

As of 04/19/12

# Patent Examiner Performance Appraisal Plan (PAP) Guidelines

## Table of Contents

INTRODUCTION .....	2
PRODUCTION.....	3
Major Activities.....	3
Criteria for evaluation .....	3
Production Crediting Process .....	7
QUALITY.....	8
Clear Error Definition .....	8
Major Activities.....	10
Criteria for Evaluation.....	28
Draft form office actions .....	36
Final form office actions .....	37
Return of work product for correction .....	37
Examiner Optional Clear Error Review Process.....	37
Charging of Errors.....	38
Quality Major Activities.....	39
Error Rates.....	43
Quality Error Rate and Element Rating .....	46
Composite Performance Ratings .....	49
Examiners on the Signatory Program.....	50
DOCKET MANAGEMENT .....	53
Major Activities.....	53
Criteria for Evaluation.....	53
Docket Management Chart.....	55
Docket Management Clocks (Start Date) Chart.....	55
Docket management restarts, suspensions, pauses and interrupts.....	58
Docket management plans (DMP) .....	60
Docket management calculations .....	64
STAKEHOLDER INTERACTION.....	70
Major Activities.....	70
Criteria for Evaluation.....	71
Indicia of Outstanding or Commendable Performance .....	72
INTERIM RATINGS.....	74
SIGNATORY AUTHORITY PROGRAM AND PAP DENOMINATORS .....	76

## **INTRODUCTION**

The guidelines set forth herein are intended to provide guidance and examples to assist rating officials and employees in the understanding and administration of the Patent Examiner Performance Appraisal Plan. These guidelines, however, are not exhaustive.

Performance Evaluation is an ongoing process. Supervisors should communicate performance feedback on a regular basis throughout the Fiscal Year. When a performance decline is noted, the supervisor should seek to understand the reasons behind such decline and institute a program of coaching, mentoring and/or training as appropriate for the situation.

These guidelines are available on the USPTO Intranet. Should you require clarification of the guidelines or the PAP itself, please contact any of the PAP Task Force members listed below:

Robert D. Budens, POPA President

Andrew Faile, Assistant Deputy Commissioner for Patent Operations

Pamela R. Schwartz, POPA Assistant Secretary

Jacqueline Stone, TC 1600 Director

David Fenstermacher, POPA Delegate

David Dalke, Office of Human Relations, Labor Relations

Howard J. Locker, POPA Vice-President

## **PRODUCTION**

The Patent Examiner Performance Appraisal Plan contains a Production element which makes up 35% of the overall rating.

### ***Major Activities***

The examiner examines assigned patent applications from first action to final disposition within an assigned period of time.

### ***Criteria for evaluation***

Under this performance element, an examiner is held accountable for achieving his/her expected Balanced Disposals (BDs). The number of expected BDs the examiner is expected to achieve in the rating period is calculated using the number of examining hours worked, the position factor based on the examiner's grade and a goal which is based on the examiner's assigned docket.

The position factor is assigned as follows:

(Utility and Plant examiners)

<u>Grade</u>	<u>Position Factor</u>
GS-5	0.55
GS-7	0.7
GS-9	0.8
GS-11	0.9
GS-12	1.0
GS-13	1.15
GS-13 (PSA)	1.25
GS-14	1.35

4/19/12

GS-15 (Generalist)	1.35
(Ph.D.)	1.35
(Senior)	1.40
(Expert)	1.50

(Design examiners)

<u>Grade</u>	<u>Position Factor</u>
GS-5	0.48
GS-7	0.64
GS-9	0.8
GS-11	0.88
GS-12	1.0
GS-13	1.14
GS-14	1.24
GS-15	1.24

Art/docket specific goals are typically normalized and stated as a GS-12 goal. This number would be the goal for a GS-12 working in that particular art. To determine the examiner's assigned docket goal, the GS-12 goal is divided by the appropriate position factor and then the RCE adjustment is added.

The expected amount of Balanced Disposals (BDs) would be calculated using the following formula:

$$\text{Expected BDs} = (\text{Examining Hours}) / (\text{Assigned Docket Goal})$$

Achievement shall be recognized in terms of percentage achievement of expected BDs.

When calculating the percentage achievement, the higher of the following two calculations shall be used:

4/19/12

Option 1)  $BD = (N+D)/2$

where N is the number of First Actions on the Merits and D is the number of Disposals

or

Option 2)  $BD = \text{counts}/2$

where the number of counts is the sum of the counts earned for actions as shown in the following table:

	Action by same examiner as previous action						Initial action by different examiner than previous action		
	Regular new case: an original, CON, DIV, CIP, or reissue in which no RCE has been filed		1st RCE: an original, CON, DIV, CIP, or reissue in which one RCE has been filed		2nd or subsequent RCE: an original, CON, DIV, CIP, or reissue in which two or more RCEs have been filed		Regular new case: an original, CON, DIV, CIP, or reissue in which no RCE has been filed.	1st RCE: an original, CON, DIV, CIP, or reissue in which one RCE has been filed.	2nd or subsequent RCE: an original, CON, DIV, CIP, or reissue in which two or more RCEs have been filed.
	Before Final	After Final	Before Final	After Final	Before Final	After Final	Total credit available for new examiner =1.5 counts	Total credit available for new examiner =1.75 counts	Total credit available for new examiner =1.75 counts
<b>Action:</b>	<b>Counts:</b>						<b>Counts:</b>		
Express Abandonment	0.75	0.50	0.75	0.50	0.75	0.50	N/A	N/A	N/A
Restriction	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
FAOM Non-final Rejection	1.25	N/A	1.00	N/A	0.75	N/A	N/A	1.00	1.00
FAOM Allowance	2.00	N/A	1.75	N/A	1.50	N/A	1.50	1.75	1.75
FAOM ex parte Quayle	1.50	N/A	1.25	N/A	1.00	N/A	1.00	1.25	1.25
Ex parte Quayle (not FAOM)	0.25	0.00	0.25	0.00	0.25	0.00	1.00	1.25	1.25
FAOM Final Rejection	1.50	N/A	1.25	N/A	1.00	N/A	1.00	1.25	1.25
Non-Final Rejection (not FAOM)	0.00	0.00	0.00	0.00	0.00	0.00	0.75	1.00	1.00
Final Rejection	0.25	0.00	0.25	0.00	0.25	0.00	1.00	1.25	1.25
Advisory Action	N/A	0.00	N/A	0.00	N/A	0.00	0.75	1.00	1.00
Allowance	0.75	0.50	0.75	0.50	0.75	0.50	1.50	1.75	1.75
Abandonment for failure to respond	0.75	0.50	0.75	0.50	0.75	0.50	N/A	N/A	N/A
RCE Disposal Credit	0.75	0.50	0.75	0.50	0.75	0.50	N/A	N/A	N/A
Examiner's Answer, Interference, SIR	0.75	0.50	0.75	0.50	0.75	0.50	1.50	1.75	1.75
Interview Summary	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Rule 1.05 Request	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Non-compliant and Non-responsive notices	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

4/19/12

First Actions on the Merits shall not include first action restriction requirements. However, an examiner will be assigned an appropriate amount of non-examining time for drafting all restriction requirements which do not include an action on the merits and are in compliance with current Office policy.

An examiner shall be assigned a rating with respect to Production Goal Achievement as follows:

110% and above	Outstanding
103% to 109%	Commendable
95% to 102%	Fully Successful
88% to 94%	Marginal*
Below 88%	Unacceptable

\* Note: Continued or repetitive performance at this level adversely impacts upon the efficiency of the service under the performance element.

All percentages shall be rounded off to the nearest whole number (i.e. 87.49% rounds to 87%; 87.50% rounds to 88%).

If the examiner's GS grade factor changes during the fiscal year, evaluation will be based on a composite goal pro-rated for the pay periods in each GS grade factor. For performance rating purposes, an examiner shall not be held to the productivity expectancy required for the grant of permanent partial or full signatory authority until such grant is made permanent.

For those examiners with a docket that contains applications having different expectancies (split docket), the Agency shall calculate bi-weekly, a composite expectancy based on the number of cases submitted for credit and for which credit was received during the pay period.

4/19/12

In the guidelines above consideration of circumstances such as learning curves, lack of familiarity with the art, transfers of art and other such adjustments is normally not included under this Element. These considerations should be weighed and evaluated in the assignment of the examiner's expectancy. However, should any one or more of these considerations arise during the rating period, the rating official should appropriately modify the assigned expectancy of the examiner prior to determining his or her percentage achievement of assigned expectancy under this Element. All such considerations must be approved in accordance with current Office policy.

After a rating has been given with respect to Production Goal Achievement, consideration may be given to circumstances that would reasonably constitute grounds for changing an appraisal of performance under this Element (e.g., a significant number of unusually complex applications, a disruption caused by extensive assigned non-examining time or by extensive sick leave.)

### ***Production Crediting Process***

GS-5 through GS-9	All actions reviewed before counting
GS-11	All actions reviewed before counting
GS-12 and GS-13	Final Determination actions reviewed before counting Non-final actions counted before reviewing
GS 13/14 (PSA)	Final Determination actions reviewed before counting Non-final actions counted when submitted
GS 14/15 (FSA)	All actions counted when submitted

The Agency will do everything reasonably possible to get cases reviewed and counted in the same bi-week in which they are first submitted by the examiner.



## **QUALITY**

The Patent Examiner Performance Appraisal Plan contains a single Quality Element which comprises 35% of the overall rating.

An examiner's performance with respect to this Element, as applicable to his/her grade factor and level of signatory authority, is to be determined from a thorough review of the examiner's work product. The number of actions reviewed will depend upon the grade factor and the level of independence assigned to the examiner in accordance with the GS-1224 or GS-1226 Classification Series.

An examiner's performance with respect to the Quality Performance Element will be determined from:

- (1) the thorough review of at least one Office action per quarter per examiner and
- (2) all Office actions (for which credit has been received during the period under consideration) which come to the rating official's attention for any reason whatsoever. This includes the routine reporting and/or review of the actions of non-signatory examiners and may also include any Office actions brought to the rating official's attention by the examiner to demonstrate evidence of Commendable or Outstanding performance under the performance element.

### ***Clear Error Definition***

Clear error under this element will be deemed to have occurred where the examiner's office action or office communication:

1. does not reasonably comply with the major activities set forth in this element, and

2. could not have been permitted at the time and under the circumstances that the action was taken, and

3. is not an honest and legitimate difference of opinion as to what action should have been taken. If the action taken by the examiner is reasonable and the action preferred by the SPE is reasonable, this constitutes an honest and legitimate difference of opinion and the action taken by the examiner is free of clear error.

This three step process is directed toward the work product submitted by the examiner in final form, and is directed only to those major activities for which the examiner is responsible per the PAP specific to the examiner's grade.

When a SPE determines a clear error has been made, the examiner should be informed of the clear error as soon as reasonably possible and that the clear error may be charged under the examiner's performance plan.

Checkpoints at the end of each quarter can also be used for the SPE to meet with the examiner and gauge progress to date in each of the examiner's assigned duties, with particular emphasis in the areas where the examiner needs improvement.

Where an examiner does not have the level of signatory authority required to independently sign a particular Office action, the review of that action normally should be made before the action is signed by a signatory examiner and subsequent to the time that it was submitted in final form. However, there is no prohibition against reviewing an Office action after the same has been signed by a signatory examiner.

The review should include an evaluation for evidence of Commendable or Outstanding performance under the Quality element as well as deficient performance indicators such as the presence of clear error. It is expected that if either of these occurrences is discovered, the reviewing official will look at additional applications for the purpose of

4/19/12

satisfying himself/herself of the extent to which the occurrence is representative of the examiner's work product.

### ***Major Activities***

The following major activities are included in this element:

(1) checking applications for (a) compliance with formal requirements of patent statutes and rules and (b) technological accuracy.

