

practitioners. Before an examiner is promoted to primary patent examiner, a group of patent applications that he or she has examined is reviewed for competence and compliance with rules and procedures. However, no test is administered to ascertain the examiner's knowledge of patent law, practice and procedure. After an examiner achieves primary status, there is no periodic testing/training to ensure that the individual maintains an expected level of competency in law, regulations and practice and procedures. Currently, subsequent training takes place in the form of lectures or memoranda following changes to the patent law and/or regulatory changes.

To ensure competence the Office is instituting a formal certification and recertification program for patent examiners, in keeping with its 21st Century Strategic Plan. The program will require examiners being promoted to grade GS-13 to pass a competency examination based on the examination taken by persons seeking to be registered as a patent practitioner.

Also, patent examiners, like licensed practitioners, would be required to receive training and pass recertification tests to update and maintain competence and proficiency in patent law, practices and procedures.

The proposed rule would provide for waiver of the registration examination for two groups of former patent examiners who were serving in the patent examining corps at the time of their separation.

Paragraph (d)(1) of § 11.7 would address former patent examiners who, by a date to be determined, had not actively served four years in the patent examining corps, and who were serving in the corps at the time of their separation. The registration examination would be waived for a former examiner if he or she met four conditions. The former examiner must have (i) actively served in the patent examining corps of the Office, (ii) received a certificate of legal competency and negotiation authority; (iii) been rated, after receiving the certificate of legal competency and negotiation authority, at least fully successful in each quality performance element of his or her performance plan for the last two complete fiscal years as a patent examiner, and (iv) not have been under an oral or written warning regarding the quality performance elements at the time of separation from the patent examining corps.

Paragraph (d)(2) of § 11.7 would address former patent examiners who, by a date to be determined, have actively served four years in the patent examining corps, and who were serving

in the corps at the time of their separation. The examination would be waived for the former examiner if he or she meets three conditions. The former examiner must (i) have actively served for at least four years in the patent examining corps of the Office by the date to be determined, have been rated at least fully successful in each quality performance element of his or her performance plan for the last two complete fiscal years as a patent examiner in the Office; and (iii) not have been under an oral or written warning regarding the quality performance elements at the time of separation from the patent examining corps.

Requiring that an examiner be rated at least fully successful in the quality performance elements of his or her performance plan is in accord with prior practice. Former examiners, who upon separation from the Office, were rated unacceptable for quality performance elements have been required to take the registration examination. *Accord*, Commissioner's Decision, leg.01.pdf, posted on the Office Web site as www.uspto.gov/web/offices/com/sol/foia/oed/legal/leg01.pdf.

Paragraph (d)(3) of § 11.7 would address certain former Office employees who were not serving in the patent examining corps upon their separation from the Office. The examination would be waived for a former Office employee meeting four requirements. The former employee must demonstrate by petition that he or she possesses the necessary legal qualifications to render to patent applicants and others valuable service and assistance in the preparation and prosecution of their applications or other business before the Office by showing that (A) he or she has exhibited comprehensive knowledge of patent law equivalent to that shown by passing the registration examination as a result of having been in a position of responsibility in the Office in which he or she: (i) Provided substantial guidance on patent examination policy, including the development of rule or procedure changes, patent examination guidelines, changes to the Manual of Patent Examining Procedure, or development of training or testing materials for the patent examining corps; or (ii) represented the Office in patent cases before Federal courts; and (B) was rated at least fully successful in each quality performance element of his or her performance plan for the position for the last two complete rating periods in the Office, and was not under an oral warning regarding the quality performance elements at the time of separation from the Office.

Paragraph (d)(4) of § 11.7 would provide additional conditions for waiver of the examination for each individual covered in paragraphs (d)(1) through (d)(3). To be eligible for consideration for waiver, the individual must file a complete application within two years of separation from the Office, together with the fee required by § 1.21(a)(1)(i). All other individuals and former examiners filing an application or paying a fee more than two years after separation from the Office would be required to take and pass the examination in order to demonstrate competence to represent applicants before the Office. If the examination is not waived, the individual or former examiner also would have to pay the examination fee required by § 1.21(a)(1)(ii) within 30 days of notice.

Paragraph (e) of § 11.7 would eliminate the provision for regrade of an examination. The current rule requires the Office to treat each regrade request individually. Candidates requesting regrade seek, in effect, individualized regrading. Individualized regrading can promote the occurrence of arbitrary and capricious decisions.

The standard for review of the grading of the registration examination is "whether the officials of the Patent Office acted fairly and without discrimination in the grading of the plaintiff's examination, pursuant to a uniform standard." *See Cupples v. Marzall*, 101 F.Supp. 579, 583 (D.D.C. 1952). The Office uses a set of model answers in grading examination answers. The use of Office Model Answers to grade the examination satisfies the Cupples standard "because it provides a set of uniform standards by which all examinations can be fairly judged and is therefore not arbitrary and capricious." *Worley v. USPTO*, 2000 U.S. Dist. LEXIS 16992, 16997 (D.D.C. 2000). In contrast, "permitting individualized and subjective regrading upon request would promote, not reduce, the likelihood that the Office would make arbitrary and capricious decisions regarding who passes and fails the Patent Bar examination." *Worley*, at 16998. *See also Kyriazis v. Dickinson*, No. 99-2299, slip op. at 7 (D.D.C. Dec. 8, 2000) ("this Court rejects Plaintiff's argument that a regrade of question 16 of the examination should consist of an individual determination as to whether Mr. Kyriazis's explanation for his answer constitutes the correct interpretation of patent law, rather than a determination whether the grading conformed with the PTO's Model Answers").

To treat each regrade request individually requires dedication of