85TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
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# PATENT OFFICE BOARD OF APPEALS AND CERTAIN SALARIES

AUGUST 12, 1958.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. WILLIS, from the Committee on the Judiciary, submitted the following

## REPORT

[To accompany S. 1864]

The Committee on the Judiciary, to whom was referred the bill (S. 1864) to authorize an increase in the membership of the Board of Appeals of the Patent Office; to provide increased salaries for certain officers and employees of the Patent Office; and for other purposes, having considered the same, report favorably thereon with amendment and recommend that the bill do pass.

The amendment is as follows:

On page 2, line 3, strike out "19,500" and substitute in lieu thereof "17,500".

### EXPLANATION OF AMENDMENT

The purpose of the committee amendment is to make the rate of compensation of Assistant Commissioners in the Patent Office commensurate with equivalent positions in other bureaus in the Department of Commerce.

### PURPOSE OF THE BILL

The bill has two objectives, one to authorize an increase in the membership of the Board of Appeals of the Patent Office, and the other to provide increased salaries for certain officers and employees of the Patent Office.

The number of examiners in chief on the Board of Appeals is changed from 9 to not more than 15.

The annual salaries of the Commissioner of Patents and the Assistant Commissioners are specified, and the Commissioner is authorized to fix, with the approval of the Civil Service Commission, the annual rates of basic compensation of the examiners in chief, without regard to the provisions of the Classification Act of 1949, as amended, at rates not exceeding the maximum rate now or hereafter prescribed by law for employees of the classes described in the first section of the act entitled "An act to authorize the creation of additional positions in the

professional and scientific service in the War and Navy Departments," approved August 1, 1947.

The authority now in the law permitting the Commissioner of Patents to designate any examiner of the primary examiner grade or higher to serve temporarily on the Board of Appeals is continued, and the present bill would permit such temporary designees to be paid at the salary received by the permanent examiners in chief while so serving.

STATEMENT

The patent statute provides that when the examiner rejects an application for patent the applicant may appeal from the decision of the examiner to a Board of Appeals (35 U. S. C. 7, 134). This Board of Appeals comprises nine examiners-in-chief (the Commissioner and Assistant Commissioners are also members of the Board of Appeals but in practice their other duties prevent them from acting regularly in deciding appeals) who are appointed by the President by and with the advice and consent of the Senate, as provided in title 35, United States Code, section 3. In view of the large volume of appeals, an act (Public Law 452, 81st Cong.) was approved March 4, 1950, giving the Commissioner of Patents authority to designate other examiners of the higher grades in the Patent Office to act temporarily as examiners-in-chief on the Board of Appeals. This act, with some minor change in language, is now the second paragraph of title 35, United States Code, section 7, which reads as follows:

> Whenever the Commissioner considers it necessary to maintain the work of the Board of Appeals current, he may designate any patent examiner of the primary examiner grade or higher, having the requisite ability, to serve as examiner-in-chief for periods not exceeding six months each. An examiner so designated shall be qualified to act as a member of the Board of Appeals. Not more than one such primary examiner shall be a member of the Board of Appeals hearing an appeal.

The opening sentence of this paragraph indicates that its purpose is to permit the augmentation of the Board of Appeals by additional temporary members in order to maintain the work current. Experience during the last 8 years has shown that numerous and repeated temporary designations must be made in order to even approach maintaining the number of appeals on hand at a reasonable figure. The following tabulation shows the number of patent appeals which were filed each calendar year during 8 years, the number of appeals disposed of, the number of appeals on hand at the beginning of each year, and the number of persons working on such appeal work.