1(a) - Compliance with formal requirements

The examiner should determine whether the formal requirements of the patent statutes and rules, including 37 CFR 1.51, 1.63, 1.66, 1.68, 1.71, 1.72, 1.75, 1.81, 1.83, etc., have been met with respect to the specification, claims, drawings and oath or declaration. The examiner should check alterations to the application to make sure that they were initialed and dated before execution of the oath or declaration.

1 (b) - Technological accuracy

The examiner should determine what structures, processes and results are being described and assess the completeness and accuracy of that description from a technological basis.

This function applies only to the examiner's ability to technologically analyze an applicant's disclosure and not the legal effect of a deficiency under the patent statutes. The legal effect of this analysis is evaluated under the function of analyzing disclosure and claims for compliance with 35 U.S.C. 112.

(2) treating disclosure statements and claims of priority.

The examiner should evaluate information disclosure statements for compliance with regulations and other current statements of Office policy, e.g., M.P.E.P. 609. The examiner should evaluate claims of priority under 35 USC 119, 120 and 371 for compliance with those statutes. This evaluation is limited to the formal requirements as opposed to determining the substantive entitlement to the right of priority.

4/19/12

(3) analyzing disclosure and claims for compliance with 35 USC 112.

The examiner should determine whether the disclosure of the invention complies with the written description, enablement and best mode requirements of 35 USC 112, first paragraph. The examiner should determine whether the claim or claims particularly point out and distinctly claim the subject matter which applicant regards as his invention, as required by 35 USC 112, second paragraph.

The failure to make an appropriate rejection of the claim(s) under 35 U.S.C. 112 would be deficient performance. For example, the failure to make an objection to the specification in cases where new matter has been added (35 U.S.C. 132, 251); when there is an improper incorporation by reference or the failure to provide appropriate information as to how one of ordinary skill in the art could make or practice the disclosed invention (i.e. enablement and/or written description requirements) would be deficient performance.

However, the failure to object to claim language which has no antecedent basis in the specification will not be a clear error. Multiple dependent claims should be scrutinized for compliance with 35 U.S.C. 112, fifth paragraph and treated by the examiner in accordance with official USPTO policy. Allowing a dependent claim which does not further restrict the claim from which it depends (112/4) or allowing an improper multiple dependent claim (112/5) shall not be considered a clear error.

(4) planning field of search.

The examiner should determine (1) which classifications (class and appropriate subclass(es)) under the U.S. system of classification must be searched or be the subject of an inquiry in evaluating patentability of the claimed and disclosed invention.

The examiner should develop strategies for locating prior art appropriate to the technology including U.S. and foreign patent documents and non-patent literature (NPL), utilizing the appropriate Office-approved search tools.

4/19/12

Some combination of text search with other criteria, in particular, classification, would be a normal expectation in most technologies. When performing a Class/Subclass search, a proper field of search shall include the subclass in which the claimed subject matter of an application would be properly classified. It is not necessary to search areas in which it could reasonably have been determined that there was a low probability of finding the best reference. See MPEP 904.02.

The examiner should prioritize the areas to be searched so that the most likely areas are searched first.

The examiner should plan a search that not only covers the claimed subject matter, but one that also covers the disclosed features that might reasonably be expected to be claimed. Especially if only broad claims are presented, the search should, insofar as reasonably possible, also cover all subject matter which the examiner reasonably anticipates might be incorporated by applicant into the claims. The examiner should consult with other examiners and SPEs as needed, especially with regard to applications covering subject matter unfamiliar to the examiner.

(5) conducting search.

The examiner should execute the planned search comparing the structures, processes and functions disclosed by each of the references in the field of search with the limitations set forth in the claimed invention to determine specific points of similarity or difference. While conducting the search, the examiner should pull the closest or best prior art. (37 CFR 1.104(c)).

Evaluation

Before a supervisor alleges the field of search or the conduct of the search is improper and a clear error committed, the supervisor shall cite as evidence a better reference retrieved from the proper field of search than has been cited in the patent application being examined, see 37 C.F.R. 1.104(c) and M.P.E.P. 904. Searching extra subclasses or databases shall not be considered a clear error.

4/19/12

Where a newly discovered reference is found which is better than the art of record the following considerations should be made before charging a clear error:

- 1) Does the record show that the search strategy employed by the examiner would be reasonably expected with a high probability of success to uncover the better prior art reference?
- 2) Was the better prior art reference found using Office provided search tools and/or Office provided databases?
- 3) Was there a high probability of finding the best prior art in the search area where the better prior art reference was found?

While not exhaustive, the following examples are set forth to provide guidance to supervisors in determining whether an examiner has committed clear error in planning a field of search or in conducting the search.

#### Example 1

Examiner properly sets forth a rejection of the claims under 35 U.S.C. 103 over prior art. The SPE makes a search and finds a reference not made of record which forms the basis for a proper rejection under 35 U.S.C. 102 for at least some of the above rejected claims.

Situation A. The record indicates that the examiner searched in the same art area as the SPE. Accordingly, as per the file record, a clear error in Major Activity (5) conducting search could be charged if there have been several repeated occurrences.

Situation B. The reference discovered by the SPE was a US Patent that was classified in an area of the US Patent Classification System that was closely related to the claimed subject matter. The examiner did not perform a search of the particular class/subclass in which the reference was originally classified.

4/19/12

Accordingly, as per the file record, a clear error in Major Activity (4) planning field of search could be charged if there have been several repeated occurrences.

### Example 2

Examiner properly sets forth a rejection of the claims under 35 U.S.C. 103 over prior art. The SPE makes a search and finds a reference which reduces the number of differences between the claimed invention and the prior art and/or provides a better teaching of how the references are combinable when more than one piece of prior art is relied upon than the art used by the examiner.

Situation A. If the reference is from an area searched by the examiner, as per the file record, a clear error in Major Activity (5) conducting search could be charged if there have been several repeated occurrences.

Situation B. If the reference is from an area not searched by the examiner as per the file record but should have been included in the search, a clear error in Major Activity (4) planning field of search could be charged if there have been several repeated occurrences.

### Example 3

Examiner sets forth a rejection of some claims under 35 U.S.C. 103 over prior art. Some of these claims are properly rejected based on the art while the remaining claims contain limitations which are not met by the art. These claims have either been improperly rejected over the art or have been objected to or allowed. The SPE conducts a search and finds a reference(s) which meets these claim limitations and is properly combinable under 35 U.S.C. 103 with other references used by the examiner.

Situation A. If the reference is from an area searched by the examiner, as per the file record, a clear error in Major Activity (5) conducting search could be charged if there have been several repeated occurrences.

4/19/12

Situation B. If the reference is from an area not searched by the examiner as per the file record but should have been included in the search a clear error in the Planning of the Search could be charged if there have been several repeated occurrences.

#### Example 4

Examiner properly sets forth a rejection of a claim under 35 U.S.C. 102 and/or 103 over prior art. The SPE conducts a search and finds a different but equally applicable reference that may be applied against the claim.

Situation A. If the reference is from an area searched by the examiner, there is no error in Major Activity (5) conducting the search as the reference found was equally applicable to the claims.

Situation B. If the reference is from an area not searched by the examiner as per the file record but should have been included in the search, there is no error in Major Activity (4) planning field of search as the reference found was equally applicable to the claims.

#### Example 5

The SPE conducts a search which produces a better reference than the prior art applied by the examiner. The reference was found on an obscure internet site or one that has a low probability of finding relevant art/or one upon which the examiner has not been trained or approved to use,

In this situation, no error in conducting the search or planning field of search should be held as the reference was not found utilizing approved search tools and/or as there was not a high probability of finding the reference where it was found.

(6) making proper rejections under 35 USC 102 and 103 with supporting rationale, or determining how claim(s) distinguish over the prior art.



4/19/12

The examiner should determine whether any prior art disclosure or disclosures anticipate the claimed subject matter under 35 USC 102, or render the claimed subject matter obvious under 35 USC 103. The office action should be clear and complete; including all reasonable rejections and no unreasonable rejections. Cumulative rejections; i.e., those which would clearly fall if the primary rejection were not sustained, should be avoided (MPEP 707.07(g)).

Under this performance element, an examiner is held accountable for clear errors of omission and commission in the formulation of an Office action.

A clear error exists when the Office action fails to include all grounds of rejections that should have been made. A clear error also exists if the office action includes unreasonable rejections.

An examiner is presumed to have actual or constructive knowledge of all current Office policies, regulations, the Manual of Patent Examining Procedure, applicable statutes and case law, and the current classification system and automated search tools for prior art references and documents.

An examiner, however, will not be charged with a "clear error" for factors which are not within the examiner's actual or constructive knowledge or control. Examples of factors not within the examiner's actual or constructive knowledge or control would include situations wherein:

A. The facts that rendered a claim unpatentable would not be discovered in a normal examination of the application containing the claim (for example, facts related to public sale and/or public use);

B. A newly found reference which renders a claim unpatentable falls outside a proper field of search.

C. A newly found reference was missing or unavailable from the search file or search results.

D. The application is from an art not familiar to the examiner in which his/her level of technical expertise is less than that of those who normally examine the art, and if at least one examiner has appropriate technical expertise in the art, the search notes include consultation with that examiner or that examiner's supervisor.

In formulating a rejection under 35 U.S.C. 102, the examiner should point out the particular parts of the prior art relied upon and, if it is not readily apparent, how the claim language is readable on the applied prior art.

In formulating a rejection under 35 U.S.C. 103, the examiner should set forth in the Office action:

- (A) the relevant teachings of the prior art relied upon, preferably the portion of the reference relied upon (e.g. column or page number(s) and line number(s)) where appropriate,
- (B) the difference or differences between the claimed invention and the applied prior art,
- (C) the proposed modification of the applied reference(s) necessary to arrive at the claimed subject matter, and
- (D) an explanation as to why the claimed invention would have been obvious to one of ordinary skill in the art at the time the invention was made.

In essence, the examiner's rationale for the rejection should be clearly expressed to the applicant. The specifics of the rationale should be readily apparent from the applied prior art and/or what has been set forth in the rejection. Applicant should be able to understand the basis for the rejection without having to guess at what is being alluded to in the rejection.

4/19/12

A rejection is unreasonable when it fails to address a claim limitation where it was probable at the time the rejection was made that either patentability would be predicated on the claim limitation or that additional prior art would be required to teach that the claim limitation was old (known) in the art. However, a rejection is not unreasonable merely because it fails to explicitly mention a claim limitation or could have treated a claim limitation differently where the limitation is so well known in the art that persons of ordinary skill in the art would not rely on it for patentability. A subsequent rejection which fails to address a specific claim limitation relied upon by applicant for patentability in the remarks accompanying a response by applicant is an unreasonable rejection. The failure to answer a specific argument which overcomes a rejection renders the subsequent making of that rejection an unreasonable rejection.

If one reasonable rejection of a claim is made on the basis of prior art under 35 U.S.C. 102 or 103, the failure to make a different rejection of the same claim based on different prior art would not be clear error, regardless of the relative strength of the omitted rejection. The best reference should be the one used. There is an exception to this in that sometimes the best reference will have a publication date less than a year prior to the application filing date, hence it will be open to being overcome under 37 CFR 1.131. In these cases, if a second reference exists which cannot be so overcome and which, though inferior, is an adequate basis for rejection, the claims should be additionally rejected thereon.

In the event that the examiner determines that no rejection on the prior art is appropriate, the record should be reasonably clear as to the reasons for allowance. If the record is not clear, the examiner should provide appropriate reasons for allowance.

Decisions by the Board of Patent Appeals and Interferences (BPAI) that reverse a rejection of an examiner are ordinarily the result of an honest and legitimate difference of opinion and are not ordinarily based on a finding that the rejection was unreasonable. Entry by the Board of Patent Appeals and Interferences of a rejection based on evidence

4/19/12

not available to the examiner or prior art outside the most probable field of classified search for the claimed invention is not a clear error.

