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DR. PULNIKOVA VALENTINA
WEIHERSTRASSE 9
VILLINGEN-SCHWENNINGEN 78050 DE GERMANY

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OFFICE OF PETITIONS

In re Application of :
Valentina PULNIKOVA :
Application No. 13/107,880 :
Filed: May 14, 2011 :
Attorney Docket No. Pulnikova :

ON PETITION

This is a decision on the petition filed July 6, 2012, under 37 CFR 1.181(a)(3) requesting that the Director exercise his supervisory authority and overturn the decision of the Director, Technology Center 3600 (Technology Center Director), dated June 1, 2012, which refused to: (1) assign a different examiner to the instant application; and (2) vacate the Office action of February 15, 2012.

The petition to overturn the decision of the Technology Center Director dated July 6, 2012, is **DENIED**.

BACKGROUND

The instant application was filed May 14, 2011.

On September 26, 2011, a petition was filed requesting that the application be assigned a different examiner.

On November 14, 2011, a decision dismissing the petition filed September 26, 2011 was mailed.

On November 28, 2011, a requirement for restriction was mailed.

On November 28, 2011, December 16, 2011, December 20, 2011, and December 22, 2011, petitions requesting previous Office actions be vacated and the application be assigned a different examiner.

On January 24, 2012 and January 25, 2012, decisions dismissing the petitions filed November 28, 2011, December 16, 2011, December 20, 2011, and December 22, 2011 were mailed.

On February 15, 2012, a non-final Office action was mailed.

On May 13, 2012, a petition was filed requesting that the application be assigned a different examiner and that Office action of February 15, 2012 be vacated. A response to the February 15, 2012 Office action was also filed.

On June 1, 2012, a decision dismissing the petition of May 13, 2012 was mailed.

On June 27, 2012, a final Office action was mailed.

On July 6, 2012, the instant petition was filed.

STATUTE, REGULATION, AND EXAMINING PROCEDURE

35 U.S.C. 132(a) states:

> (a) Whenever, on examination, any claim for a patent is rejected, or any objection or requirement made, the Director shall notify the applicant thereof, stating the reasons for such rejection, or objection or requirement, together with such information and references as may be useful in judging of the propriety of continuing the prosecution of his application; and if after receiving such notice, the applicant persists in his claim for a patent, with or without amendment, the application shall be reexamined. No amendment shall introduce new matter into the disclosure of the invention.

MPEP 1201 states:

> The United States Patent and Trademark Office (Office) in administering the Patent Laws makes many decisions of a substantive nature which the applicant may feel deny him or her the patent protection to which he or she is entitled. The differences of opinion on such matters can be justly resolved only by prescribing and following judicial procedures. Where the differences of opinion concern the denial of patent claims because of prior art or other patentability issues, the questions thereby raised are said to relate to the merits, and appeal procedure within the Office and to the courts has long been provided by statute (35 U.S.C. 134) .
>
> The line of demarcation between appealable matters for the Board of Patent Appeals and Interferences (Board) and petitionable matters for the Director of the U.S. Patent and Trademark Office (Director) should be carefully observed. The Board will not ordinarily hear a question that should be decided by the Director on petition, and the Director will not ordinarily entertain a petition where the question presented is a matter appealable to the Board. However, since 37 CFR 1.181(f) states that any petition not filed within 2 months from the action complained of may be dismissed as untimely and since 37 CFR 1.144 states that petitions from restriction requirements must be filed no later than appeal, petitionable matters will rarely be present in a case by the time it is before the

Board for a decision. In re Watkinson, 900 F.2d 230, 14 USPQ2d 1407 (Fed. Cir. 1990).

OPINION

Petitioner seeks reversal of the Technology Center Director's decision of June 1, 2012, on the ground that the Technology Center Director has acting improperly in refusing to vacate the February 15, 2012 Office action and replace the examiner of record.

