralegal Non-Production Time⁵¹⁹

Fiscal Year	OIG Replication Non-Production Hours	OIG Replication: Non-Production Wages
2009	15,156.75	\$587,830.48
2010	36,838.50	\$1,519,980.92
2011	35,063.25	\$1,514,609.24
2012	30,022.00	\$1,336,343.83
2013	13,631.25	\$635,426.48
Total	130,711.75	\$5,594,190.95

Adding in the bonuses paid to the Paralegal Specialists and first-line Supervisory Paralegal Specialists (\$681,719) and the bonuses paid to the relevant Senior Managers (\$87,745), the total cost using the Outside Consulting Firm's definition of non-production time equals approximately \$6,363,655.⁵²⁰

II. Analysis

A. PTAB Incurred Gross Waste in Poorly Executing Its Hiring Plan and Failing to Timely Address the Other Time Problem.

The evidence established that, from Fiscal Year 2009 through Fiscal Year 2013, the PTAB paid numerous Paralegal Specialists full-time wages, even though the paralegals spent a considerable portion of their work hours doing nothing. In fact, some of these employees logged more than half of their work hours to the Other Time code. Worse, the evidence established that, despite the huge volume of non-productive work time among PTAB's Paralegal Specialists, these employees received thousands of dollars in bonuses every year.

We found that these expenditures were wasteful. As explained above, the waste in paying Paralegal Specialists for non-production time during the relevant time period ranged between \$4.3 million and \$5.6 million, depending on whether the OIG's or Outside Consulting Firm's formula is used. Adding in approximately \$681,719 in bonuses paid to the Paralegal Specialists and first-line Supervisory Paralegal Specialists and \$87,745 in bonuses paid to the Senior Managers overseeing paralegal operations, the total amount of wasteful spending rises to between \$5.09 million and \$6.4 million.

⁵¹⁹ OIG IRF: Data Analysis, *supra*.

⁵²⁰ *Id.*

It is particularly egregious that Paralegal Specialists with extremely high rates of Other Time still earned bonuses. For instance, the four Paralegal Specialists with the highest averages of Other Time from Fiscal Years 2010 through 2013 earned several thousand dollars in bonuses each year, as reflected in the following table:

Table 9. Bonuses Paid to Paralegal Specialists with the Highest Average Other Time between Fiscal Years 2010 and 2013⁵²¹

Paralegal Specialist	2010	2011	2012	2013
Paralegal A (Percent Other Time)	\$2,393 (46%)	\$3,227 (60%)	No longer in position	No longer in position
Paralegal B (Percent Other Time)	\$2,440 (61%)	\$3,227 (66%)	\$3,331.50 (13%)	No longer in position
Paralegal C (Percent Other Time)	\$2,016 (53%)	\$3,123 (35%)	\$3,227.40 (54%)	\$3,331.50 (33%)
Paralegal D (Percent Other Time)	\$2,602 (56%)	\$3,436 (55%)	\$3,435.60 (47%)	\$3,539.70 (12%)

The majority of the wasteful spending occurred during the tenures of Chief Judge 1 and Chief Judge 2. The table below provides an approximate breakdown of total wages paid for Other Time during the tenures of the respective Chief Judges.

Table 10. Approximate Wages Paid to Paralegal Specialists for Time Spent Logging Other Time (by Chief Judge)⁵²²

Chief Judge 1 (2009-2010)	Acting Chief Judge (Jan. 2011 – April 2011)	Chief Judge 2 (May 2011-2013)
Over \$1.7 million	Over \$350,000	Over \$2.1 million

Part of this Other Time waste resulted from Chief Judge 1's instruction that the PTAB hire two additional paralegals over the objection of the hiring managers. The PTAB paid these two paralegals \$44,581 total in Other Time wages. Beyond those Other Time wages, the PTAB spent on these two individuals over \$172,000 in bonuses and wages not directly related to production between Fiscal Years 2009 and 2013. We note that this latter figure likely underestimates the amount of waste related to the hiring of these two individuals, considering that these two Paralegal Specialists' productive hours could have been shifted to the other

⁵²¹ *Id.*

⁵²² *Id.*

Paralegal Specialists, which would have therefore reduced those other paralegals' Other Time charges as well.

On the whole, the PTAB's waste is especially troubling in light of the USPTO's decision to more than double the regular appeal fees. Essentially, many members of the public who used the USPTO's services, including the PTAB, paid more for those services while the PTAB wasted millions of dollars employing and rewarding full-time personnel who had essentially been working a part-time schedule.

