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MEMORANDUM

DATE: January 17, 2007

TO: Group Directors
Managing Attorneys
Senior Attorneys
Examining Attorneys

FROM: Deborah S. Cohn
Deputy Commissioner for Trademark Operations

SUBJECT: Revised Management Implementation Guidelines

The Performance Appraisal Plan (PAP) went into effect on May 15, 2005, and the original Management Implementation Guidelines were issued on April 18, 2005 and amended on December 23, 2005. The guidelines are being reissued to better clarify the intended meaning of two provisions relating to balanced disposal transfers, Section I. A. 4. d. and e. All other provisions remain unchanged. This document comprises the complete guidelines and supersedes the guidelines issued on December 23, 2005.

I. PENDENCY

A. Balanced Disposals

- 1) Retroactive first action credit will be given for any classes added to an application once the additional fees are paid. Generally, the attorney advisor should search and examine the number of classes for which fees have been paid. The attorney advisor will determine the classes to which any fees paid will be allocated, which should generally be the lowest numbered class listed in the application, and notify the applicant of this determination.
- 2) Supervisors will notify attorney advisors before withdrawing credit for any reason during the last two weeks of any quarter. The attorney advisor may timely present any information he or she would like management to consider prior to a decision to withdraw credit.

- 3) Attorney advisors shall continue to be provided with the examiner activity report modified to measure performance under the new PAP.
- 4) Balanced Disposal Transfers
 - a. During the first two weeks of the second quarter of the fiscal year, the attorney advisor may transfer up to 50 BDs from the BD totals of the first quarter to the BD totals of the second quarter or may transfer BDs to be earned in the second quarter into the first quarter. During the first two weeks of the third quarter of the fiscal year, the attorney advisor may transfer up to 50 BDs from the BD totals of the second quarter to the BD totals of the third quarter. During the first two weeks of the fourth quarter of the fiscal year, the attorney advisor may transfer up to 50 BDs from the BD totals of the third quarter to the BD totals of the fourth quarter.
 - b. The request must be made in writing before the end of the two-week period.
 - c. The score for the quarter will be determined once the BD transfer has been given effect. In no case may the total BDs for the year before and following the transfers differ. In the event that BDs are transferred to a previous quarter, the subsequent quarter will have a negative BD balance until such time that the attorney advisor has produced sufficient BDs.
 - d. No BDs may be transferred if the attorney advisor's total number of BDs in either the transferring or receiving quarter is below Marginal. An attorney advisor may not transfer BDs into any quarter that the attorney advisor is subject to a performance improvement plan. No BDs may be transferred between rating years.
 - e. If the total number of BDs produced by an attorney advisor during a quarter, aside from those transferred from another quarter, is less than the Marginal goal, the transferred BDs will revert back to the quarter from which they were transferred. The attorney advisor's score for the quarter will be determined solely by the number of BDs produced during that quarter.
 - f. The transfer of BDs is for the determination of the quarterly score only and will not be considered in connection with the level of award for which the attorney advisor is eligible. The transfer of BDs into any quarter will not be considered for a determination of eligibility for either a within grade increase or a promotion.

B. Adjustments

- 1) In appropriate circumstances, the rating official may make reasonable adjustments to the balanced disposal (BD) and first action (FA) goals to determine a fair and reasonable rating in the pendency element. Adjustments may be made during a quarter, at the end of a quarter, or at the end of the rating period, as appropriate.
- 2) For every hour that an adjustment is approved by the supervisor, the BD and FA goals will generally be adjusted proportionally based on a presumption of 385 examining hours per quarter. *I.e.*, for every hour of adjustment given, the BD goals will be reduced by 1/385th.

- 3) When an attorney advisor receives more than 100 hours of adjustments in a quarter, the BD and FA goals for the relevant period will be prorated against the full number of work hours available in a quarter (520), rather than adjusted hourly. This has the effect of treating an attorney advisor as the equivalent of a part-time employee for the remaining hours. *I.e.*, if the net hourly adjustments (hourly adjustments minus paid overtime or compensatory time worked) an attorney advisor receives are in excess of 100 hours, the BD goals for each level of performance and the first action goals will be prorated as follows:

$$\text{New BD goal} = \text{PAP BD goal} \times (520 - \text{total adjustments})/520$$

In appropriate circumstances, if the attorney advisor has examined less than 40% of the quarter, the supervisor has the discretion, with the approval of the group director, to shift the hours and BDs earned to the next or previous quarter.