(7) determining whether amendment introduces new matter.

The examiner should evaluate matter, deleted or added by way of amendment to the specification, drawings, or claims for conformity with the originally presented disclosure. Includes objections to the specification under 35 U.S.C. 132 and 35 U.S.C. 112, first paragraph, and the rejection of claims dependent upon the new matter under 35 U.S.C. 112, first paragraph. See MPEP 706.03(o).

(8) appropriately formulating restriction requirements, where application could be restricted.

The examiner should determine (1) whether the claims of an application are drawn to two or more patentably distinct inventions, and (2) whether the burden involved in examining the plural patentably distinct inventions is serious enough to justify a restriction requirement.

Requiring restriction is discretionary on the part of the Utility or Plant Examiner. See MPEP 1500 for restriction practice in Design applications.

The examiner should make a telephone call to the attorney or agent of record and request an oral election except in cases where the restriction is complex, the application is being prosecuted pro se, or the examiner has reason to believe that an election will not be made by telephone.

A restriction requirement could rise to clear error if it is clearly contrary to written Office policy and if there have been several repeated occurrences of the same deficient performance.

In National stage applications filed under 35 USC 371, the examiner should determine whether a holding of lack of unity of invention is proper according to existing guidelines.

4/19/12

The examiner should point out a supporting rationale for any determination that restriction is proper and should evaluate requests for reconsideration of the requirement.

(9) determining whether claimed invention is in compliance with 35 USC 101.

The examiner should determine whether the subject matter of the invention or discovery comes within the boundaries set forth by 35 U.S.C. 101, which permits patents to be granted only for “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.”

The examiner should determine whether a legally acceptable function of the invention has been disclosed and whether the disclosed invention will perform that function.

(10) evaluating/applying case law as necessary

The examiner should conduct legal research to determine the state of the law when necessary.

The examiner should evaluate case law discovered in his/her own research and/or that relied on by applicants or their attorneys to determine applicability to the application at hand.

The examiner should apply case law, when necessary, in support of his/her determinations.

Clear Error is not chargeable per se under this Quality Major Activity (Activity). A failure to properly evaluate and/or apply case law under this section may be charged as appropriate under another Activity, provided that the examiner is responsible for this Activity, the Major Activity in which the clear error occurred (e.g., 102 or 103), and the Office action was submitted in final form.

Example 1: A primary examiner makes a rejection under 35 USC 103 that relies on case law to support the rejection. The case law however, is not applicable to the specific fact

4/19/12

pattern of the instant rejection and therefore is not properly relied on. A clear error would not be charged against the examiner for failure to apply case law per se but rather a clear error could be charged for failure to make a proper rejection under 35 USC 103 (major activity 6).

Example 2: A GS-11 examiner makes a rejection under 35 USC 103 that relies upon case law to support the rejection and posts the case for review. The case law however, is not applicable to the specific fact pattern of the instant rejection and therefore is not properly relied upon. A clear error would not be charged against the GS-11 examiner for improperly applying the case law, nor would a clear error be charged against the GS-11 examiner for making an improper rejection under 35 USC 103 (major activity 6) as this stemmed from the major activity 10 issue, for which the GS-11 examiner is not responsible.

(11) determining where appropriate line of patentable distinction is maintained between applications and/or patents.

The examiner determines whether rejection on the ground of double patenting, either statutory or "obviousness" type, is initially appropriate or should be maintained after the filing of a terminal disclaimer.

The examiner determines the appropriateness of other measures for treating an application having one or more claims conflicting with those of another application or patent including: rejections under 102(e) or 102(e)/103; rejections under 102(f) or (g) or 102(f)/103 or 102(g)/103; requirement for common assignee or common inventor to name the prior inventor of the conflicting subject matter.

After several documented instances of deficient performance without improvement on the part of the examiner, a Category 1 clear error may be charged in this Activity when the examiner has failed to make a proper determination in accordance with the preceding paragraphs, provided that the examiner is a GS-11 or higher.

4/19/12

The examiner should determine when conflicting claims of unrelated parties are directed to the same invention and make recommendations and render opinions during interference proceedings, including suggesting claims, making an initial recommendation of which claims correspond to a proposed count, preparation of initial interference papers and the rejection of claims after termination of an interference based on the lost count or upon estoppel.

(12) evaluating sufficiency of affidavits/declarations.

The examiner evaluates legal sufficiency of evidence, including test results, affidavits/declarations filed under 37 CFR 1.131, 1.132, etc., and other evidence presented by the applicant in accordance with stated Office policy.

Clear Error is not chargeable per se under this activity. Any failure to properly evaluate the sufficiency of an affidavit and/or declaration will be charged as a clear error under other activities as appropriate, provided that the examiner is responsible for this Major Activity, the Major Activity in which the clear error occurred (e.g., 102, 103), and the Office Action was submitted in final form.

Example: An examiner makes a rejection under 35 USC 103. Applicant files a proper Rule 131 declaration that swears behind the references used by the examiner in making the rejection. The examiner fails to properly consider the declaration and maintains the 35 USC 103 rejection. In this case, a clear error would not be charged against the examiner for failure to evaluate the declaration per se but rather a clear error could be charged for making an improper rejection under 35 USC 103 (major activity 6), provided that the examiner is a GS-12 or higher.

(13) evaluating sufficiency of reissue oaths/declarations.

The examiner determines whether the reissue oath/declaration complies with the requirements of 35 U.S.C. 251, 37 C.F.R. 1.175 and stated Office policy.

4/19/12

(14) promotes compact prosecution by including all reasonable grounds of rejection, objections, and formal requirements (MPEP 707.07(g) etc).

The examiner ordinarily should reject each claim on all valid grounds available, while avoiding, undue multiplication of references. (See MPEP § 904.03.) Major technical rejections on grounds such as lack of proper disclosure, lack of enablement, indefiniteness and res judicata should be applied where appropriate even though there may be a seemingly sufficient rejection on the basis of prior art. Where a major technical rejection is appropriately set forth, a rationale should be provided rather than a mere conclusory statement.

Some situations exist where examination of an application appears best accomplished by limiting action on the claim thereof to a particular issue. These situations include the following:

- (A) Where an application is too informal for a complete action on the merits. See MPEP § 702.01;
- (B) Where disclosure is directed to subject matter which violates the Laws of Physics. However, in such cases, the best prior art readily available should be cited and its pertinency pointed out without specifically applying it to the claims. MPEP 707.07.

On the other hand, a rejection on the grounds of res judicata, no prima facie showing for reissue, new matter, or inoperativeness (not involving subject matter which violates the Laws of Physics) should be accompanied by rejection on all other available grounds.

(15) makes the record, taken as a whole, reasonably clear and complete.

The examiner should set forth any appropriate reason(s) to support any rejection(s) or objection(s) made. Failure to do so could rise to clear error unless the intent of the examiner is readily apparent from the evidence relied upon by the examiner. Clarity and accuracy of the Office position is expected in each Office action because applicant must be provided with such information as may be useful in judging the propriety of continuing the prosecution of the application 35 U.S.C. 132.



The record in an allowed application should be reasonably clear as to the reasons for allowance. Under certain circumstances, such as when an examiner withdraws a rejection for reasons not in the record or when the references cited in a first action allowance need to be distinguished from the limitations in a claim, the examiner would be expected to add a reason for the allowance to the record. Another example is where applicant's response sets forth an argument as well as evidence presented in an affidavit to overcome a reference and the examiner allows the application, the record should clearly reflect why the application was allowed.

Where specific reasons are recorded by the examiner, care must be taken to ensure that statements of reasons for allowance (or indication of allowable subject matter) are accurate, precise, and do not place unwarranted interpretations, whether broad or narrow, upon the claims.

Each statement of reasons for allowance should include at least (1) the major difference in the claims not found in the prior art of record, and (2) the reasons why that difference is considered to define patentably over the prior art if either of these reasons for allowance is not clear in the record. The statement is not intended to necessarily state all the reasons for allowance or all the details why claims are allowed and should not be written to specifically or impliedly state that all the reasons for allowance are set forth. Where the examiner has a large number of reasons for allowing a claim, it may suffice to state only the major or important reasons, being careful to so couch the statement. For example, a statement might start:

“The primary reason for the allowance of the claims is the inclusion of the limitation X in all the claims which is not found in the prior art references,” with further amplification as necessary. MPEP 1302.14.

(16) properly treats all matters of substance in applicant's response.

The examiner should consider all rebuttal arguments and evidence presented by

4/19/12

applicant. Failure to respond to the substance of an argument made by applicant, whether in response to a rejection, objection, or requirement made by the examiner, may rise to clear error if that rejection, objection or requirement is repeated. It is not clear error, however, to ignore conclusory statements like "the examiner has acted in hindsight" or "there would be no serious burden in examining all three inventions in a single application."

(17) formulates and independently signs final determinations of patentability (final rejections, allowances, examiner's answers and advisory actions).

The examiner formulates and independently signs final determinations of patentability (final rejections, allowances, examiner's answers and advisory actions) in accordance with all laws, rules and office policies.

Clear Error is not chargeable per se under this activity. Provided the examiner is responsible for this Activity (i.e. GS-14 (FSA) or higher), the failure to properly formulate and sign a final determination of patentability could be charged as a clear error under one of the other Activities as appropriate.

Example: An examiner improperly allows an application. The SPE finds that a proper rejection of the claims under 35 USC 102 should be made. In this case, a clear error would not be charged against the examiner for failure to properly formulate and sign a final determination of patentability per se but rather a clear error could be charged for failure to make an improper rejection under 35 USC 102 (major activity 6), provided the examiner was a primary examiner (GS-14 + with FSA).

(18) properly closes prosecution: makes no premature final rejection (37 CFR 1.113).

Under this section, a clear error may be charged if the examiner makes a premature final rejection (one that should not have been made final in accordance with Office policy). Under present practice, second or any subsequent actions on the merits shall be made final, except where the examiner introduces a new ground of rejection that is neither necessitated by applicant's amendment of the claims, nor based on information submitted

4/19/12

in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p).

Where information is submitted in an information disclosure statement during the period set forth in 37 CFR 1.97(c) with a fee, the examiner may use the information submitted, e.g., a printed publication or evidence of public use, and make the next Office action final whether or not the claims have been amended, provided that no other new ground of rejection which was not necessitated by amendment to the claims is introduced by the examiner.

The claims of a new application may be finally rejected in the first Office action in those situations where (A) the new application is a continuing application of, or a substitute for, an earlier application, and (B) all claims of the new application (1) are drawn to the same invention claimed in the earlier application, and (2) would have been properly finally rejected on the grounds and art of record in the next Office action if they had been entered in the earlier application.

The claims of an application for which a request for continued examination (RCE) has been filed may be finally rejected in the action immediately subsequent to the filing of the RCE (with a submission and fee under 37 CFR 1.114) where all the claims in the application after the entry of the submission under 37 CFR 1.114 are (A) drawn to the same invention claimed in the application prior to the entry of the submission under 37 CFR 1.114, and (B) would have been properly finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to the filing of the RCE under 37 CFR 1.114.

However, it would not be proper to make final a first Office action in a continuing or substitute application or an RCE where that application contains material which was presented in the earlier application after final rejection or closing of prosecution but was denied entry because (A) new issues were raised that required further consideration and/or search, or (B) the issue of new matter was raised.

4/19/12

Further, it would not be proper to make final a first Office action in a continuation-in-part application where any claim includes subject matter not present in the earlier application. MPEP 706.07(b).

When applying any 35 U.S.C. 102(e)/103 references against the claims of an application the examiner should anticipate that a statement averring common ownership at the time the invention was made may disqualify any patent or application applied in a rejection under 35 U.S.C. 103 based on 35 U.S.C. 102(e). If such a statement is filed in reply to the 35 U.S.C. 102(e)/103 rejection and the claims are not amended, the examiner may not make the next Office action final if a new rejection is made. MPEP 706.07(a).