B. *Although Aware of the Waste, Supervisors and Management Ignored the Problem and Even Rewarded the Employees Committing the Waste.*

The evidence was clear that PTAB management was well aware of the volume of Other Time being logged from Fiscal Year 2009 through Fiscal Year 2013. Yet, other than a few short-term projects, management did not take action to rectify the problem and even continued to reward the PTAB staff, from employees to upper management, with Outstanding ratings and significant bonuses. Supervisory Paralegal Specialists and Senior Managers did not recognize their responsibility to resolve this problem. One manager summed up the general attitude in telling a Paralegal Specialist, "We can't do anything about [the lack of work] . . . 'this is the situation we're in.'"⁵²³ It is deeply troubling that so many government officials, including some of the senior-most executives in the organization, were aware of such pervasive waste and took little – or no – action to fix it for nearly five years. Management did not even make an effort to consistently monitor the amount of Other Time until late in Fiscal Year 2012, and not because management was concerned about the amount of Other Time, but rather to "ensure the Board would not be caught unaware when Judge output does again exceed paralegal capacity."⁵²⁴

Given the large amount of Other Time, management should have at least considered how they were rating their employees and refrained from paying the more than \$560,000 in bonuses to Paralegal Specialists between Fiscal Years 2009 and 2013. At a minimum, the PTAB should have pro-rated the Paralegal Specialists' bonuses based on the employees' Other Time, as the PTAB did in late 2013. And if PTAB management previously believed in prior years that it could not have pro-rated or declined to pay bonuses to the Paralegal Specialists under the Labor Agreement, they should not have rewarded the many levels of managers with bonuses, while such waste was occurring on their watch.

Even if management had not been aware of the extent of the problem until September 2011, nothing seemed to have substantially changed until after the OIG referred the whistleblower complaints to the USPTO in early 2013. Moreover, after the OIG referred the complaints in February 2013, no special projects were implemented to reduce the Other Time until May 2013. Worse, the first and principal special project eventually implemented was initially described as "busy work" by the individual who proposed it and merely shifted nearly all of the Other Time to another code, Legal Administration.

⁵²³ [REDACTED]

⁵²⁴ See *USPTO Response, supra*, at Ex. 7 (Official Statement of Senior Manager 5).

Even assuming the 2013 special projects were originally designed to be legitimately helpful projects, the fact that PTAB management failed to implement them earlier reflects poor management and cost the PTAB millions of dollars in wasted funds. Once directed to develop a plan to reduce Other Time to zero, it took mere hours for management to develop the list of projects with which the Paralegal Specialists could occupy their free time. Yet, from 2009 through nearly half of 2013, the Chief Judges and their management team simply waited for the end of the hiring freeze at some unknown date in the future to resolve the problem. The evidence established that they expended efforts to push USPTO management to end that freeze, which did not occur until December 2011, rather than address the growing Other Time problem. But after three years, and spending more than \$2.6 million on wages to paralegals for logging Other Time from Fiscal Years 2009 to 2011, the Chief Judges and Senior Managers should have taken other action to remedy this problem, particularly since most interviewed by the OIG assumed that Paralegal Specialists were watching television, surfing the internet, and pursuing other personal activities while being paid by the U.S. Government. Even Chief Judge 2 recognized in an internal memorandum that management “only took decisive action [regarding use of Other Time] when the OIG referred the whistleblower complaints to the USPTO.”⁵²⁵

One example of this lack of effort is management’s failure to distribute the work more evenly among teams despite the fact that some teams had far greater Other Time than others. PTAB management also apparently failed to explore other options such as details or layoffs for the teams who had extreme amounts of Other Time, sometimes as high as 66% in a given year. As Chief Judge 2 recognized in July 2013, despite “long term work imbalances between groups, . . . [management] seems never to have addressed these imbalances until recently.”⁵²⁶

Additionally, the Chief and Vice Chief Judges did not make efforts to use the many layers of management to resolve the Other Time problem while the judges were busy developing and preparing for the implementation of the AIA. The PTAB should have recognized that such a task would take large amounts of time and ensured that other members of management were still dealing with reducing the waste caused by the Other Time.

The OIG investigation revealed that individuals at all levels of management immediately dismissed many solutions to the Other Time problem in 2011 because of an aversion to dealing with the Union. Some managers were effectively paralyzed out of concern that the Union would object to any idea they had to keep Paralegal Specialists busy. This again reflected poor management. Whatever aversion some employees may have to Union negotiation should not prevent managers from discussing possible options that may involve Union negotiation.