- 4) For all time approved for union representational duties, an attorney advisor's BD and FA goals will be given a prorated adjustment. The BD goals will be adjusted as follows:

$$\text{New BD Goal} = \text{PAP BD Goal} \times (520 - \text{union time adjustment})/520$$

In effect, the attorney advisor is treated as the equivalent of a part-time employee for the hours when not performing union representational duties. Any additional adjustments received by a union representative for other reasons will be adjusted separately as indicated in (2) and (3) above.

- 5) All time approved for mentoring will be adjusted on the hourly basis indicated in (2) above, regardless of the number of hours of total adjustments. All other adjusted time will be considered separately, and an hourly adjustment will be provided unless all other adjusted time exceeds 100 hours. For example, if an attorney advisor receives adjustments of 70 hours for mentoring and 70 hours for other reasons, there would be an hourly adjustment of 140 hours. If an attorney advisor receives adjustments of 110 hours for mentoring and 120 hours for other reasons, there would be both an hourly adjustment of 110 hours and a prorated adjustment of 120 hours.
- 6) The rating official will normally provide adjustments for the following types of activities:
- Extended absence (including intermittent absences) from the Office where sick leave or FMLA-related leave is used, or there is otherwise an absence due to maternity/paternity, illness, injury, or disability
 - Compensatory time used
 - Approved leave without pay
 - Annual leave for those earning 8 hours of leave per biweek – the adjustment will be 12 hours per quarter
 - Union representational duty time
 - Mentoring
 - Details and work projects
 - Military leave

- Jury duty
- 7) In the case of extended absences due to a serious health condition as defined by the Family and Medical Leave Act, including maternity/paternity leave, adjustments will be given for
- (a) sick leave relating to the particular condition in excess of 22 hours and
 - (b) annual leave relating to the particular condition used in excess of 40 hours.
- Sick leave and annual leave used for purposes unrelated to the serious health condition will be considered in determining whether the 22-hour and 40-hour thresholds are met, but the attorney advisor will generally receive an adjustment for only the leave used in connection with the serious health condition.
- 8) In extraordinary circumstances, with the approval of the group director, the rating official may provide additional adjustments.
- 9) Adjustments are generally not appropriate for time that is within the ordinary scope of the examination process or otherwise job-related, because they have been accounted for in the attorney advisors' goals. Adjustments are generally not appropriate for the following:
- Annual leave (except as indicated in (5) above)
 - Sick leave (except as indicated in (5) above)
 - Holiday leave
 - Administrative leave due to government closures
 - Administrative leave due to blood donation
 - System downtime
 - Time for correcting examination, data entry or workflow errors of others
 - Time for examining difficult or complex applications
 - Time for meeting with applicants and applicants' attorneys
 - Time for writing appeal briefs
 - Time for oral arguments
 - Workflow processing time (such as "TRAM", "TICRS", and "TLTIA" time)
 - Meeting time, including conferences with management
 - Training, including legal lectures, electronic training modules, and conferences
 - Time for preparing financial disclosure forms
 - Time for participation in Office-wide events, such as PTO Community Day and the Combined Federal Campaign
- 10) The PAP goals take into account 20 hours of holiday leave every quarter. Since federal holidays actually occur at irregular intervals throughout the year, for FY 2006 attorney advisors may opt to have their goals adjusted to properly reflect when the holidays occur. The first quarter (four holidays) would receive an adjustment of 12 hours, the second quarter (three holidays) would receive an adjustment of 4 hours, the third quarter (one holiday) would receive an increase of 12 hours, and the fourth quarter (two holidays) would receive an increase of 4 hours. Attorney advisors must opt into this in writing no later than January 14, 2006.

- 11) If an attorney advisor has taken on at least one-half of the docket of another attorney advisor, but has not met the first action requirement, the supervisor may consider adjusting the first action requirement for an appropriate length of time.
- 12) In extraordinary circumstances, such as where the examining attorney has been on extended leave, on detail or involved in other activities which substantially impact an attorney advisor's ability to examine full time, the managing attorney may waive or make appropriate adjustments to the first action requirement.
- 13) An attorney advisor's BD and FA goals will be increased for every hour of paid overtime or compensatory time worked at a rate proportional to each goal based on a presumption of 385 examining hours per quarter. Hourly adjustments will be given for all compensatory time used.
- 14) Part-time – Goals for part-time attorney advisors will be prorated as follows:
New goal = PAP goal x (Weekly hours on part-time schedule / 40)
Any hours worked in addition to a part-time employee's normal schedule would be treated in the same fashion as overtime hours.