(19) properly rejects all rejectable claims in a final rejection; properly allows all claims in an allowance.

Under this activity, an examiner is held accountable for improperly allowing one or more claims in an allowed application, or for improperly finally rejecting one or more claims in a final rejection.

The guidelines set forth in the major activities above should be used when determining whether or not the claims in a final rejection or allowance have been properly rejected or allowed.

In the case of a final rejection, as long as there is at least one valid rejection of each rejectable claim; any additional improper rejections can be charged under another major activity of this element, but may not be charged as a clear error under this activity.

Example 1: In a final rejection, all of the pending claims are properly rejected under 35 USC 103. There is also an improper rejection under 35 USC 112. In this situation no error can be charged under this Activity because all of the claims have been properly

4/19/12

rejected in the final office action. A Category 2 error could be charged for the improper 35 USC 112 rejection under as set forth in major activity 3.

## ***Criteria for Evaluation***

### Newly Hired Examiners

All newly hired examiners having no prior patent examining experience will be evaluated under the Quality element as follows:

#### During the first six months:

All examiners are evaluated with respect to:

##### Major Activities:

After receiving specific and detailed preliminary instructions, the examiner performs patent examining functions of a simple nature, assigned primarily for training purposes. The assigned functions may include, by way of example, those of: checking applications for (a) compliance with formal requirements and (b) technological accuracy; treating disclosure statements and claims of priority; and conducting searches. The examiner submits all office actions in draft form.

##### Criteria for Evaluation:

The examiner is evaluated under the generic performance standards with respect to his or her ability to (1) learn and independently perform the assigned functions and (2) accept instruction and incorporate feedback with respect to the performance of these functions.

#### During the second six months:

Examiners paid at the GS-5 level will be evaluated under the same provisions as for the first six months.

Examiners paid at the GS-7 level and above will be evaluated with respect to:

##### Major Activities:

After receiving preliminary instructions, the examiner performs the following patent examining functions and formulates or recommends appropriate action with respect to each: (1) checking applications for (a) compliance with formal requirements and (b) technological accuracy; (2) treating disclosure statements and claims of priority; (3) analyzing disclosure and claims for compliance with 35 USC 112; (4) planning field of search; (5) conducting search; (6) formulating rejections under 35 USC 102 and 103 with supporting rationale, or determining how claim(s) distinguish over the prior art. The examiner submits all office actions in draft form.

Criteria for Evaluation:

The examiner is evaluated under the generic qualitative performance standards with respect to his or her ability to (1) learn and independently perform the assigned functions and (2) accept instruction and incorporate feedback with respect to the performance of these functions.

After twelve months:

All examiners will be evaluated with respect to their actual GS level for all assigned functions.

Note: “Assigned functions”, above, means the PAP Major Activities for which the examiner is responsible at his/her grade.

For functions requiring preliminary instruction, clear error may not be charged absent such instruction.

An examiner shall not be charged with clear error when an error is made in the course of acting on a case involving an art outside the examiner's normally assigned docket (not familiar to the examiner), in which his level of technical expertise is less than that of those who normally examine in the art, and (1) the search notes indicate consultation with either (a) one or more examiners known to have appropriate technical expertise in the art

4/19/12

or (b) the SPE in the Art Unit to which the art is assigned, and (2) the error resulted from the lack of familiarity. Evidence that the examiner failed to communicate the relevant features of the invention shall negate reliance upon the expertise of another.

As anticipation (35 USC 102) is the epitome of obviousness (35 USC 103), a rejection made under 35 USC 103 that would be proper under 35 USC 102, is not a clear error.

### **GS-5 through GS-9 non-probationary examiners**

Examiners at the GS-5 level shall be assigned a rating based on the ability of the examiner to perform the appropriate patent examining functions (major activities) for that particular grade, after receiving specific and detailed preliminary instruction, guidance and training in all aspects of work assignments. All office actions are submitted in draft form.

Examiners at the GS-7 level shall be assigned a rating based on the ability of the examiner to perform the appropriate patent examining functions (major activities) for that particular grade, after receiving preliminary instructions. All office actions are submitted in draft form.

Examiners at the GS-9 level shall be assigned a rating based on the ability of the examiner to perform the appropriate patent examining functions (major activities) for that particular grade. Basic examining functions (e.g. analyzing claims, planning and conducting the search, applying references to the patent application, etc) are performed without preliminary instruction from the supervisor. Examiners may perform “Advanced” patent examining functions (requirements for restrictions, the recognition and development of probable interferences, etc.) only after obtaining preliminary instruction from their supervisor. All office actions are submitted in draft form.

For examiners at the GS-5 through GS-9 levels, all actions submitted for credit are submitted in draft form. Clear error may not be charged in an Office action which is submitted in draft form. Clear error may be charged in Office actions submitted in final

4/19/12

form, so long as the examiner who has performed the action is responsible for the functions (major activities) in which clear error has occurred

For Examiners at the GS-5 through GS-9 level the following criteria shall be used:

Outstanding: The examiner's oral and written expressions are exceptionally clear and effective. Except for rare occurrences, the work product is complete, accurate and leaves little room for improvement.

Commendable: The examiner's oral and written expressions are clear and effective. In substantially all actions, the work product is complete and accurate with little or no revision required.

Fully Successful: The examiner's oral and written expressions normally convey the examiner's position effectively. Normally the work product is complete and accurate, requiring only minor revision.

Marginal: In a significant number of instances oral or written expressions do not effectively convey the examiner's position. In a significant number of instances the work product is incomplete or inaccurate, and requires substantial revision.

Unacceptable: Performance is not adequate for the position. In numerous instances, oral or written expressions do not effectively convey the examiner's position. In numerous instances, the work product is incomplete or inaccurate, and requires major revision.

The criteria above apply to Office actions submitted by GS-5 through GS-9 examiners in final form. In order to support or justify a Quality rating at the marginal or unacceptable level, the SPE would need to make a determination as to the frequency and magnitude of the clear errors by following the language of the PAP to qualitatively evaluate the examiner performance to distinguish between the marginal and unacceptable levels. Note that in order to rate an examiner either marginal or unacceptable, the SPE must show a



4/19/12

significantly higher percentage of clear errors in the final form work product than would be required for those examiners who have error rates.

**GS-11 through GS-13 examiners**

Examiners at the GS-11, GS-12 and GS-13 levels will be assigned a rating in the Quality element with respect to the functions (major activities) for which the examiner is responsible.

For error rates in the Outstanding or Commendable ranges, an examiner must meet additional criteria as set forth in the “Indicia of Outstanding or Commendable Performance” identified below to maintain the rating as determined by error rate (if it’s shown that the criteria are not met, the rating may be moved down one level (i.e. Outstanding to Commendable, or Commendable to Fully Successful):

Outstanding: The error rate is 0% - 4.49%. Except for rare occurrences, the examiner complies with indicia 1 and 2 of the “Indicia of Outstanding or Commendable Performance” as identified below.

Commendable: The error rate is 4.50% - 5.49%. In substantially all actions, the examiner complies with indicia 1 and 2 of the “Indicia of Outstanding or Commendable Performance” as identified below.

Fully Successful: The error rate is 5.50% - 6.49%.

Marginal: The error rate is 6.50% - 7.49%.

Unacceptable: The error rate is greater than or equal to 7.50%.

For GS-11 examiners, with no preliminary instructions, the examiner formulates or recommends appropriate action with respect to the functions (major activities) for that particular grade. After receiving preliminary instructions, the examiner formulates or

4/19/12

recommends appropriate action with respect to Major Activity #11. All non-final actions are submitted in final form except for actions containing Advanced and Legal functions, which are submitted in draft form. All other actions are submitted in draft form.

For GS-12 examiners, with no preliminary instructions, the examiner formulates or recommends appropriate action with respect to the functions (major activities) for that particular grade. After receiving preliminary instructions, the examiner formulates or recommends appropriate action with respect to major activities 10-13. The examiner submits all actions in final form.

For GS-13 examiners, with no preliminary instructions, the examiner formulates or recommends appropriate action with respect to major activities 1-13. The examiner submits all actions in final form.

A description of Basic, Advanced and Legal functions can be found in the Position Classification Standard for Patent Examining, 1224.

### **GS-13 (PSA) and GS-14(PSA) examiners**

Examiners at the GS-13 (PSA) and GS-14 (PSA) levels will be assigned a rating in the Quality element with respect to the major activities for which the examiner is responsible.

For error rates in the Outstanding or Commendable ranges, an examiner must meet additional criteria as set forth in the “Indicia of Outstanding or Commendable Performance” identified below to maintain the rating as determined by error rate (if it’s shown that the criteria are not met, the rating may be moved down one level (i.e. Outstanding to Commendable, or Commendable to Fully Successful):

Outstanding: The error rate is 0% - 4.49%. Except for rare occurrences, the examiner complies with indicia 1 and 2 of the “Indicia of Outstanding or Commendable Performance” as identified below.

4/19/12

Commendable: The error rate is 4.50% - 5.49%. In substantially all actions, the examiner complies with indicia 1 and 2 of the “Indicia of Outstanding or Commendable Performance” as identified below.

Fully Successful: The error rate is 5.50% - 6.49%.

Marginal: The error rate is 6.50% - 7.49%.

Unacceptable: The error rate is greater than or equal to 7.50%.

### **Indicia of Outstanding and Commendable Performance**

1. The examiner’s statements of rejection, objection and response to arguments clearly and concisely present the positions taken or recommended in the resulting office actions including a thorough substantive explanation to convey those positions to the applicant.
2. The office actions as well as the file record clearly indicate that the examiner fully complies with the principles of compact prosecution. Note the principles of compact prosecution comprise conducting an initial search which is as complete as possible including consultation with an expert in the art where the examiner lacks such expertise; placing art of record which meets both the concept and the wording of the claims as well as other art which is pertinent to significant though unclaimed features of the disclosed invention; and issuing a first office action which clearly explains the examiner’s position on each essential issue in such detail that absent some unexpected consideration the next office action may be made final.

Note: Failure to meet the “Indicia for Outstanding or Commendable Performance” may result in lowering the rating only one level below that determined by the error rate at the Outstanding and Commendable levels.

Examiners at these Grade levels submit all actions for credit in final form.

### **GS-14 and GS-15 FSA examiners**

Examiners at the GS-14 (FSA) and GS-15 (FSA) levels will be assigned a rating in the Quality element with respect to the major activities for which the examiner is responsible.

For error rates in the Outstanding or Commendable ranges, an examiner must meet additional criteria as set forth in the “Indicia of Outstanding or Commendable Performance” identified below to maintain the rating as determined by error rate (if it’s shown that the criteria are not met, the rating may be moved down one level (i.e. Outstanding to Commendable, or Commendable to Fully Successful):

Outstanding: The error rate is 0% - 4.49%. Except for rare occurrences, the examiner complies with indicia 1-3 of the “Indicia of Outstanding or Commendable Performance” as identified below.

Commendable: The error rate is 4.50% - 5.49%. In substantially all actions, the examiner complies with indicia 1-3 of the “Indicia of Outstanding or Commendable Performance” as identified below.

Fully Successful: The error rate is 5.50% - 6.49%.

Marginal: The error rate is 6.50% - 7.49%.

Unacceptable: The error rate is greater than or equal to 7.50%.

### **Indicia of Outstanding and Commendable Performance**

1. The examiner’s statements of rejection, objection and response to arguments clearly and concisely present the positions taken or recommended in the resulting office actions including a thorough substantive explanation to convey those positions to the applicant.

2. The office actions as well as the file record clearly indicate that the examiner fully complies with the principles of compact prosecution. Note the principles of compact prosecution comprise conducting an initial search which is as complete as possible including consultation with an expert in the art where the examiner lacks such expertise; placing art of record which meets both the concept and the wording of the claims as well as other art which is pertinent to significant though unclaimed features of the disclosed invention; and issuing a first office action which clearly explains the examiner's position on each essential issue in such detail that absent some unexpected consideration the next office action may be made final.