In addition, although PTAB managers characterized potential discussions with the Union as “a huge obstacle”⁵²⁷ and “a stumbling block,”⁵²⁸ the evidence did not show that PTAB management addressed this problem. Rather than evaluate its relationship with the Union, PTAB

⁵²⁵ OIG IRF: Review I of Electronic Documents Received from USPTO (October 25, 2013, Memorandum from Chief Judge 2 to File).

⁵²⁶ *Managing Judge 1 Documents #2, supra* (emphasis omitted) (July 17, 2013, e-mail from Chief Judge 2 to Senior Manager 6 and Managing Judge 1).

⁵²⁷ *Chief Judge 1 Interview, supra*, at Tr. 980-87

⁵²⁸ *Senior Manager 2 Interview, supra*, at Tr. 2157-63

management largely ignored any problems, which is especially egregious in light of the large amount of waste resulting from the logging of Other Time.

On some occasions, witnesses interviewed did not even know whether Union negotiation would be necessary if they pursued a particular option to reduce Other Time and still stated that they did not explore those options. For example, because the Labor Agreement expressly provided that “[a]ll awards [we]re subject to budgetary limitations and [we]re paid at the discretion of the [USPTO],” PTAB management should have explored whether it could have declined to pay bonuses to all of the employees who were being paid full-time salaries to essentially work part-time. Management also should have evaluated whether, under other provisions of the Labor Agreement, the PTAB could have asked for volunteers to be temporarily detailed to work on opinions until the PTAB could hire more judges. Management may not have been required to give these employees more pay, a higher grade, or advertise a new position to the public to make this change, contrary to the speculations of some interviewed by the OIG. Given that multiple Paralegal Specialists expressed interest in doing this type of work and managers believed a significant number of paralegals were overqualified for their job, it seems likely that they could have more fully employed these Paralegal Specialists while helping to reduce the backlog faster.⁵²⁹

Similarly, PTAB management apparently did not consider changing the paralegal PAP to account for the volume of Other Time. Management seemed to have flexibility and authority to do so under the Labor Agreement without Union negotiation. Yet only after the OIG sent the whistleblower complaints to the USPTO for investigation did the PTAB endeavor to change the PAP, albeit temporarily, to attempt to better reflect the performance of the paralegals, and prorate the bonuses by the amount of Other Time.

Importantly, it seems that the current Chief Judge, his Vice Chiefs, and Senior Managers have worked over the past year to effectively eliminate the amount of Other Time. We credit their efforts, as they appear to have reduced the amount of time employees are being paid to do nothing. However, management needs to continue to monitor the amount of administrative time being logged, especially with respect to special projects. A high volume of administrative time could indicate a waste issue, and, if so, management should examine whether it has too many paralegals for the amount of available work and take action. Additionally, management needs to ensure that it continues to assign worthwhile special projects to the paralegals during slow periods, to ensure that they are not masking staffing and workflow problems with meaningless busy work.

C. Paralegal Specialists Likely Violated Telework Rules in Logging Other Time.

When teleworking, Paralegal Specialists have been required to be accessible and available during work hours. As such, they have been required to respond to voicemail and e-mail in a timely manner. Additionally, paralegals have been required to work on tasks directly related to their job functions or as otherwise assigned by a supervisor. Furthermore, Paralegal Specialists have

⁵²⁹ If management had reviewed the Labor Agreement they would have also found that it was indeed possible to shift Paralegal Specialists to part-time status after they asked for volunteers and negotiated with the Union, if necessary.

been required to ensure that personal responsibilities do not interfere with work duties. Paralegal Specialists have participated in telework training programs and have understood that they are not permitted, while on government time, to conduct such personal activities as watching television, reading books, browsing the internet, performing work for other organizations, and doing laundry and other household chores.

Nevertheless, the evidence established that Paralegal Specialists engaged in at least the following personal activities while on government time:

- reading books;
- browsing the internet;
- shopping online;
- cleaning dishes;
- watching television;
- doing household chores;
- sending and receiving personal e-mail messages;
- using social media, such as Facebook;
- reading the news;
- reading magazines;
- making personal telephone calls; and
- performing volunteer work for a non-profit organization from home.