C. Docket Management

- 1) The date of delivery of all applications is when the file appears in the attorney advisor's online docket or, in the case of corrections, when the attorney advisor is electronically notified (such as by e-mail). Applications delivered on weekends, holidays or after normal business hours will be considered to have been delivered on the next business day. Applications delivered to an attorney advisor while the attorney advisor is on leave will be considered to have been delivered on the date the attorney advisor returns to a duty status. Applications where OTQR has identified an error will be considered to have been returned to the attorney advisor when the attorney advisor's supervisor instructs him or her to take corrective action.
- 2) Managers must ensure that all employees follow proper procedures regarding the transfer of new applications (such as special marks or copending applications) to attorney advisors who did not electronically request them. If a file should be reassigned to a new attorney advisor, the transferring employee must contact the new attorney advisor or the new attorney advisor's supervisor (such as by e-mail) to identify the application to be transferred but may not reassign the file. The new attorney advisor will reassign the file immediately upon receiving the notice, or the new attorney advisor's supervisor will reassign the file and notify him or her by e-mail.
- 3) In computing the date action must be completed, the day of the act, event, or occurrence from which the designated period of time begins to run is not included. For example, if a new case is assigned on a Tuesday, action on that case must be completed by the end of the following Tuesday. When the last day of any time period for taking an action falls on a Saturday, Sunday, or holiday, or when the Office is closed for business for all or part of

the business day, the action would not be considered overdue if completed on the next business day.

- 4) The time limit for taking appropriate action on amended applications will be considered to be 30 calendar days from the date of delivery where the attorney advisor has been assigned the equivalent of at least one-half of the amended docket of another attorney advisor. This adjustment will normally last for no more than seven months following the departure of the absent attorney advisor.
- 5) In extraordinary situations, the attorney advisor may need additional time to prosecute an application properly. The attorney advisor may request in advance that such applications be excused from being considered overdue and that the processing time for such applications be extended on a case-by-case basis. The supervisor may grant such requests if sufficient cause is provided.
- 6) Supervisors may consider the following as potentially valid reasons for extending the processing times for applications on a case-by-case basis:
 - A supervisor directs the attorney advisor to perform other duties that prevented taking timely action on an application.
 - Material necessary for the preparation of an action (such as information from the library or translations department or a file from the warehouse) has not been provided to the attorney advisor though requested in a timely manner.
 - The record of the application requires correction due to data entry errors committed by a party other than the attorney advisor that prevent action from being completed.
 - A subsequent response must be entered by other Office personnel prior to the action being taken.
 - The applicant or applicant's attorney requests a conference, intends to file a subsequent response, or intends to notify the attorney advisor of amendments or provide other information which would potentially change the status of the application within a definite and brief time period of the date the application is due for action.
 - The attorney advisor's mentoring responsibilities have interfered with his/her ability to complete the application in a timely fashion.
 - The attorney advisor is handling significant portions of the dockets of other examining attorneys in addition to his/her own docket.
 - The attorney advisor is absent on approved leave for a significant period of the time available to take action; or on the day the application is due for action the attorney advisor is on approved leave due to illness, incapacity or personal emergency.
 - The file requires scanning so that its entire contents may be displayed in TICRS.
 - Completion of the action is dependent upon the action of Office personnel over whom the attorney advisor has no control, and the actions have not occurred as intended to such an extent that the ability to complete the work is hampered.
 - Electronic systems required to complete the action are unavailable for a significant period of the time available to take action.
 - For TWAH attorneys, the paper file is required in order to process a correction.

- 7) In making a determination of unexcused delay, the supervisor should seek input from the attorney advisor before drawing any conclusions. If and when the supervisor concludes that a delay will not be excused, written notification of that finding will be given to the attorney advisor.
- 8) In the case of two separate findings of unexcused delay, the managing attorney will conduct a counseling conference if requested by the attorney advisor.

D. First Action Cap

- 1) Supervisors will favorably consider requests by attorney advisors for waivers to the production cap and will respond promptly. Consideration will be given to employees who have worked overtime, credit hours or compensatory time during the bi-week.
- 2) A supervisor will normally not grant a waiver in circumstances where the attorney advisor exceeded the cap in the last two biweeks of a quarter merely for the purpose of raising his/her production to an acceptable level when the attorney advisor had not made similar efforts in prior biweeks of that quarter. Consideration will be given to whether the attorney advisor used leave during this time. It may be considered grounds for a waiver if the attorney advisor produces first actions at a higher level to make up for absences from the Office.
- 3) Retroactive first action class credits will not count towards the first action cap.
- 4) When an attorney advisor exceeds the first action cap, the supervisor will check at least 10% of the first actions completed during the bi-week for errors.