| Year | On hand at beginning of year | Appeals filed | Appeals disposed of | | | Number of men |
|---|---|---|---|---|---|---|
| | | | Dismissed | Decided | Total | |
| 1950 | 3,705 | 3,687 | 2,177 | 1,929 | 4,106 | 14.0 |
| 1951 | 3,286 | 4,552 | 2,088 | 2,345 | 4,433 | 15.0 |
| 1952 | 3,405 | 5,352 | 2,457 | 2,778 | 5,235 | 16.0 |
| 1953 | 3,522 | 4,735 | 2,258 | 2,259 | 4,517 | 13.5 |
| 1954 | 3,740 | 4,354 | 2,284 | 1,777 | 4,061 | 11.0 |
| 1955 | 4,033 | 3,819 | 1,603 | 1,656 | 3,259 | 12.0 |
| 1956 | 4,593 | 7,306 | 3,383 | 2,248 | 5,631 | 20.2 |
| 1957 | 6,268 | 6,269 | 2,542 | 2,812 | 5,354 | 20.4 |
| 1958 | 7,183 | | | | | |

As will be seen from the table, the appeals filed during this period averaged 5,000 yearly and the appeals disposed of averaged 4,500 per year. The number of men serving on patent appeal work during this period averaged 15 per year.

An appeal to the Board of Appeals may be taken by an applicant after his application has been twice rejected by the examiner. The Patent Office has been engaged in increasing the number of assistant examiners engaged in patent-examining work from 640 at the beginning of the fiscal year 1956 to over 1,000 in the current fiscal year, in order to reduce the large backlog of pending applications to a reasonable number. With this enlargement of the examining corps, and the intensifying of efforts to dispose of pending applications and reduce the backlog, it is apparent that the number of appeals filed will correspondingly increase and this increase has been manifested during the last 2 fiscal years. With this increase, it will be necessary not only to continue the practice of designating other examiners to serve temporary tours of duty on the Board of Appeals but also to increase the number so serving. While this measure is highly desirable as a means of adjusting manpower to take care of peak periods of fluctuating workload, it is felt that there should not be such a large number of temporary members. One reason is that these men are removed from their other duties, which disadvantageously affects the work of examination in the divisions from which they are drawn, and of course temporary members could not be as efficient as those serving permanently. It is accordingly proposed that the permanent members of the Board of Appeals be increased by not more than 6, raising the number from 9 to not more than 15. While the data submitted above shows that 15 members may not be sufficient to carry on the work of the Board of Appeals at the present increased level of the filing of appeals, a membership of 15 permanent members will reduce considerably the number of temporary members which need to be assigned, and will allow for the possibility that when the task of reducing the backlog of applications pending before the examiners is accomplished the number of appeals filed may decrease to such an extent as to be capable of being handled by them alone, with possibly only an occasional temporary designation. The bill is so worded that the total number of 15 need not be filled when the workload so warrants.

The provision relating to temporary designations is retained since this is very useful for occasional assistance and also provides a means of testing prospective new members. The second section of the bill is for the purpose of permitting the temporary designees to be paid at the salary received by the permanent examiners in chief while so serving.

The Commissioner and Assistant Commissioners of Patents administer the patent and trademark laws. These positions are unique among professional positions in Government in that they require a high degree of administrative, legal and scientific ability, and skill. When compared with the salaries of other comparable positions in Government which are filled by Executive appointments, the present compensation is inadequate. Appointments to these positions at present are largely limited to individuals who, for patriotic and other reasons, are willing to take the financial sacrifice. This drastically limits the number of highly qualified persons available for consideration. The patent profession outside Government is one of the highest salaried

amongst all professions which reflects the value attached to the combination of two professional attainments, as it should be.

Other Federal positions considered to be comparable for which a rate of $20,000 is provided are: The Federal Highway Administrator; the Civil Aeronautics Administrator; and members of the Federal Maritime Board.

The proper and efficient administration of the patent laws have a direct and marked effect on the economic well-being and progress of the Nation. By the prompt granting and publication of patents, the scientific and technological advances and discoveries become known by and available to the public. Significant advances disclosed in patent applications have resulted in the creation of new industries and expanded employment opportunities. Much duplication and wasted time in scientific research activities can be avoided by the early disclosure of advances in the arts contained in applications for patents. This information must be maintained in secrecy until the determination is made that the applicant is entitled to a patent. If the period required to make this determination is excessively long, scientific and technological progress can be materially retarded.