As noted above, Department of Commerce policies 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.”⁵³⁰ We note that, while federal rules generally permit de minimus use of government resources for personal reasons, the evidence established that the activities described above exceeded such negligible usage. Therefore, it is reasonable to conclude that Paralegal Specialists violated telework policies by engaging in these activities and logging those hours under Other Time.

Regardless of whether these activities constituted a violation of Department of Commerce rules, we found such conduct to be troubling. Any reasonable person should know that extreme non-productivity for such extended periods of time is not acceptable, especially for a federal employee whose wages are paid by the public. Moreover, the allegations that some Paralegal Specialists gamed the system to avoid work, while ostensibly maintaining their productivity and receiving bonuses, are deeply disturbing. Federal employees should be held to a higher standard, and those that manipulated their work environment to dodge work and artificially inflate their performance ratings should be disciplined accordingly. At the same time, however, we recognize that PTAB managers laid the foundation for these problems, as the managers were aware of the extensive amount of Other Time and believed, or had reason to believe, that Paralegal Specialists conducted personal activities while on government time.

⁵³⁰ DOC Department Administrative Order 202-751, App. B.

In light of the fact that the Paralegal Specialists did not have sufficient work to occupy a full-time schedule, it is reasonable to conclude that their supervisors – the Supervisory Paralegal Specialists – were also underworked. In fact, one such supervisor confirmed to the OIG that she sat at her desk with nothing to do many days and that some of her peers were similarly underworked. Supervisory Paralegal Specialists spend a significant portion of their time correcting and assigning work, and evidence established that the amount of quality checking did not increase during this time frame. While none of the Supervisory Paralegal Specialists admitted to the OIG that they pursued personal activities during work hours, our review of the evidence established that it is reasonable to conclude that many of them did not have sufficient workloads to occupy full-time schedules.

D. Paralegals and Managers Violated Regulations, Executive Orders, and Policies in Failing to Report the Waste.

Evidence showed that multiple levels of personnel at the PTAB knew that Paralegal Specialists did not have enough work and knew how long that problem had persisted. Yet, except for the whistleblower(s) who contacted the OIG, these employees, from the Paralegal Specialists to PTAB's highest executives, seemingly sat on their hands. They seemed to rest on their impression, which the evidence supported, that everybody knew this was going on. Once they had seen how many weeks and then months and then years of waste were occurring at the PTAB, employees should have reported the waste to the highest of management and the OIG.

By failing to report the significant waste incurred by the PTAB when Paralegal Specialists were being paid to not work, numerous PTAB employees appear to have violated various laws and Department of Commerce policies. As noted above, Section 2635.101(b)(11) of Title 5 of the Code of Federal Regulations states, "Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities."⁵³¹ Additionally, Department of Commerce Administrative Order 207-10 § 3.01 provides that

information indicating the possible existence of any of these activities [which may constitute mismanagement, waste of funds, abuse of authority, or a violation of law or regulation] is to be reported to the OIG If a Department official or employee has any question about whether a particular matter should be reported to the OIG, the official or employee should contact the [Principal Assistant Inspector General for Investigations] or the OIG Hotline.⁵³²

Further, employees cannot argue that it was not their role to report this waste. The law is clear: it is their duty to do so. In fact, courts have identified this regulation as an example of a

⁵³¹ 5 C.F.R. § 2635.101(b)(11); see also *United States v. White Eagle*, 721 F.3d 1108, 1116-17 (9th Cir. 2013) ("[A]ll government employees[] ha[ve] a duty to 'disclose waste, fraud, abuse, and corruption to appropriate authorities,' codified in the Code of Federal Regulations as a '[b]asic obligation of public service.'" (final alteration in original)); Exec. Order No. 12,674 § 101(k), 5 C.F.R. § 2635 (1989).

⁵³² Dep't of Commerce Administrative Order 207-10 § 3.01 (effective December 12, 2012).

“situation in which [an] employee is obligated to report the wrongdoing [even if] . . . not part of the employee’s normal duties or the employee has not been assigned those duties.”⁵³³

We credit the whistleblower(s) who did come forward and fulfill their duties by reporting the ongoing waste at the PTAB. Many other PTAB employees, however, clearly failed to fulfill their obligations and let the waste continue unfettered.

⁵³³ *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1354 (Fed. Cir. 2001) (“For example, the regulations, 5 C.F.R. § 2635.101(b)(11), specifically require all employees to ‘disclose waste, fraud, abuse, and corruption to appropriate authorities.’”).