II. QUALITY

- A. An error is an action or failure to act that is not in compliance with relevant statutes, the Code of Federal Regulations, applicable case law, or Office policy as set forth in the Trademark Manual of Examining Procedure, examination guides and notes, or any other policies that have been made known to the attorney advisor.
- B. The determination as to whether an error was committed by an attorney advisor will be made by the attorney advisor's supervisor. In the case of findings raised by OTQR, the finding will be considered to be an error by the attorney advisor unless the finding is appealed by the supervisor to the group director in a timely manner; however, the supervisor may make the final determination as to whether it is considered an error regardless of the results of the appeal.
- C. If a rating official becomes aware of any error that will be used in a performance appraisal, he/she must disclose the facts concerning the deficiency to the attorney advisor as soon as practical, normally within two weeks from when the rating official becomes aware of the error.

- D. When a finding of error is made, the supervisor will provide a written explanation of the rationale for the finding, along with an indication as to how the error came to the supervisor's attention.
- E. Distinct errors in a single application may be treated as separate errors. However, multiple errors within a single field (such as the identification of goods) will generally be counted as a single error. Multiple copending applications containing the identical error will be counted as one error only.
- F. Supervisors will take into consideration errors within a file previously handled by another attorney advisor. If an attorney advisor takes over an application previously assigned to another attorney advisor, the supervisor will consider whether there was an opportunity for the attorney advisor to take corrective action on any errors. The supervisor will further consider whether the attorney advisor, in complying with accepted office procedures and policies in processing the inherited application, should have been expected to discover the errors.
- G. An error will not be counted against an attorney advisor if the attorney advisor corrects the error prior to the error coming to the attention of the supervisor.
- H. An error will not be counted against an attorney advisor if the error is brought to the attention of the managing or senior attorney by the attorney advisor or by another attorney advisor.
- I. A data entry error will constitute an error only if it affects the clarity or accuracy of the data element. Typographical errors in the fields of the applicant's address, correspondence address, and/or domestic representative will not be considered an error unless it is likely that correspondence would not reach that party using the address as entered. Typographical errors in the field of the identification of goods or services will not be considered an error unless the error changes the meaning of the entry. Superfluous design code entries will not be considered an error. Typographical errors to numbers will generally be considered an error.
- J. If an attorney advisor receives a finding of excellent writing or evidence on a statutory issue by OTQR, the supervisor will offset a finding of an error under the statutory component during the year.
- K. In order to encourage consistency of action between attorney advisors, errors and inconsistencies brought to the attention of the rating official by other attorney advisors will not be counted as errors against the attorney advisor.
- L. An error may not be counted against an attorney advisor if the application registered or abandoned (and not subsequently reinstated or revived) prior to the rating year or if the application was last handled by the attorney advisor prior to May 15, 2005.

M. With the exception of appeal briefs, all files reviewed under the Written Communications component of the Quality element will be selected from a computer-generated list of Office actions taken during the rating period. The manager will review at least three first actions and three final actions (including final actions at the SOU stage) per quarter, if possible.

N. Under the Written Communications component, the supervisor will rate the quality of the writing and evidence of the action for which the application was selected. When evaluating a final action, the supervisor should read it in conjunction with the explanations and evidence provided in the previous actions. Inadequate writing or evidence in previous actions should not affect the rating if the final action properly addresses the issues, but explanations and evidence included with previous actions should be considered when determining how extensive the final action should be. When evaluating a brief, the supervisor will rate the quality of the writing in the brief and the quality of the evidence attached to previous actions and referenced in the brief.

O. The supervisor will review the entire file, including the search, for applications pulled for review under the Written Communications component. Any errors discovered from this review may be counted under the Statutory or Practice and Procedure components, but will not factor into the Written Communications rating.

P. For any attorney hired between January 2005 and October 2005, an error or finding on work completed before the promotion to a GS-13 will not count toward the performance rating under the GS-13/14 PAP. Errors can be counted as appropriate under the GS-12 PAP for purposes of the progress review and can be considered in the final rating for the year.