3. The record usually developed by the examiner shows an indication of allowable subject matter at the earliest time which is consistent with the file record and prosecution of the application.

Note: Failure to meet the "Indicia for Outstanding or Commendable Performance" may result in lowering the rating only one level below that determined by the error rate at the Outstanding and Commendable levels.

Examiners at these Grade levels submit all actions for credit in final form.

### ***Draft form office actions***

Office actions submitted in draft form are not subject to holding of clear error.

If substantive correction is required so that a submitted draft form office action complies with the Major activities, the reviewer should provide an explanation, appropriate to the grade level of the examiner, as to what corrections should be made in the draft action and return the draft action to the examiner for correction. If the indicated substantive corrections are not made by the junior examiner, and if the corrections not effected are directed to Major activities for which the junior examiner is responsible at his/her grade, the situation may rise to the level of clear error.

### ***Final form office actions***

Final form office actions are subject to holding of clear error if substantive corrections are required so that the office action complies with the major activities for which the examiner is responsible at his/her grade.

An action submitted in final form can be either:

- A. The first submission by the examiner if the examiner submits his/her actions, per the PAP specific to his/her grade, in final form; or
- B. The resubmission of a draft action with necessary corrections, following review appropriate to the grade level of the examiner.

### ***Return of work product for correction***

Work product will normally be returned when correction is required so that it complies with the major activities. The emphasis of the evaluation should be with respect to the completeness and accuracy of the work product and whether the work product is sufficiently clear to reasonably convey the Examiner's position. The fact that the rating official/reviewer prefers a different format, style, manner of expression or arrangement of the work product content does not reflect upon the completeness and accuracy of the work product, and should not be reflected in the evaluation of the formulated or recommended work product. Emphasis on editorial review and personal preferences in style should be avoided; however, the work product may also be returned for correction if the work product is replete with grammatical and/or idiomatic errors.

### ***Examiner Optional Clear Error Review Process***

Reviewers /trainers will continuously review work and provide timely feedback and assistance to examiners consistent with their grade level and assigned duties.

4/19/12

At the appropriate point when the combination of coaching/mentoring/training has not resulted in the necessary improvement relative to the particular issue, a clear error may be charged. (The SPE has the discretion not to charge a previously identified error for performance evaluation, see below). The SPE will inform the examiner that a clear error under the appropriate category is being charged.

Step 1 - The examiner will have the option to rebut such clear error (orally or in writing). The SPE will consider the rebuttal and either remove the clear error or inform the examiner in written form why the rebuttal was insufficient.

Step-2 - If the issue remains unresolved, the examiner may take the issue forward to the TC Director for review.

Until the examiner receives the TC Director's response per Step 2, the time period for filing a grievance is stayed.

As is currently the practice, the SPE has the discretion not to charge a previously identified error for performance evaluation. In situations where a newly identified performance deficiency is discovered (for example as a result of a change in supervision) there will ordinarily be an acclimation and retraining period prior to errors being charged. Other situations where this will be considered include when an employee is turned down for either promotion to GS-13 or for denial of partial signatory authority after previously receiving ratings of Fully Successful or greater in Quality.

### ***Charging of Errors***

There are three categories of errors; Category 1, Category 2 and Category 3. The chart on the following page shows major activities under this performance element, when examiners become responsible for those major activities and the category into which any clear error would fall.

**Quality Major Activities**

Quality Major Activities	Activity Level	Error Category	GS	GS	GS	GS	GS	GS	GS	GS	GS
			5	7	9	11	12	13	13/14 PSA	14 FSA	15
1. Checking applications for compliance for (a) compliance with formal requirements of patent statutes and rules and (b) technological accuracy	Basic	1	✓	✓	✓	✓	✓	✓	✓	✓	✓
2. Treating disclosure and claims of priority	Basic	1	✓	✓	✓	✓	✓	✓	✓	✓	✓
3. Analyzing disclosure and claims for compliance with 35 USC 112	Basic	2		✓	✓	✓	✓	✓	✓	✓	✓
4. Planning field of search	Basic	1		✓	✓	✓	✓	✓	✓	✓	✓
5. Conducting search	Basic	1	✓	✓	✓	✓	✓	✓	✓	✓	✓
6. Making proper rejections under 35 USC 102 and 103 with supporting rationale, or determining how claim(s) distinguish over the prior art	Basic	2		✓	✓	✓	✓	✓	✓	✓	✓
7. Determining whether amendment introduces new matter	Advanced	2				✓	✓	✓	✓	✓	✓
8. Appropriately formulating restriction requirements, where application could be restricted	Advanced	1				✓	✓	✓	✓	✓	✓
9. Determining whether claimed invention is in compliance with 35 USC 101	Advanced	2				✓	✓	✓	✓	✓	✓
10. Evaluating/applying case law as necessary	Legal	*					✓	✓	✓	✓	✓



Quality Major Activities	Activity Level	Error Category	GS	GS	GS	GS	GS	GS	GS	GS	GS
			5	7	9	11	12	13	13/14 PSA	14 FSA	15
11. Determining where appropriate line of patentable distinction is maintained between applications and/or patents	Legal	1				✓	✓	✓	✓	✓	✓
12. Evaluating sufficiency of affidavits/declarations	Legal	*					✓	✓	✓	✓	✓
13. Evaluating sufficiency of reissue oath/declaration	Legal	1					✓	✓	✓	✓	✓
14. Promotes compact prosecution by including all reasonable grounds of rejections, objections, and formal requirements (M.P.E.P. 707.07((g), etc.)	Legal	1							✓	✓	✓
15. Makes the record, taken as a whole, reasonably clear and complete	Legal	1							✓	✓	✓
16. Properly treats all matters of substance in applicant's response	Legal	1							✓	✓	✓
17. Formulates and independently signs final determinations of patentability (final rejections, allowance, examiner answers and advisory actions)	Legal	*								✓	✓
18. Properly closes prosecution: makes no premature final rejection	Legal	2								✓	✓
19. Properly rejects all rejectable claims in a final rejection; properly allows all claims in an allowance	Legal	3								✓	✓

\*Errors for these items will be charged under another major activity

A category 1 error may be charged only after several occurrences of the same error and when individual mentoring and training has failed to correct the problem. The several occurrences of the same error must have occurred over a time period extending back no further than the beginning of the previous Fiscal year.

Category 2 and Category 3 errors may be charged after a single occurrence.

In order for a clear error to be charged, it must:

- A. Have occurred in a major activity for which the examiner is responsible per the PAP specific to the examiner's Grade/level of signatory authority;
- B. Have occurred in an Office action which was submitted in final form relative to the major activity at issue; and
- C. Have occurred in an Office action which was submitted for credit and for which credit was received during the period charged.

Where two or more clear errors under the same category are found in a single office action, the rating official shall document (identify and set forth an explanation of the deficiency) each of such errors and shall set forth the most significant error, if apparent. However, only one clear error under that category will be used in determining the error rate for that category. The SPE should avoid calling unnecessary cumulative errors.

Where there are found separate, unrelated instances of clear error under different categories in an office action or application, as appropriate, there may be a holding of clear error under each applicable category. For example:

- A. Both a Category 1 and a Category 2 clear error may be charged in a single action if they are unrelated.
- B. Both a Category 1 and a Category 3 clear error may be charged in a single action if they are unrelated.

4/19/12

Where there are found separate, related instances of clear error (e.g. one arising from the other) under different categories in an office action, it is not proper to hold clear error under each category, and only the higher category error should be charged. For example:

A. The examiner performs an inadequate search, and does not reject one or more claims over art in an FAOM. Upon conducting a proper search, the SPE finds a reference that should have been applied to the claims under 35 U.S.C. 102 that were not rejected over art in the FAOM. In this situation, the SPE should hold only a clear error under Category 2 (major activity (6) – failure to make a proper rejection of the claims under 35 U.S.C. 102...) and not under Category 1 (major activity (5) failure to conduct a proper search). In this situation, the two errors are related in that the Category 1 error directly resulted in the Category 2 error.

B. If the Office action counted in “A” above was an allowance, the clear error could be charged under Category 3 (provided that the examiner was responsible for major activity 19).

Additionally, a Category 2 and a Category 3 error cannot be charged in the same office action, even if the errors are wholly unrelated.

Error rates are based on Office actions not applications. Each Office action in an application is subject to review as long as it reflects work submitted for credit by the examiner during the rating period and credited for the rating period. If in the same application, the same clear error occurs in more than one Office action subject to review, only the most recent occurrence of that clear error shall be charged, if no notice was provided after the previous occurrence.

Whereas it is desirable that an examiner correct a prior mistake, an examiner will not be charged with a clear error occurring in a prior Office action within the rating period if the clear error has been corrected in a second or subsequent action within the rating period.

4/19/12

The correction must occur prior to the error or errors being noted to the examiner by the rating official.

Consistent with current practice, if at the end of quarter and/or FY an examiner turns in a grossly disproportionate amount of work inconsistent with the relative amount of examining hours during the last bi-week of the period, the examiner may be subject to a heightened work product review. There is no particular percentage or amount of work which defines “grossly disproportionate.” The supervisor will take into consideration the volume of work completed and the time period in which the work was handed in.

### ***Error Rates***

Note: The end of a “rating period” does not necessarily coincide with the end of a pay period. One example of this is “Count Monday” for Primary Examiners, in that even though the pay period ends at midnight the previous Saturday, office actions properly submitted up until a designated hour on Monday are considered to be submitted for credit, and credited for the previous pay period. Another example is at the end of a Fiscal Year. Actions properly submitted through September 30 are considered to be submitted for credit, and credited for the previous Fiscal Year.

**The error rates specified are the percentage of Office actions submitted in final form which contained clear error in a major activity for which the examiner is responsible as defined herein based on the total number of Office actions counted during the period under consideration. See attachment entitled Signatory Authority Program and PAP Denominators.**

### **Error Rate calculation for GS-11 – GS-14 PSA examiners**

For GS-11 through GS-14 PSA examiners, an error rate is first determined for both Category 1 and Category 2 errors.

4/19/12

The Category 1 error rate (CAT1) is determined by dividing all Category 1 errors in the actions submitted for credit during the rating period and credited for the rating period by the total number of actions submitted for credit during the rating period and credited for the rating period.

$$\text{CAT1} = (\# \text{ Category 1 Errors}) / (\# \text{ Actions})$$

The Category 2 (CAT2) error rate is determined by dividing all Category 2 errors in the actions submitted for credit during the rating period and credited for the rating period by the total number of actions submitted for credit during the rating period and credited for the rating period.

$$\text{CAT2} = (\# \text{ Category 2 Errors}) / (\# \text{ Actions})$$

An error rate of 7.50% or above in any single category is unacceptable and controls the overall element rating.

If the examiner's error rate is below 7.50% in each of the two categories, then the two error rates are averaged to produce an overall Quality Error Rate.

$$\text{QUALITY ERROR RATE} = (\text{CAT1} + \text{CAT2}) / 2$$

**Error Rate calculation for GS-14 (FSA) examiners and GS-15 (FSA) examiners**

For primary examiners, an additional category of errors are classified as Category 3 errors. A Category 3 error occurs when:

one or more claims are not properly under final rejection in a final rejection office action, or one or more claims are improperly allowed in an allowance office action.

First, an error rate is determined for each of Categories 1-3.