Chapter 4: Conclusions and Recommendations

I. Findings

As a result of the analysis described above, the OIG found that:

- (i) the PTAB wasted millions of dollars by paying employees for non-productive time;
- (ii) numerous PTAB Paralegal Specialists appear to have violated PTAB telework rules by engaging in impermissible activities during official work hours for which they received full pay;
- (iii) PTAB management knew of the non-productive time, failed to address the problem in a timely or effective manner, and even rewarded employees who had logged extensive non-productive hours with performance bonuses; and
- (iv) PTAB management started taking real measures to fix the problems only after the OIG became involved.

II. Conclusions

Beyond the findings presented above, the OIG reached broader conclusions regarding the management structure and the telework programs at the PTAB. It is deeply disturbing that, despite the many layers of management at the PTAB and the fact that members at each level knew of the Other Time problem, no manager took action or responsibility to resolve the Other Time problem. Only after the whistleblowers brought this matter to the attention of the OIG and the OIG forwarded the complaints to the USPTO for investigation did PTAB management seriously address the issue. PTAB managers seemed to accept that someone up the chain was aware of and content with their employees' troublingly high volume of idle time. Moreover, when efforts were made to develop projects for the Paralegal Specialists in late 2011, those efforts were generally feeble and short-lived. The highest-level PTAB managers were preoccupied with preparing for AIA matters, which took significant time, and the many layers of managers beneath them did not seem to actively take over the task of resolving the Other Time problem.

In short, no one at the PTAB took ownership of the problem. As a result, PTAB's management was ill-equipped to resolve administrative problems – problems were not adequately communicated up the chain and middle managers were not aware of their responsibilities to resolve problems on their own initiative.

In addition, the OIG concluded that the nature of the PTAB telework programs exacerbated the Other Time problems. First, the fact that the paralegals were not physically present in an office environment likely masked the extent of the problem and enabled supervisors to look the other way. Had the 38 to 51 Paralegal Specialists been in the office between Fiscal Years 2009

and 2013 – when they were not working more than 23% of the time – perhaps the Other Time problem would have been more obvious and undeniable.

Furthermore, we found that the telework programs did not foster adequate communication between management, Paralegal Specialists, and Supervisory Paralegal Specialists. Paralegal Specialists and Supervisory Paralegal Specialists were physically separated from each other and senior management, as if each were on his or her own island. The paralegals largely communicated with their supervisors only when they had questions. The many years of confusion over critical questions – such as when Paralegal Specialists were permitted to log Other Time, whether they had to inform their supervisors if they were out of work, whether they had to ask for permission to log Other Time, how much Other Time they could log, and when they could work each day – largely could have been resolved through more direct, face-to-face communication, or at least more regular check-ins or team conference calls.

Furthermore, the OIG concluded that, although PTAB management recognized the strengths and skills of some of their Paralegal Specialists, they failed to practically apply their strengths and skills by providing the Paralegal Specialists with work best suited for their abilities. PTAB management should have at least explored whether those Paralegal Specialists could have helped to reduce the backlog in other ways beyond creating eWFs and editing opinions when they trickled in. In fact, some paralegals stated clearly that they would be interested in taking on additional responsibilities. More broadly, the PTAB should consider how best to use its Paralegal Specialists, and whether differing duties, and thus differing grades, are appropriate.

III. Recommendations

A. Recommendation 1

The PTAB should institute clearer telework rules, including what types of activities are permissible and impermissible on official duty. The PTAB should provide regular training to all teleworking employees and their supervisors on those rules. Additionally, the PTAB should review the effectiveness of all of its telework programs and determine whether they are appropriate for the work of the organization.

B. Recommendation 2

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.

C. Recommendation 3

The PTAB should examine the workloads of the Paralegal Specialists and Supervisory Paralegal Specialists on a regular basis and implement a process to readjust workforce assignments, among other things, if employees have insufficient workloads.

D. Recommendation 4

The PTAB should review the Labor Agreement for efficiency and effectiveness and insist on implementing policies or even modifying terms as necessary to prevent waste and abuse of government resources.

E. Recommendation 5

The PTAB should analyze and determine the best use of its Paralegal Specialists and whether some are better suited to working on different tasks than others. Along these lines, the PTAB should explore advancement opportunities for Paralegal Specialists and whether Paralegals Specialists need to be classified at different GS levels based on their skills and experience.

F. Recommendation 6

The PTAB should provide consistent directions to its employees, including managers – ranging from how many documents supervisors should review each month to how to use particular time codes and what to do when they have insufficient workloads.