III. E-GOVERNMENT, CUSTOMER SERVICE AND ORGANIZATIONAL EFFECTIVENESS

A. Examiner's Amendment Usage

- 1) Under this component, examiner's amendments include combined examiner's amendments/priority actions (EA/PAs).
- 2) Section 66(a) applications will not be counted in the denominator of the phone percentage calculation.

B. The rating official may take the following into consideration when determining the rating in the E-Government and Organizational Effectiveness component:

- The attorney advisor contributes to the achievement of announced Office goals.
- The attorney advisor demonstrates support of the Office's E-Government initiatives by diligently adhering to all electronic workflow procedures; carefully maintaining electronic file records; taking steps to ensure the accuracy of the databases;

demonstrating expertise with the Office's E-Government systems, resources and website; assisting applicants in the use of the Office's website; offering written suggestions for improvement of electronic systems; and/or participating in Office projects for the development of E-Government systems.

- The attorney advisor adheres to procedures made known to the attorney advisors regarding workflow, internal processes, and application file control procedures.
- The attorney advisor demonstrates a commitment to exceptional customer service when dealing with internal and external customers.
- The attorney advisor demonstrates support of, offers written suggestions to management for and/or participates in Office projects and process changes.
- The attorney advisor utilizes Office resources to assist in reducing cycle times and improving productivity.
- The attorney advisor assists in the handling of dockets of attorney advisors other than their own.
- The attorney advisor provides analysis of important trademark cases and/or disseminates relevant information to facilitate quality examination.
- The attorney advisor takes steps to act with consistency with regard to previously issued Office actions and decisions, where appropriate.
- The attorney advisor participates in training programs, legal lectures and continuing legal education programs offered by the Office.
- The attorney advisor demonstrates an ability and willingness to assist other attorney advisors.
- Other significant contributions made during office hours, not specifically enumerated above, may be considered in the evaluation of this element.

C. To be rated less than marginal for failure to meet the standards in the Employee Responsibilities component, an attorney advisor must display a pattern of behavior that fails to meet the standards enumerated. A single instance of failing to meet one or more of these standards will not normally constitute grounds for a rating of less than marginal in this element.

IV. PROMOTIONS

A. Promotion from GS-12 to GS-13

1. Final Ratings

- a) If an attorney advisor is promoted from GS-12 to GS-13 fewer than 120 days into the fiscal year, the rating for the year will be based primarily on the attorney advisor's performance under the GS-13 PAP. While the attorney advisor will not receive a separate progress review for the period as a GS-12, the attorney advisor's performance during that period will be considered in determining the final rating.
- b) If an attorney advisor is promoted with fewer than 120 days remaining in the fiscal year, the rating for the year will be based primarily on the attorney advisor's performance under the GS-12 PAP. While the attorney advisor will not receive a

- separate progress review for the period as a GS-13, the attorney advisor's performance during that period will be considered in determining the final rating.
- c) If an attorney advisor is promoted and is in both grades for at least 120 days, the attorney advisor will receive separate progress reviews for the time under each PAP. The final rating will be based on a combination of the scores from each progress review weighted according to the percentage of the year at each grade. If the attorney advisor is Marginal in any element of either PAP, score from the relevant progress review may be no greater than 289 points. If the attorney advisor is Unacceptable in any element of either PAP, score from the relevant progress review may be no greater than 199 points.
 2. Pendency Element – If an attorney advisor is promoted from GS-12 to GS-13 during a quarter, the balanced disposal and first action goals will be prorated for the time remaining in the quarter. If the promotion occurs halfway through the quarter or earlier, the attorney advisor will receive a rating for that quarter under the GS-13 PAP. If the promotion occurs more than halfway through the first, second or third quarters, the goals and BDs will be combined with those of the following quarter.
- B. Promotion from GS-13 to GS-14 – Pendency Element
If an attorney advisor is promoted to GS-14 during a quarter, the Balanced Disposal and First Action goals for that quarter remain those for a GS-13. At the beginning of the following quarter, the goals will be increased to those for a GS-14.

V. GENERAL ADJUSTMENTS

Rating officials will assign a performance rating that is fair and reasonable under the circumstances when the application of the rating system leads to an unfair or unreasonable overall performance rating. When rating any attorney advisor under Performance Appraisal Plan standards, a supervisor should ensure that special circumstances do not exist which would require an adjustment, and that he or she assigns an overall rating that would be fair and reasonable given the attorney advisor's particular circumstances.