4/19/12

The Category 1 error rate (CAT1) is determined by dividing all Category 1 errors in the actions submitted for credit during the rating period and credited for the rating period by the total number of actions submitted for credit during the rating period and credited for the rating period.

$$\text{CAT1} = (\# \text{ Category 1 Errors}) / (\# \text{ Actions})$$

The Category 2 (CAT2) error rate is determined by dividing all Category 2 errors in the actions submitted for credit during the rating period and credited for the rating period by the total number of actions submitted for credit during the rating period and credited for the rating period.

$$\text{CAT2} = (\# \text{ Category 2 Errors}) / (\# \text{ Actions})$$

The Category 3 (CAT3) error rate is determined by dividing all category 3 errors by the total number of final office actions and allowances submitted for credit during the rating period and credited for the rating period.

$$\text{CAT3} = (\# \text{ Category 3 Errors}) / (\# \text{ final office actions and allowances})$$

An error rate of 7.50% or above in any single category is unacceptable and controls the overall element rating.

If the examiner's error rate is below 7.50% in each of the three categories, then the three error rates are averaged to produce an overall Quality Error Rate.

$$\text{QUALITY ERROR RATE} = (\text{CAT1}) + (\text{CAT2}) + (\text{CAT3}) / 3$$

### ***Quality Error Rate and Element Rating***

For those examiners having an error rate associated with their grade level (i.e. GS-11-GS-15 examiners), the following criteria is used:

0 – 4.49%	Outstanding
4.50% – 5.49%	Commendable
5.50% - 6.49%	Fully Successful
6.50% - 7.49%	Marginal*
Greater than or equal to 7.50%	Unacceptable

\* Note: Continued or repetitive performance at this level adversely impacts upon the efficiency of the service under the performance element.

Error rates are truncated to the second decimal. For example an error rate of 5.498 = 5.49.

#### Example 1:

A GS-12 examiner has been charged with 7 CAT1 errors and 3 CAT2 errors during the rating period. The examiner submitted for credit and received credit for 130 actions during the rating period.

First, the category 1 error rate (CAT1) is determined:.

$$\text{CAT1} = 7/130 = 0.0538 \text{ (5.38 \%)}$$

Next, the category 2 error rate (CAT2) is determined:

$$\text{CAT2} = 3/130 = 0.0230 \text{ (2.30 \%)}$$

The two error rates are averaged to get the total quality error rate:

4/19/12

$$\text{Quality Error Rate} = (0.0538 + 0.0230) / 2 = 0.0384 \text{ (3.84 \%)}$$

An error rate of 3.84 % would correspond to a rating of Outstanding.

The SPE would then have to consult the “Indicia of Outstanding or Commendable Performance” for evaluation for outstanding or commendable ratings.

If the examiner’s final form work product complies with indicia 1 and 2 of the “Indicia of Outstanding or Commendable Performance” then the examiner would receive a rating of Outstanding.

If the examiner’s final form work product does not comply with indicia 1 and 2 of the “Indicia of Outstanding or Commendable Performance” then the examiner could receive a rating of Commendable.

Note that because no rating may be reduced more than one level based on the “Indicia of Outstanding or Commendable Performance”, based on the Examiner’s error rate (corresponding to the Outstanding level), the examiner may not be rated Fully Successful because of a lack of indicia shown.

Example 2:

A GS-14 examiner having full signatory authority has submitted and received credit for a total of 200 actions during the rating period. Of these 200 actions, 150 were non-final determination actions (i.e. restrictions, first actions on the merits, other non final office actions, etc.). The remaining 50 office actions were either allowances or final rejections.

Based on a review of the examiner’s actions, the examiner has been charged with 12 CAT1 errors; 8 CAT2 errors and 2 CAT3 errors.

First, the category 1 error rate (CAT1) is determined:



4/19/12

$$\text{CAT1} = 12/200 = 0.0600 \text{ (6.00 \%)}$$

Next, the category 2 error rate (CAT2) is determined:

$$\text{CAT2} = 8/200 = 0.0400 \text{ (4.00 \%)}$$

Next, the category 3 error rate (CAT3) is determined:

$$\text{CAT3} = 2/50 = 0.0400 \text{ (4.00 \%)}$$

The three error rates are averaged to get the total quality error rate:

$$\text{Quality Error Rate} = (0.0600 + 0.0400 + 0.0400) / 3 = 0.0466 \text{ (4.66 \%)}$$

(Note truncation after the second decimal).

An error rate of 4.66 % would correspond to a rating of Commendable. The SPE must then determine if the examiner has met indicia 1-3 of the “Indicia of Outstanding or Commendable Performance” as listed above. If the indicia are met, then the examiner would receive a rating of Commendable.

If the examiner’s work product does not comply with indicia 1-3 of the “Indicia of Outstanding or Commendable Performance” then the examiner would receive a rating of Fully Successful.

Note that because no rating may be reduced more than one level based on the “Indicia of Outstanding or Commendable Performance”, based on the Examiner’s error rate (corresponding to the Commendable level), the examiner may not be rated below Fully Successful because of a lack of indicia shown.

4/19/12

Example 3:

During a single quarter of the fiscal year, a GS-12 examiner has been charged with 3 CAT1 errors and 8 CAT2 errors. The examiner submitted and received credit for 75 actions during the quarter.

First, the category 1 error rate (CAT1) is determined:.

$$\text{CAT1} = 3/75 = 0.0400 \text{ (4.00 \%)}$$

Next, the category 2 error rate (CAT2) is determined:

$$\text{CAT2} = 8/75 = 0.1066 \text{ (10.66 \%)}$$

In this situation, because the examiner's CAT2 error rate is greater than 7.50%, this error rate would control and the examiner would be at an Unacceptable level for the quarter in the Quality element.

### ***Composite Performance Ratings***

An examiner shall be rated under the performance elements and major elements thereof applicable to the grade and level of permanent signatory authority (if any) held by the examiner during the rating period.

For an examiner promoted within the rating period, the rating shall be based upon a composite of the PAPs applicable to the grade(s) and level of permanent signatory authority (if any) held during each pay period of the rating period.

At the beginning of the rating year the examiner will be issued the performance appraisal plan (PAP) for the current grade and level of permanent signatory authority held (if any). At the time of promotion or grant of a permanent level of signatory authority the examiner will be issued a new performance plan for the new grade/permanent level of

4/19/12

signatory authority. In determining the final rating of an examiner, the points for the quality element are generated as the prorated sum of the numerical value of the achieved standard for each grade and level of permanent signatory authority (if any) held by the examiner.

### ***Examiners on the Signatory Program***

An examiner granted temporary partial or temporary full signatory authority will not be evaluated for performance appraisal purposes on the basis of the quality and production goal elements of the PAP applicable only to the permanent grant of partial or full signatory authority. However, noted deficient performance may be charged to the examiner under his/her current PAP for performance appraisal purposes if such is a major activity for which the examiner is responsible at his/her current grade/level of permanent signatory authority. At the time of entry on the signatory program the examiner will be given an unsigned copy of the performance appraisal plan which reflects the elements and standards necessary to be achieved for successful completion of the applicable phase of the program for which the temporary grant has been given. For rating purposes during the period a temporary grant of authority is held the examiner will be treated as if the temporary grant of authority had not been made. Upon successful completion of the applicable portion of the signatory program the examiner will be issued the new performance appraisal plan reflective of the grant of the permanent authority and henceforth be subject to it for rating purposes.

#### Example of how errors made during the Signatory Review programs are treated for performance appraisal purposes:

An examiner is a GS-13 with permanent partial signatory authority at the beginning of the rating year and is on the Full Signatory Program. During the program, the following deficiencies/errors are found during a review of the examiner's work:

- a) 3 CAT1 errors of a type that have been raised for the first time

4/19/12

The 3 CAT1 errors would not be charged as errors because they all came to the attention of the rating official during the signatory program at the same time and the examiner was neither made aware of the errors nor received coaching and mentoring regarding how to correct them.

b) 2 CAT1 errors of a type that have occurred several times over the current and previous fiscal year and for which the examiner has received coaching/mentoring.

The 2 CAT1 errors would be charged as errors because they occurred several times over the current and previous fiscal year and the examiner received coaching/mentoring.

c) 2 CAT2 errors which comprise an improper 35 USC 102 rejection (Major Activity 6) and improperly making an Office action final (Major Activity 18).

For the 2 CAT2 errors found, only the improper 35 USC 102 rejection (Major Activity 6) would be charged as an error and used in the examiner's rating because the examiner was responsible for this Major Activity as a GS-13 (PSA) Examiner. Because a GS-13 (PSA) Examiner is not responsible for Major Activity 18, the improper final rejection made during the course of the program would not be used when determining the examiner's rating.

d) 1 CAT3 error which is based on an allowance where an appropriate rejection under 35 USC 102 should have been made (Major Activity 19).

For the CAT3 error found, the examiner would not be charged with a CAT3 error for rating purposes because once again, a GS-13 (PSA) Examiner is not responsible for Major Activity 19 (properly allowing all claims in an allowance). However, the examiner could be charged with a CAT2 error based on Major Activity 6 (failure to make a proper 35 USC 102 rejection on a claim) because the Major Activity does fall under the responsibilities of a GS-13 (PSA) Examiner.

Based on the criteria set for in the Full Signatory Program, the examiner is granted full signatory authority beginning in the 11<sup>th</sup> pay period of the fiscal year.

4/19/12

Suppose for rating purposes the examiner's performance in the quality element was as shown below:

#PP's	Grade	Quality Rating during that grade
10	13-PSA	Outstanding (5)
16	14-FSA	Commendable (4)

Thus, the number of rating points earned would be determined as follows:

$(\text{Portion of FY at old grade}) \times (\text{Rating Points (1-5)}) \times (\text{Quality Element Weight (35)}) +$   
 $(\text{Portion of FY at new grade}) \times (\text{Rating Points (1-5)}) \times (\text{Quality Element Weight (35)})$

$$(10/26) \times 5 \times 35 = 67.3$$

$$(16/26) \times 4 \times 35 = 86.2$$

$$67.3 + 86.2 = 153.5.$$

Accordingly, the examiner would receive 153.5 ratings points for the quality element.

## **DOCKET MANAGEMENT**

The Patent Examiner Performance Appraisal Plan contains a Docket Management element which comprises 20% of the overall rating.

### ***Major Activities***

Except where the SPE, Director, or other appropriate authority has waived, excused, or directed otherwise, the examiner:

1) Handles all patent applications (cases) and proceedings awaiting action in accordance with the time period or special handling instructions prescribed by current Office policy\* ;

2) Forwards all work for processing and/or handling promptly or in accordance with prescribed time periods\* .

\* Specific time periods and special handling instructions are set forth in the PAP.

Note: An examiner will be held responsible only for patent applications that are ready for examination. If the examiner believes a case is not ready to be acted upon, the examiner should notify their SPE who will make the final determination.

### ***Criteria for Evaluation***

The criteria for evaluation are based on the average number of days an examiner takes to complete all cases that are subject to docket management time periods.

4/19/12

All pay periods and bi-weeks are defined as Office of Human Resources pay periods which are used in WebTA.

Each action type (defined as a component) has an expected average days to complete and a ceiling control. The number of days the examiner has taken to complete each action is used to calculate a percentage score for each component that is based on the average actual number of days to complete actions compared to the expected average number of days for that type of action.

The component score percentage is then weight-averaged based on the number of actions in each component to determine the overall docket management rating. The following table shows the types of actions along with the Expected Average Days and Ceiling Control Days for each component.

The ceiling control days are the maximum number of days an examiner has to do the case before it moves to the ceiling exceeded tab. Once the case has been moved to the ceiling exceeded tab, the docket management item is closed by adding the number of ceiling control days for the type of case into the component average.

Categories are designated on the following chart. Components are the individual case types within each Category. For example, Category 2 has three components, special law new cases, special programs new and special amended.