Petitioner specifically requests (1) that Technology Center Director's decision of June 1, 2012, be reversed, (2) cancellation of the Office action of February 15, 2012, due to "falsified examination," and (3) disqualification of the examiner of record and several other USPTO personnel.

As noted in In re Ovshinsky, 24 USPQ2d 1241, 1251-2 (Comm'r Pats.1992), the issue is not whether the perceptions of an applicant regarding alleged bias are reasonable; rather the issue is: whether an applicant has demonstrated improper conduct, including bias or the appearance of bias, on the part of the Technology Center Director. A full investigation of the facts set forth in the petition, as well as a full consideration of the entire record of this application fails to reveal bias or improper conduct on the part of either the Group Director or the examiner, and as such, there is no reversible error in the Technology Center Director's decision.

Petitioner contends that the Office action mailed February 15, 2012, evidences "falsification of evidence and plagiarism" on the part of the examiner. However, that Office action has been carefully reviewed and there is no evidence of any improper action or conduct therein on the part of the examiner.

The gravamen of applicant's complaint seems to be that despite two Office actions on the merits, the examiner has not indicated any patentable subject matter at this stage of prosecution; rather the examiner continues to reject the claims on various statutory grounds, and applicant obviously disagrees with the rejections contained in the Office action of February 15, 2012. It should be noted that reasonable men can disagree as to whether a given claim is patentable and on what basis. See Lear, Inc. v. Adkins, 395 U.S. 653, 670, 162 USPQ 1, 8 (1969). A mere difference of opinion between the examiner and the applicant as to the patentability of one or more claims does not evidence bias, a lack of understanding, "a falsification of evidence", or improper conduct on the part of the examiner, much less that their replacement is justified. Indeed, the Technology Center Director correctly observed that some of the drawing objections made in the Office action mailed February 15, 2012, would be withdrawn. This does not evidence bias or "fraudulent" action on the part of the examiner; rather the examiner is merely attempting to clarify the record. Petitioners contentions of plagiarism (*e.g.*, quoting the MPEP without footnoting, and using form paragraphs) and falsification of evidence and infringements (*e.g.*, presenting rejections with which petitioner disagrees) are not improper conduct on the part of the examiner.

Moreover, applicant appears to be unaware that any rejection of the claims cannot be reviewed on petition; rather, as explained in MPEP 1201, the mechanism for having the propriety of a given rejection reviewed is by way of appeal before the Board of Patent Appeals and Interferences under 35 U.S.C. § 134 and 37 CFR 1.191. The issues of whether the rejections set forth in the last office action are "plagiarism" or "a falsification" relate to the merits of those rejections and such can only be considered on appeal and will not be considered on petition. See 37 CFR 1.181(a); see also Boundy v. U.S. Patent & Trademark Office, 73 USPQ2d 1468 (DC Eva 2004),appeal dismissed, 2004 U.S. App. LEXIS 26384 (Fed. Cir. 2004). It is well settled that the Director will not, on petition, usurp the functions or impinge upon the jurisdiction of the Board of Patent Appeals and Interferences. See In re Dickerson, 299 F.2d 954, 958, 133 USPQ 39, 43 (CCPA 1962); Baylev's Restaurant v. Bailey's of Boston, Inc., 170 USPQ 43, 44 (Comm'r Pat. 1971).

DECISION

For the reasons given above, petitioner has failed to adequately demonstrate bias or the appearance of bias towards applicant by the Technology Center Director, or the examiner. The petition is granted to the extent that the decision of the Technology Center Director dated June 1, 2012, has been reviewed, but is **denied** as to the request that the aforementioned decision be overturned. The examiner will not be replaced, no action will be taken against the examiner, and the Office action of February 15, 2012, will not be disturbed.

This decision is a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review of the petitionable questions only. See MPEP 1002.02.

This application is being referred to Technology Center 3600 for further processing.

Telephone inquiries related to this decision should be addressed to Petitions Examiner David Bucci at (571) 272-7099.

Andrew Hirshfeld
Deputy Commissioner for
Patent Examination Policy/
Petitions Officer