G. Recommendation 7

The PTAB should continue to examine how to incentivize judges to submit opinions throughout the months and fiscal year, so that they do not continue to submit the majority of their decisions at the end of the months and at certain times of the fiscal year. For example, the PTAB could consider assigning judges staggered due dates such that some judges submit their decisions at one point of the month and others at another point.

H. Recommendation 8

The PTAB should provide additional training to its entire staff, including managers, on the importance of disclosing waste, fraud, abuse, and mismanagement to appropriate authorities, such as the OIG. In doing so, the PTAB should notify employees that federal law imposes a duty on employees to disclose such waste and inform them of whistleblower protections for such disclosures.

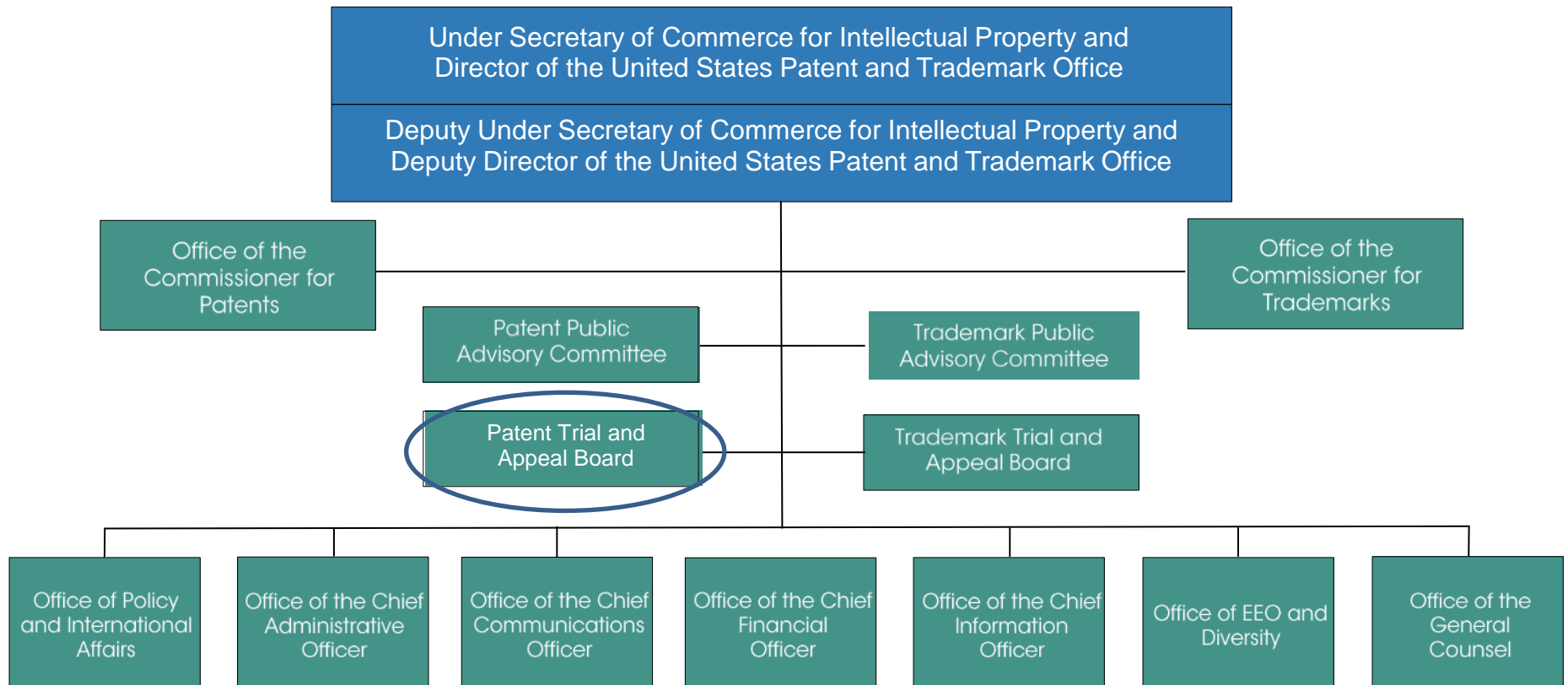
I. Recommendation 9

The PTAB should consult with the USPTO, legal counsel, and the Union and implement a plan to recover, on a voluntary or mandatory basis as legally permissible, bonuses paid to Paralegal Specialists and Supervisory Paralegal Specialists during Fiscal Years 2009 to 2013. The PTAB should particularly focus on all instances in which an employee did not meet the eligibility requirements of working 1,250 non-Other Time hours per year for a full bonus and between 600 and 1,250 non-Other Time hours for a pro-rated bonus. If an employee received a full bonus but was only eligible for a pro-rated bonus, the difference between the full and pro-rated bonus may be an improper payment. If an employee received any bonus for which he or she

was not eligible based on hours or rating, the entire bonus may be an improper payment. The PTAB should recover all improper payments.