During the present critical period of our national security and economy, this Nation can ill afford the luxury of a leisurely processing of patent applications. The present 8-year program to place the work of the Patent Office on a current basis is behind schedule partially because of excessive losses of trained examiners. Inadequate salaries and promotional opportunities are believed to be the paramount cause of these losses.

A study of the salary structure existing in the Patent Office reveals that it has not increased at the same rate as the advance in scientific and judicial skills which are required of its professional employees to properly evaluate patent applications. The salaries of its professional employees are inadequate largely because of the low ceiling imposed by the salaries presently being paid to the Commissioner and Assistant Commissioners. An upward revision at the top level will permit payment of higher salaries to the professional staff and should result in the retention of a greater percentage of the better examiners upon the completion of their training. This is considered essential if the work of this Office is to be performed in a timely manner.

The present salaries of the highest Patent Office officials are fixed in accordance with the Classification Act of 1949, as amended, and are as follows: Commissioner of Patents, $17,500; First Assistant Commissioner, $16,335; Assistant Commissioners (2), $15,150 and examiners in chief (9), $13,970. These appear inadequate when compared with the $25,500 salary a member of the Court of Customs and Patent Appeals—the court which hears appeals from the actions of the examiners in chief. A comparable position, in the executive branch to the examiner in chief of the Board of Appeals of the Patent Office is a member of the Tax Court of the United States. The salaries of these positions are fixed at $22,500. Appointments to these positions are recommended by the President and confirmed by the Senate. The duties and responsibilities combined with executive appointment requirements of these positions indicate that salaries in excess of those provided for career civil service employees are appropriate. Further justification for the salaries proposed in the bill is that these positions are unique among professional positions in

Government in that they require the combination of the highest level, judicial and scientific attainment for the proper discharge of the responsibilities assigned to them by statute.

The quasi-judicial duties of the members of the Board of Appeals are the most difficult and exacting in the Patent Office. It is required by law that the examiners in chief be scientifically competent and trained in law. Their work has unusually great significance and importance in the technological and industrial development of this Nation. The provisions of Public Law 85–462 will permit the fixing of the salaries of certain professional employees, whose duties and responsibilities are of lesser importance, at rates in excess of those presently being paid to examiners in chief. Enactment of the salary provisions of this bill into law will ease this inequity by authorizing the fixing of the salaries of the examiners in chief with the approval of the Civil Service Commission in the range specified in the act referred to in the bill (Public Law 313, 80th Cong., approved August 1, 1947, as amended by Public Law 854, 84th Cong., approved July 31, 1956) which is $12,500 to $19,000. It should be noted however that while the range of salaries specified in that act is $12,500 to $19,000 the specific salaries of the examiners in chief will be determined with respect to the nature of their work and their relative positions with respect to the other officials of the Patent Office.

The Department of Commerce in its report on this legislation to the Senate Judiciary Committee dated January 7, 1958, approves the increase in the number of members of the Board of Appeals, but does not approve of the recommended raises in salaries. A copy of this report is attached hereto. In its report the Department states that the matter of pay has been under extensive study in the executive branch and while the duties and responsibilities of the Patent Office positions covered by S. 1864 are substantial, it is unable to recommend that they be selected for preferential treatment.

The Senate Judiciary Committee and this committee do not agree with the conclusions reached by the Department of Commerce in regard to the salary features of this bill. As a matter of fact, a bill, S. 734, which contains provisions affecting the salaries of a few persons in the Patent Office became law June 20, 1958, Public Law 85–462. Under this law positions in the Patent Office such as the Director of the Office of Research and Development and examining group supervisors could receive higher compensation than examiners in chief. Examiners in chief, though a higher ranking position, would not be affected by Public Law 85–462 because no Presidential appointee may be paid under this act, as it applies only to positions compensated in the classified service. In fact, it would mean that positions provided for in the instant bill would be completely left behind all other positions in and out of the Patent Office if favorable action is not taken on this portion of the bill. Obviously, if the salaries of the subordinate positions in the Patent Office are raised, inequity would be done unless the salaries of the officers in the Patent Office are likewise raised.

