

Optional Clear Error Review Process

The Optional Clear Error Review Process was first introduced in the [2011](#)

[Examiner Performance Appraisal Plan \(PAP\)](#) (see page 4):

When an examiner is charged with a clear error under the 2011 PAP's Quality critical element, and the examiner disagrees with the error determination, he/she may rebut the error either orally or in writing. The SPE will consider the rebuttal and either remove the error or inform the examiner why his/her rebuttal is unpersuasive. If this process does not resolve the disagreement, the examiner may raise the disagreement with his/her Technology Center Director. Any contractual time period for filing a grievance over the error will not start until the TC Director has communicated a decision to the examiner.

Examiners are notified of charged errors via an email from the "SPE Management Database Notification", and example of which is shown below:

The screenshot shows an email notification from the SPE Management Database. The header is "SPE Management Database Notification". The body contains the following information:

Examiner:	PATTY EXAMINER (12345)
Art Unit:	1234
Application Number:	12345678
Revision:	1
Type of Action:	Non-Final Action
Date Action Submitted for Credit:	02/27/2012
Date of Review:	02/27/2012
Date of Notification:	02/27/2012
Status:	Clear Error
SPE:	SUE P. VISOR

At least one clear error has been identified in this Office action. Please review this document and if you would like to participate in the optional clear error review process, respond orally or in writing. Your response should be received during the quarter in which credit was received for the Office action or 14 calendar days after the "Date of Notification" indicated above, whichever is longer. If you cannot respond within this timeframe, please see your SPE to request additional time. If you do not respond within the timeframe set forth or obtain an extension, the optional clear error review process will close for this Office action.

Category: II
Activity: Making proper rejections under 35 U.S.C. 102 and 103 with supporting rationale, or determining how claim(s) distinguish over the prior art
Action: Clear Error Charged
SPE Comment: For claim 6, Goel paragraph 0049 has been argued by the applicant as failing to teach these feature. The paragraph is maintained and no reply to arguments is provided. It is unclear how the arguments are moot when they are directed to citations that are maintained and in fact do not read on the claimed limitations. See remarks page 14

This message was automatically generated by the [SPE Management Database](#)

This notification must clearly identify the application at issue, the category of error and the SPE's rationale for assigning the error. It is important to note that this email will also

identify the timeframe during which the Examiner must reply in order to take advance of the process.

The following FAQs are directly related to use of the Clear Error Review Process and may help Examiners better understand both its purpose and implementation. The [full list of PAP FAQs](#) is available through the USPTO Intranet.

<u>Topic/Category</u>	<u>#</u>	<u>Question</u>	<u>Answer</u>
Quality	10	How much coaching/mentoring/training must be completed before a clear error is charged?	This will be dependent upon several factors, including the grade of the employee and the specific issue upon which the employee is being coached/mentored, trained. The coaching/mentoring/training must be appropriate to the issue and commensurate with the level of responsibility assigned to the examiner in his/her PAP. See Answer 4 above relative to charging CAT 1-3 errors.
Quality	12	When will examiners be notified of CAT errors? Will it be computer generated?	The SPE should notify an examiner of potential errors contemporaneously with the SPE's identification of the error. This is a process that requires interaction between the SPE and the examiner. It is not a computer generated process.
Quality	14	On the Major Quality Activities matrix, what do the asterisks mean?	No clear error can be charged under any major activities identified with an asterisk. If a clear error occurs in the asterisked major activities (#10, #12, or #17), the clear error may be charged under another major activity (e.g. major activity 6), in which the Office action is improper. If the examiner is not responsible for the asterisked major activity from which the clear error arose, the examiner will not be subject to holding of clear error.
Quality	15	When being charged with a clear error, is it "optional" or necessary for the SPE to identify to the examiner the specific category of the error? In writing/email? Where specifically is the optional clear error review process in the MOU?	The SPE must point out the clear error in written form with the appropriate level of specificity so that the examiner knows where they stand in terms of their performance, and how to improve. The optional clear error review process is located in the MOU in Section I.E. at page 4 of 11.
Quality	21	Are there periods of time that have to be met, period to notify the examiner of clear error being charged, period to rebut the clear error, etc.?	Notification of the error by the SPE occurs as soon as possible once the error is identified. The examiner has until the relevant evaluation is finalized to rebut clear errors using the Optional Clear Error Review Process.
Quality	22	If a SPE/Reviewer fails to identify a Category 1, 2, or 3 error in the bi-week in which the action was submitted, can the "error" be charged at the end of FY for rating purposes?	There should be no surprises, The clear error should be identified reasonably contemporaneously, so it does not become a larger issue.

Quality	27	1) What constitutes "several" deficiencies? Is it determined by the SPE or is there a set number?	1) There is no set number. For all examiners, CAT 1 errors cannot rise to chargeable clear error in the PAP unless there have been several previous instances of the same error in major activities for which the examiner is responsible, with appropriate intervening training/assistance and no subsequent improvement by the examiner.
		2) Who determines the "honest and legitimate difference of opinion"?	2) The first line supervisor makes the initial clear error call, with the examiner having the option to rebut the error. So long as the position taken by the examiner is justifiable/supportable, there is no clear error.
Quality	28	In the Optional Clear Error Review Process, can this become an iterative process (i.e., you fix one issue raised, SPE raises another issue?)	No
Quality	29	Will clear errors be charged if they are only discovered when the applicant responds to the Office action?	Yes, unless the time between the office action and discovery of the error crosses Fiscal Years. If charged, the error would be applied only to the evaluation for the Fiscal Year in which the examiner received credit for the office action.
Quality	32	Who decides whether or not the examiner's position is reasonable in the event that a clear error is alleged?	The work product does that - that's the standard. Management charges clear errors - but errors charged need to comport with Clear Error criteria 1-3 (see Quality Error Definition). Additionally, the clear error must be in a major activity for which the examiner is responsible, and the Office action must have been submitted in final form.
Quality	50	If SPE is responsible for determining errors then won't there still be inconsistency across the Corps with respect to examiner evaluations?	By developing an agreed upon definition of clear error and providing improved review processes, inconsistencies in calling clear errors should be reduced.
Quality	61	Will charging of errors be mandatory or discretionary per SPE?	As is currently the practice, the SPE has the discretion not to charge a previously identified error for performance evaluation.
Quality	62	Frequently, I find myself rejecting claims that might be allowable, as my SPE has instructed that there is no allowable subject matter and that I maintain my rejection or go final. Can I be charged with a clear error on something I was compelled to do?	If you are doing what your SPE has instructed you to do in a particular case, you should not be facing the issue of clear error.
Quality	66	How often will the error rate be reported to examiners?	The error rate will be reported to examiners at fiscal year end PAP rating, if there have been no major performance issues such as oral warnings or safety zones during the year. If there are issues that are charged as clear errors, the SPE will timely identify the issue and discuss same with examiner so that it does not become a larger issue.
Quality	67	How many claims in a final rejection can have an error?	While it is possible that every claim could have a clear error, only one (1) clear error will be held per action relative to that Category.

Quality	71	Assuming that both the examiner and SPE have a reasonable difference of opinion, which opinion carries the day?	According to the quality error definition, if both the examiner's action and the SPE's preferred action are reasonable, there will be no clear error charged against the examiner. At the end of the day, however, the SPE is tasked with making sure that the work product from the art unit is proper and conforms with Agency policy and procedures. The SPE may require the examiner to make a change to modify the office action even though no clear error exists.
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