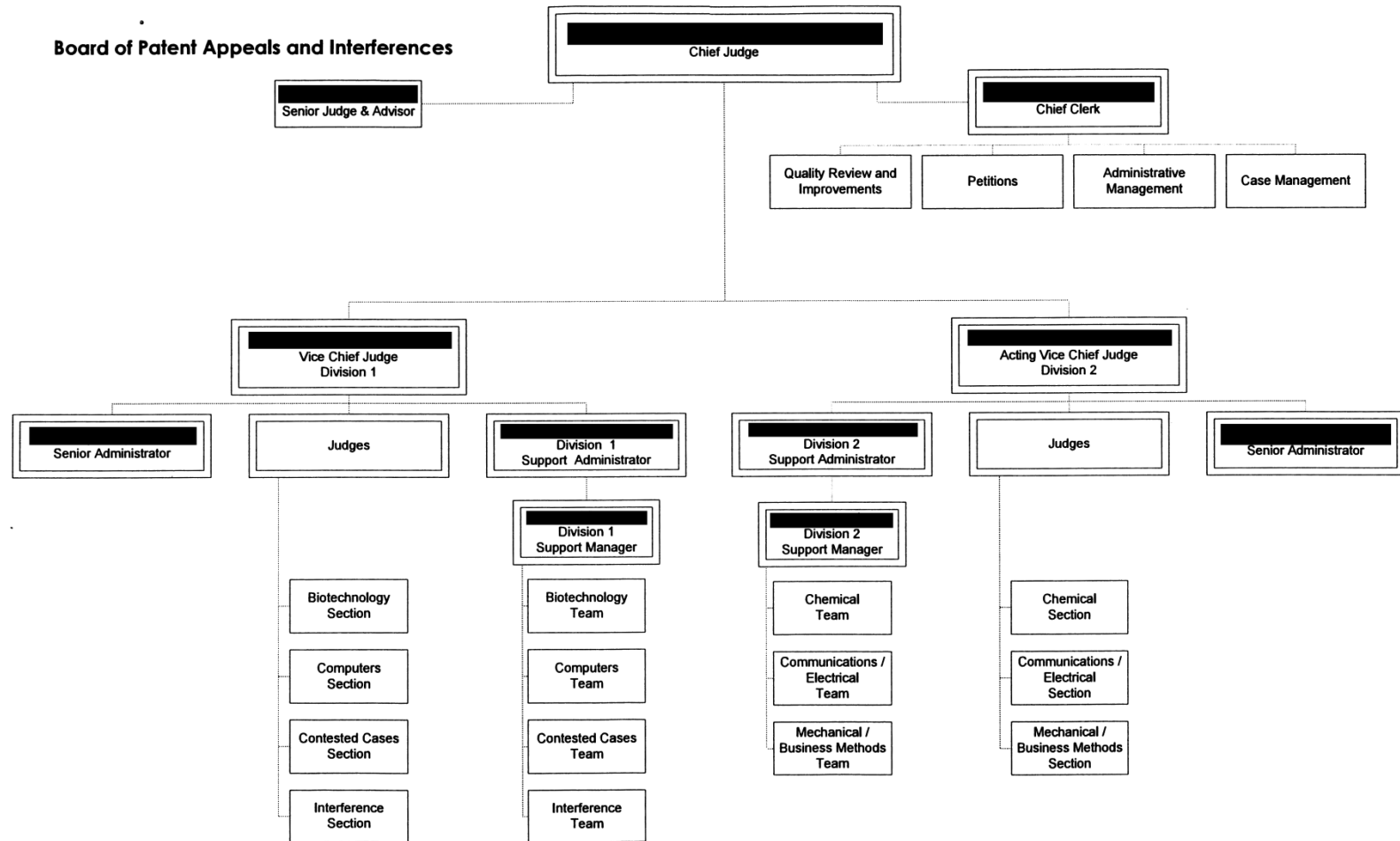
APPENDIX A

I. USPTO Structure¹



¹ USPTO, http://www.uspto.gov/about/bios/uspto_org_chart.pdf (emphasis added) (last visited July 25, 2014).