## Docket Management Chart

Component (Action Type)		Expected Average Days	Ceiling Control (Days)
1	<b>Amendments</b> , response to non-final OA, Appeal Briefs	56	112
2	<b>Special Law New</b> PCT, Reexam, Reissue	14	28
	<b>Special Programs New</b> Green Tech, PPH, Accelerated Examination, Project Exchange, Petitions to make Special	14	28
	<b>Special Amended-</b> PPH, Accelerated Examination, Petitions to Make Special, Board Decisions/Remands	14	28
3	<b>Regular New</b> with Oldest Filing Date Regular, Continuations-in-Part (CIP's)	28	56
	<b>Continuing New</b> with Oldest Effective Filing Date Continuations, Divisional, RCEs	28	56
4	<b>Expedited</b> After Finals, Responses under 37 CFR 1.312, PUBs Cases (Printer Rushes)	11	30
5	<b>Returns</b> (Returned by TSS)	11	30
	<b>Returns</b> (Returned by Reviewer)	14	30

The number of days for completion of work is determined when the case is posted for credit, approved, or counted, whichever occurs first.

## Docket Management Clocks (Start Date) Chart

The following Table shows the start date for each type of action:

Component (Action Types)	Start Dates
<b>Amendments</b>	Start of the bi-week after the application is placed on examiners docket.
<b>Special Law New *</b>	A single new application is added the bi-week after the previous case was completed.
<b>Special Programs New *</b>	A single new application is added the bi-week after the previous case was completed.
<b>Special Amended</b>	Date when application is placed on examiners docket except for board decisions which will start 64 days after board decision date.
<b>Regular New</b> with Oldest New Filing Date Regular, Continuations in Part (CIPS) *	A single new application is added the bi-week after the previous case was completed.
<b>Continuing New</b> with Oldest Effective Filing Date Continuations, Divisionals, RCEs	A single application is added the bi-week after the previous case was completed.
<b>Expedited</b> After Finals, Responses under 37 CFR 1.312, Printer Rushes	When application is placed on examiners docket.
<b>Returns</b> (Returned by TSS)	Date returned to Examiner.
<b>Returns</b> (Returned by Reviewer)	



\* In general, for docket management items that begin on a pay period, the first day of the pay period is “Day 1.” For docket management items that do not begin at the start of the pay period, the first day the application appears available for action is defined as “Day 0.”

- For 56-day cases (Category 1 in the Table above), the docket management period begins (day 1) on the first day of the first full pay period after the amendment is entered (Sunday).
- For 14 day Special Laws and Petitions/Special programs new cases, the examiner is expected to move the oldest case in each component for each qualifying pay period. A qualifying pay period is one in which the examiner has a number of examining hours equal to or greater than 40 or the examiner’s actual hours per BD including the RCE adjustment, whichever is greater. In situations involving mixed dockets, the higher of the hours per BD of the cases posted for credit during that pay period will be used for this determination. If a pay period is not a qualifying pay period the time period is reset to day one at the start of the following pay period.

For those examiners on a part-time schedule, the examiner must move the oldest case every two pay periods in which the examiner accumulates at least 40 hours of examining time or their actual hours per BD including the RCE adjustment, whichever is greater, over those two pay periods. In situations involving mixed dockets, the higher of the hours per BD of the cases posted for credit during that pay period will be used for this determination. If a pay period is not a qualifying pay period the time period is reset to day one at the start of the following pay period

- For 14-day (Special Amended) cases (Category 2 in the Table above) - and 11-day (After finals, Responses under 37 CFR 1.312, Printer Rushes) cases (Category 4 in the Table above), the docket management period begins the day of

the event which puts the case in that category. The day the case is forwarded to the examiner will be counted as day zero.

- For 28-day cases (Category 3 in the Table above) the docket management period begins (day 1) on the day after “Count Monday”. The next 4 oldest regular new cases and the next 2 oldest continuing new cases will also be marked (asterisk cases) on an examiner’s docket. If the oldest new case is moved in a pay period, and if any of those marked with an asterisk (\*) next oldest cases are also moved during that same pay period, then those cases will be included in the average days calculation. These next oldest cases will be added to the average days calculation as having been completed in “0” days.

If the oldest marked case is paused (e.g., TI or Petition) and not posted for credit during the pay period then zero day scores will not be entered into the average day calculation for the other marked cases during that pay period. The next pay period, a new case will be marked as the oldest, and the examiner can once again receive zero day scores for turning in the other marked cases.

- Returns initiated by either a SPE or primary examiner reviewer (Category 5 in the Table above) will start the 14 day docket management clock upon returning the action to the examiner. The day the case is forwarded to the examiner will be counted as day zero. The docket management clock for returns accumulates days when the examiner has the case (see example D).
- Returns by TSS (Category 5 in the Table above) will start a separate 11 day docket management clock upon returning the action to the examiner. The day the case is forwarded to the examiner will be counted as day zero. The docket management clock for returns accumulates days when the examiner has the case (see example D).

## ***Docket management restarts, suspensions, pauses and interrupts***

### **RESTARTS**

Under some circumstances, the number of days in the docket management calculation will be restarted. Any supplemental amendment filed or withdrawal of an action will restart the docket management clock.

Additionally, if a case is re-docketed to a new examiner, the docket management period restarts for the new examiner and the period will be reset according to the applicable docket management beginning point as described above.

### **SUSPENSIONS**

In some situations, the docket management clock is suspended. Any undecided [Critical Petitions](#) or noncompliant preliminary amendments will result in a suspension in the docket management clock. The case is hidden from view on the examiner's docket during the suspension period. The docket management period is restarted when the suspension period is over.

Non-critical petitions do not affect the docket management clock. The case may be acted upon by the examiner and counted prior to the petition being decided.

### **PAUSES**

Additionally, certain categories of docket management such as Transfer Inquiry or Board Decision are subject to a pause in the clock. While a case is in a Pause status, it will still show up on an examiner's docket.

### **INTERRUPTS**

An Interrupt applies only to a docket management item (case) wherein no posting for credit has been made. The Interrupt causes the docket management item to close. Interrupts are defined as: removing a case from an examiner's docket or docketing a case to a different examiner; abandonments; informal/non-compliant amendments; filing of

4/19/12

RCE/CPA; and changing of docket categories.

#### OVER/UNDER RULE FOR DOCKET MANAGEMENT CALCULATIONS DUE TO INTERRUPTS

If the docket management clock (e.g. pause date of the TI) at the time of the interrupt is before the “Expected Average” days, the docket management item is excluded from calculation.

If the docket management clock at the time of the interrupt is past the “Expected Average” date, but before the “Ceiling Control” date”, docket management for the item is calculated using the interrupt date as the docket management end date.

If the docket management clock at the time of interrupt is on or after the “Ceiling Control” date has been exceeded, then the docket management days that go into the calculation is the “Ceiling Control” number of days.

In the case of an application on transfer inquiry, the docket management clock is paused for the examiner making the transfer request. If accepted by the other examiner, the above rules for an Interrupt apply and a new docket management clock is started for the accepting examiner. If the application is not accepted for transfer and the requesting examiner ends up acting on the application, then the clock resumes for the original examiner.

#### DOCKET MANAGEMENT CALCULATION ADJUSTMENTS FOR A 28+ DAY ABSENCE

For an extended absence of four or more contiguous weeks (28+ days), beginning on any work day (Monday through Saturday), for reasons that the examiner would normally be eligible for FMLA or sick leave (i.e., this excludes vacations), all Categories (1-5) will be paused upon the examiner’s departure and resumed upon the examiner’s return. These cases may be reassigned if there is a reasonable expectation that they would go over the expected average days during the time that the examiner is absent.

4/19/12

If an employee returns to the Office for 4 hours or less of examining or examining-related activities during a week this time will not restart the time clock. For example, if an examiner were to return to the office for a brief period such as a 1 hour Art Unit meeting or training class, this will not restart the time clock.

If there is a delay between the time the examiner leaves and the time the SPE designates the examiner as out of office, the docket management clocks shall be reset to the values they would have been if they were paused on the first day of the absence.

#### DOCKET MANAGEMENT – WHEN THE CLOCK STOPS RUNNING (END POINTS)

The docket management period ends for a particular case, when a qualified PALM action is either posted for credit, approved, or counted, whichever comes first. An Interview Summary does not close any docket management item.

#### CEILING EXCEEDED TAB

If a case exceeds the ceiling control days, the case is moved onto the Ceiling Exceeded Tab where it is then handled individually, and the ceiling exceeded number of days for that case is then used when calculating the average number of days for that particular component.

#### ***Docket management plans (DMP)***

The DMP is designed as a process to assist the examiner in working off ceiling exceeded cases and getting back into a healthy docket management pipeline. The examiner should normally manage their docket in a way that prevents cases from exceeding the established ceiling. In the situation where a case(s) exceeds the ceiling control days and is placed in a DMP, the examiner is expected to complete the case(s) within the allotted time frame in order to prevent additional performance consequences. In addition to

4/19/12

completing the assigned DMP cases, the examiner should manage the rest of his/her docket to prevent other cases from exceeding the ceiling control days.

A Docket Management Plan (DMP) does not replace the SPE providing coaching, mentoring, and training to the examiner. The SPE should work with the examiner to keep cases from hitting the ceiling exceeded tab, to successfully complete the cases on a DMP, and toward assisting the examiner in improving his/her skills in Docket Management.

For cases that exceed the ceiling number of days, a DMP will be assigned. The DMP will use the consistent methodology set forth below so that a reasonable number of ceiling exceeded cases can be readily calculated.

The calculation is based on the individual examiner's expectancy (hours per BD which includes the RCE adjustment) and the amount of actual regular examining hours worked by the examiner in that biweek.

If the examiner has 64 or more regular examining hours in the biweek, the calculation to determine the number of ceiling exceeded cases moved to the Docket Management Plan Tab and assigned that biweek would be based on 64 examining hours. If the examiner has less than 64 regular examining hours, the calculation would be based upon that lower number of examining hours.

The examiner and SPE should meet at/near the beginning of the biweek to discuss the DMP. If known in advance, the examiner should provide the supervisor with his/her anticipated leave usage at the beginning of the biweek before the calculation is performed.

The number of ceiling exceeded cases to be completed would be calculated using the same formula to calculate the number of BDs required in a biweek, with the result truncated at the decimal to the whole number. If there are more ceiling exceeded cases

4/19/12

on the examiner's docket than assigned per the DMP, the SPE may prioritize which ceiling exceeded cases are to be worked on and move those to the DMP tab.

Examining hours/(Hours per BD) = the number of ceiling exceeded cases that need to be completed. For examiners on a split docket the hours per BD will be calculated using the weighted average of expectancies of the cases on the examiner's Ceiling Exceed Tab.

If the examiner has posted for credit, approved, or counted (whichever comes first) the ceiling exceeded cases on his/her DMP by the end of counting for that biweek, no additional data points will be generated for these cases.

EXAMPLE 1 - If the examiner's expectancy is 15.00 hrs/BD, expects to work 72 regular examining hours during the bi-week then the number of ceiling exceeded cases to be worked on would be 4 ( $64/15.00=4.26$ ).

EXAMPLE 2 - If the examiner's expectancy is 22.00 hrs/BD, expects to work 68 regular examining hours during the bi-week then the number of ceiling cases to be worked on would be 2 ( $64/22.00= 2.90$ ).

EXAMPLE 3 - If the examiner's expectancy is 15.00 hrs/BD and the examiner only has 50 regular examining hours in the biweek, then the number of ceiling exceeded cases would be 3 ( $50/15.00=3.33$ ).

Using this formula, the number of ceiling exceeded cases on the Docket Management Plan tab should be reasonably attainable and should afford the examiner a reasonable opportunity to perform to the other critical standards of his/her PAP, including Docket Management relative to cases under the ceiling.

If the examiner works less hours than those hours used in determining the number of cases on the docket management plan for the pay period, then the number of cases will be recalculated at the end of the pay period. If the examiner has posted for credit, approved

4/19/12

or counted (whichever comes first) at least the recalculated number of cases from the docket management plan then the examiner will be excused from completing the other cases on the DMP during that pay period.