Among other organizations and individuals who have expressed approval of S. 1864 is the section of patent, trademark and copyright law of the American Bar Association. Other communications and resolutions on file with the committee endorsing this legislation

include those from the Chicago Bar Association; the Patent Law Association of Los Angeles, and the National Association of Manufacturers. The Missouri Bar has advised the committee that:

> As it is the policy of the Missouri Bar to take no position pro or con on any legislation affecting the income of Government personnel, we are not able to communicate our position on the provisions of this bill which would increase the salaries of the Commissioner and Assistant Commissioners of Patents. With regard only to the above policy restriction, we endorse and solicit your support of this bill.

## FEDERAL AGENCY VIEWS

Set forth below are communications from the Departments of Commerce and Justice which were addressed to the Senate Judiciary Committee:

THE SECRETARY OF COMMERCE,
*Washington, D. C., January 7, 1958.*

Hon. JAMES O. EASTLAND,
*Chairman, Committee on the Judiciary,*
*United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: This letter is in reply to your request of April 18, 1957 for the views of this Department with respect to S. 1864, a bill to authorize an increase in the membership of the Board of Appeals of the Patent Office; to provide increased salaries for certain officers and employees of the Patent Office; and for other purposes.

This bill would increase the membership of the Patent Office Board of Appeals from 9 to not more than 15. It also would raise the salaries of the Commissioner of Patents, the First Assistant Commissioner, and the Assistant Commissioners. It further would provide for increased compensation to permanent and temporary members of the Board of Appeals. This Department recommends enactment of this legislation amended as set forth below.

The need of more than nine examiners-in-chief to keep the work of the Patent Office Board of Appeals current has already been recognized by the provision in existing section 7 of title 35 of the United States Code for the designation by the Commissioner of any patent examiner of the primary examiner grade or higher to serve as an examiner-in-chief. During calendar years 1950 through 1954, numerous and repeated designations had to be made. Below is a tabulation for that period showing the number of patent appeals which were filed each calendar year, the number of appeals disposed of, the number of appeals on hand at the beginning of each year, and the number of professional employees working on the appeals:

| Year | On hand at beginning of year | Appeals filed | Appeals disposed of | | | Number of men |
|---|---|---|---|---|---|---|
| | | | Dismissed | Decided | Total | |
| 1950 | 3,705 | 3,687 | 2,177 | 1,929 | 4,196 | 14.0 |
| 1951 | 3,286 | 4,552 | 2,088 | 2,345 | 4,433 | 15.0 |
| 1952 | 3,405 | 5,352 | 2,457 | 2,778 | 5,235 | 16.0 |
| 1953 | 3,522 | 4,735 | 2,258 | 2,259 | 4,517 | 13.5 |
| 1954 | 3,740 | 4,354 | 2,284 | 1,777 | 4,061 | 11.0 |

The Patent Office is now actively engaged in enlarging the examining corps. With this enlargement and the intensification of efforts to dispose of pending applications and reduce the backlog, the number of appeals filed should increase considerably. Such an expectation, like the data tabulated, indicates that the proposal of the bill to increase the number of permanent members of the Board of Appeals is definitely in order. The resultant possibility of decrease in the number of temporary Board members should make for more efficiency in the examination of applications for patents. The temporary members are largely drawn from the ranks of primary examiners, and examination work in their divisions necessarily suffers during their absences.

No substantial increase in the budgetary needs of the Patent Office should ensue from the proposed increase of the number of permanent members of the Board of Appeals. If the work is not done by permanent members, it will have to be done by temporary members.

As the committee is no doubt aware, the matter of civilian pay has been under intensive study in the executive branch. While the duties and responsibilities of the Patent Office positions covered by S. 1864 are substantial, we are unable to recommend that they be selected for preferential treatment. In furtherance of this policy, therefore, the Department urges that section 1 (c) of S. 1864 be deleted. Because the deletion of this subsection removes the need for section 1 (b), this provision should also be deleted along with the identification "(a)" in line 3, page 1, which is no longer needed.