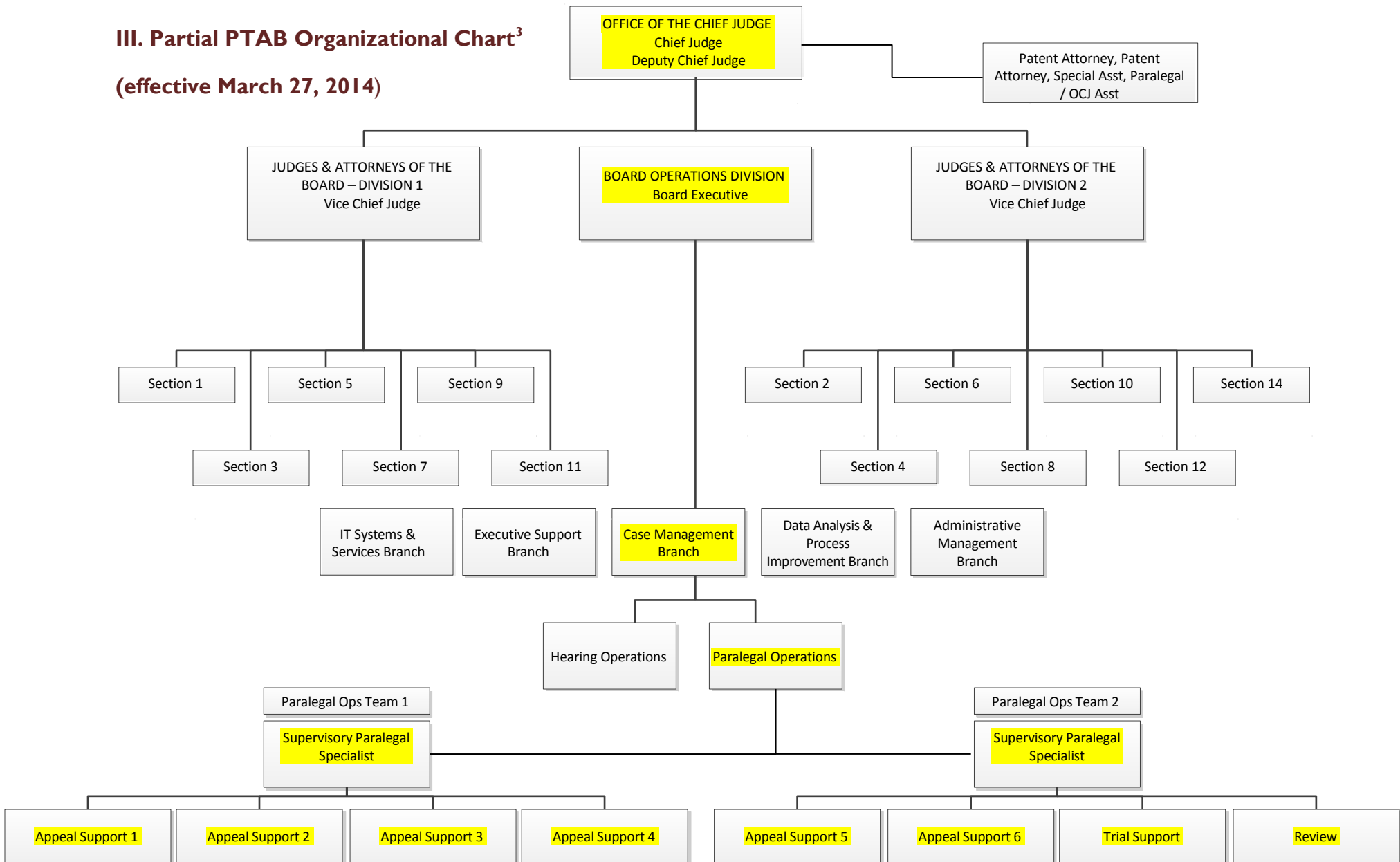
II. Partial PTAB Organizational Chart (as of October 4, 2009)²



As of 4 Oct 2009 (kjb)

² Senior Manager I Interview, *supra*, at Ex. I (redactions applied by the OIG).

III. Partial PTAB Organizational Chart³
(effective March 27, 2014)



³ Paralegal 2 Documents, *supra* (redactions and emphasis applied by the OIG).