Persons serving as examiners in chief in a temporary or acting capacity are presently compensated at lower rates than examiners in chief. This is unjust and the correction of this inequality is quite apart from and unaffected by the above-mentioned policy against requesting increases. Section 2 of the proposed bill appears intended to remedy this inequity and the Department supports language to carry out this intention. To assure accomplishment of the desired purpose and for the additional purpose of clearing up any ambiguity which may result from the assignment of authority to the Commissioner, as contrasted with the Secretary of Commerce, to fix the annual rate of compensation of such employees, the addition to section 7 of title 35 of the United States Code proposed by section 2 should be modified by the addition of the following sentence and section:

SEC. 2. * * * Such designated examiners in chief may be compensated at the established rate for the positions in which they are temporarily serving, provided, that at the end of the period for which designated their rate of compensation shall be adjusted to what it would have been had such designation not been made.

"SEC. 3. The provisions of this Act shall be subject to the second paragraph of Section 3 of Title 35 of the United States Code."

We have been advised by the Bureau of the Budget that it would interpose no objection to submission of this report to your committee.

Sincerely yours,

——— ———, *Secretary of Commerce.*

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
*Washington, D. C., October 11, 1957.*

Hon. JAMES O. EASTLAND,
*Chairman, Committee on the Judiciary,*
*United States Senate, Washington, D. C.*

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the bill (S. 1864) to authorize an increase in the membership of the Board of Appeals of the Patent Office; to provide increased salaries for certain officers and employees of the Patent Office; and for other purposes.

The bill would amend provisions of sections 3 and 7 of title 35 of the United States Code relating to the officers and employees of the Patent Office and the Board of Appeals. It would increase from "9" to "not more than 15" the number of examiners in chief who might be appointed. It also would provide specifically the annual rate of compensation to be paid the Commissioner ($20,500), the First Assistant Commissioner ($20,000), and each Assistant Commissioner ($19,500). The Commissioner also would be authorized, without regard to the provisions of the Classification Act of 1949, as amended, to fix the compensation of certain other employees of the Patent Office.

Whether the bill should be enacted involves questions of policy on which the Department of Justice prefers to make no recommendation.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS,
*Deputy Attorney General.*

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no proposed is shown in roman):

TITLE 35—PATENTS

§ 3. Officers and employees.

A Commissioner of Patents, one first assistant commissioner, two assistant commissioners, and [nine] *not more than fifteen* examiners-in-chief, shall be appointed by the President, by and with the advice and consent of the Senate. The assistant commissioners shall perform the duties pertaining to the office of commissioner assigned to them by the Commissioner. The first assistant commissioner, or, in the event of a vacancy in that office, the assistant commissioner senior in date of appointment, shall fill the office of Commissioner during a vacancy in that office until a Commissioner is appointed and takes office. The Secretary of Commerce, upon the nomination of the Commissioner in accordance with law, shall appoint all other officers and employees.

*The annual rate of compensation of the Commissioner shall be $20,000 and that of each assistant commissioner shall be $17,500. The Commissioner is authorized, without regard to the provisions of the Classification Act of 1949, as amended, to fix the annual rates of basic compensation of the examiners-in-chief, subject to the approval of the Civil Service Commission, at rates not exceeding the maximum rate now or herafter prescribed by law for employees of the classes described in the first section of the Act entitled "An Act to authorize the creation of additional positions in the professional and sceintific service in the War and Navy Departments," approved August 1, 1947 (61 Stat. 715), as amended.*

The Secretary of Commerce may vest in himself the functions of the Patent Office and its officers and employees specified in this title and may from time to time authorize their performance by any other officer or employee.

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§ 7. Board of Appeals.

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Whenever the Commissioner considers it necessary to maintain the work of the Board of Appeals current, he may designate any patent examiner of the primary examiner grade or higher, having the requisite ability, to serve as examiner-in-chief for periods not exceeding six months each. An examiner so designated shall be qualified to act as a member of the Board of Appeals. Not more than one such primary examiner shall be a member of the Board of Appeals hearing an appeal. *Such designated examiners-in-chief may be compensated at the established rate for the positions in which they are temporarily serving, provided, that at the end of the period for which designated their rate of compensation shall be adjusted to what it would have been had such designation not been made.*

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