When a regular amendment moves to the ceiling exceeded tab, a 112 day score (112/1) will be entered into the Docket Management calculation for that component. Should this amended application be part of the DMP assigned for the next biweek and not be posted for credit, approved, or counted (whichever comes first) by the end of counting for that biweek, that case will count as another entry at the ceiling level (112/1) towards the examiner's component and composite Docket Management scores for that biweek. The additional entry at the ceiling level is the ceiling control number for whatever category the particular case falls under. This process is intended to resolve docket management issues as performance issues.

Deletion of a PALM count will not affect the status of posted for credit as the end point of the docket management calculation.

Withdrawal of an action shall not reopen an old docket management item but instead create a new one.

For amendments, where the start date is always the first day of the pay period signatory examiners who post for credit on Sunday/Monday and get the case counted before the count Monday cut off time will get post credit as if posted on the last Saturday of the biweek.

For amendments, where the start date is always the first day of the pay period, junior examiners who post for credit on a Sunday/Monday at the end of a quarter or fiscal year, and get the case counted before the count Monday cut off time ends will get post credit as if posted on the last Saturday of the biweek.

#### Example

A primary examiner has a regular amended case on their docket that will reach 56 days on the second Saturday of a pay period. The examiner posts for credit an action in the case on the following count Monday which is then counted that day for credit for the previous bi-week. In this situation, even though the examiner took 58 days to complete



4/19/12

the action, the examiner would only be charged for 56 days when determining the docket management calculation for that application.

#### Returns - Examples

A. The day a case is returned to an examiner for correction is day 0. If the examiner returns the case before midnight of that day, the number of days used in the docket management calculation is 0.

B. The SPE returns an action to an examiner at 4:30 PM. The examiner corrects the action and returns the action to the SPE at 7:30 PM. In this situation, the number of days used in the docket management calculation would be 0 days.

C. The SPE returns an action to an examiner at 10:00 PM. The examiner corrects the action and returns the action to the SPE the following morning at 8:00 AM. In this situation, the number of days used in the docket management calculation would be 1 day.

D. The examiner returns a correction to the SPE on day 6 of the correction cycle. The SPE returns the action for a second time for the same correction. In this case, the first day the examiner gets the case back will be considered to be day 6.

### ***Docket management calculations***

Docket management calculations will be performed at the end of every biweek for the biweek that just ended. Calculations will be performed only on docket management items where the docket management item has been ended by counting of the action or completing a docket management interrupt. In actions that have been posted for credit but not counted, docket management calculations will not be performed until the action is counted (note: the action of posting for credit has already stopped the clock). Cases remain in any given docket management category until the case has been counted in PALM, even if there is a post for credit. The return category is an exception to the case counting requirements.

Negative numbers will go into the docket management calculation as a 0. An example of such a scenario would be where an amended case is placed on an examiner's docket during a pay period and then the examiner posts an action for credit in that application prior to the end of the pay period. Because the docket management clock does not start for amended cases until the pay period following the pay period in which they are forwarded to the examiner, the docket management clock on the aforementioned amended case was never started. A calculation of 0 days would be used when determining the examiner's docket management calculation for that application.

#### Component Score Percentage

The Component Score Percentage is based on the average number of days to complete all actions and docket management items compared to the Expected Average number of days for each component. The following formula is used to determine the component score percentage:

$$\text{Component Score Percentage (CS)} = (((wf_0 - wf_1) / wf_0) + 1) * 100$$

where:  $wf_0$  is the number of expected average days for the particular component;  
and  
 $wf_1$  is the average number of days the examiner has taken to complete all actions and docket management items in that particular component.

Note that for Category 5 (Corrections), the Component Scores (CS) are capped at 110.0%.

If an examiner were to complete each action in an average number of days equal to the Expected Average number for any particular component, their Component Score Percentage (CS) for that component would be equal to 100%. If the average number of days taken to complete the work in the component is lower than the Expected Average number, then the CS for that component will be greater than 100%. When the average

4/19/12

number of days taken is greater than the Expected Average number, the CS will be lower than 100%.

The Component Score Percentage for each component is then weight averaged based on number of cases  $n_0$  to determine the overall docket management rating.

An example is shown in the following Table:

Component (Action Types)		Expected Average Days <i>wf0</i>	Number of Cases <i>n<sub>o</sub></i>	Average Days <i>wf1</i>	Component Score ((( <i>wf0</i> - <i>wf1</i> )/ <i>wf0</i> ) +1)*100 <i>CS<sub>I</sub></i>	Contributing Score ( <i>n<sub>o</sub></i> /Sum( <i>n<sub>o</sub></i> ))* <i>CS<sub>I</sub></i>
1	<b>Amendments</b> in response to non-final OA, Appeal Briefs	56	100	60.0	92.9%	39.5%
2	<b>Special Law New</b> PCT, Reexam, Reissue	14	2	20.0	57.1%	0.5%
	<b>Special Program New</b> Green Tech, PPH, Accelerated Examination, Project Exchange, Petitions to Make Special	14	10	12.0	114.3%	4.9%
	<b>Special Amended</b> PPH, Acceleration Examination, Petitions to Make Special, Board Decisions/Remarks	14	10	10.0	128.6%	5.5%
3	<b>Regular New</b> with Oldest New Filing Date, Continuations, Continuations in Part (CIPs)	28	26	20.0	128.6%	14.2%
	<b>Continuing New</b> with Oldest Effective Filing Date, Continuations, Divisionals, RCEs	28	26	20.0	128.6%	14.2%
4	<b>Expedited</b> After Finals	11	45	10.0	109.1%	20.9%
	<b>Expedited</b> Responses under 37 CFR 1.312	11	10	6.0	145.5%	6.2%
	<b>Expedited</b> PUBs cases (Printer Rush, returned allowances)	11	2	7.0	136.4%	1.2%
5	<b>Returns</b> (Returned by TSS)	11	2	10.5	104.5%	0.9%
	<b>Returns</b> (Returned by SPE/Reviewer)	14	2	8	110.0%	0.9%
Sum( <i>n<sub>o</sub></i> )=225						Overall % Score – <b>108.8%</b>

Note: Component Score Percentage is capped at 110% for Category 5 **Returns**.

An examiner shall be assigned a rating with respect to Docket Management as follows:

110% and above	Outstanding
103% to 109%	Commendable
95% to 102%	Fully Successful
88% to 94%	Marginal*
Below 88%	Unacceptable

\* Note: Continued or repetitive performance at this level adversely impacts upon the efficiency of the service under the performance element.

All percentages shall be rounded to the nearest whole number.

#### Examiners on Detail

When an examiner is on a detail for a period of at least 50% of their time, the examiner may choose to be removed from the average day system and to be placed on a docket management plan that allows sufficient time to complete the assigned work. The examiner may make this choice at any time during the detail. However, examiners are responsible for meeting the performance requirements of the Docket Management element up to the time that they choose to be removed from the average day system. Upon return from the detail, if the examiner had elected the docket management plan option, docket management for the examiner will be calculated for the examiner as if the examiner had an extended absence. Treatment of extended absences is discussed below. Detail beginning and end dates will be maintained by the SPE. If an examiner chooses to remain on the average day system, regular docket management calculations are performed.

Examiners away for  $\geq 5$  consecutive days

4/19/12

If an examiner is on approved absence for five or more consecutive calendar days (excludes AWOL), there will be an adjustment for 11 and 14 day returns, special amended and 11 day cases unless the application is already past the expected average days prior to the beginning of the approved leave. Timeframes of cases already on the examiner's docket are paused on the day the examiner leaves and resume on the day the examiner returns.

If an employee returns to the Office for 4 hours or less of examining or examining-related activities during the period of approved leave this time will not restart the time clock. For example, if an examiner were to return to the office for a brief period such as a 1 hour Art Unit meeting or training class, this will not restart the time clock.

If the examiner is away for 4 days or less, then there is no adjustment.

## **STAKEHOLDER INTERACTION**

The Patent Examiner Performance Appraisal Plan contains a Stakeholder Interaction element which comprises 10% of the overall rating. This is a non-critical element.

### ***Major Activities***

- (1) Treat EXTERNAL stakeholders with courtesy and professionalism by:
  - (a) Returning phone calls from external stakeholders, generally in one business day.
  - (b) Reviewing email messages generally at least once every workday, and responding, if necessary, by any appropriate means.
  - (c) Providing normal schedule information via voice mail if working other than a Monday through Friday schedule.
  - (d) Providing voice mail notice of extended absences of three or more business days.
  - (e) Directing external stakeholders to appropriate office or person, in accordance a list provided or posted by Management.
  - (f) Conducting all interviews and/or other contacts with external stakeholders as scheduled with adequate preparation, and in a courteous manner. Further, no interview and/or other contact is arbitrarily or capriciously refused by the examiner.
  - (g) Displaying proper decorum in official communications (e.g., office action or interview summary) to external stakeholders.

"Business Day" - shall refer to each Monday through Friday except Federal holidays.

Business hours shall run from 8:30 A.M. to 5:00 P.M. Eastern Time.

4/19/12

"Work Day" - is defined as a normal Monday through Friday and when the examiner is working for a substantial portion of the day. Such excludes holidays, days in which adjusted work dismissal occurs, day in which "the employees is not expected to work" (or Agency is closed), and days in which employees are excused from duty early.

Examiners are not expected to count hours. Generally "in one business day" means by the end of the next business day. Examiners are not expected to return calls when they are not at work.

(2) Providing search consultation and other assistance to the public and peers.

Examiners should provide search consultation and assistance commensurate with their experience / knowledge in the particular area of upon which they are consulted / queried. Generally, it is expected that providing search assistance is an activity primarily conducted by examiners at a GS-12 level and above.

When providing search assistance, examiners should provide a listing of classes and subclasses most likely to have relevant art pertaining to the subject matter being searched. Any known relevant NPL sources should also be provided. If asked, the examiner providing the assistance should also provide any technical expertise that he feels would be helpful in understanding and/or searching the subject matter.

Because every patent is presumed to be valid, examiners must be especially wary of any inquiry from any person outside the USPTO, including an employee of another U.S. Government agency, to which the answer to the inquiry might indicate that a particular patent should not have issued.

### ***Criteria for Evaluation***

The following criteria are to be used to determine an examiner's rating in this element. The Supervisor should use stakeholder feedback, direct observation and any other



4/19/12

documentation such as examiner's work products to evaluate the examiner's performance in this element. In order to receive a rating of either Outstanding or Commendable, the examiner must also meet the Indicia of Outstanding or Commendable Performance that follows.

Outstanding - All major activities identified are routinely performed in a timely and courteous manner and, except for rare exceptions, the employee demonstrates all of the identified indicia.

Commendable - All major activities identified are routinely performed in a timely and courteous manner and the employee demonstrates all of the identified indicia in substantially all circumstances.

Fully Successful - All major activities identified are routinely performed in a timely and courteous manner.

Marginal - Demonstrates some contribution to the element. However, a significant number of documented deficiencies in at least one of the major activities have been identified to the examiner.

Unacceptable - Performance is not adequate for the position, failing to meet the Marginal level. Numerous instances of documented deficiency in at least one of the major activities have been identified to the examiner.

### ***Indicia of Outstanding or Commendable Performance***

- (1). Routinely uses interview practice to facilitate compact prosecution.
- (2). Examiner is accessible and responsive regardless of physical location
- (3). Provides appropriate information to address stakeholder inquiries
- (4). Responds to internal stakeholders in a timely manner
- (5). Responds appropriately to requests for personal interviews in a timely manner

4/19/12

(6). Is always well prepared for interviews

Supervisors need to document any deficiencies and make the examiner aware of the deficiencies contemporaneously with when the supervisor is made aware of the deficiencies. A multiplicity of the same deficiency should not be counted against the examiner until the examiner has been made aware of the first deficiency.

## **INTERIM RATINGS**

An interim rating is a rating developed during the appraisal year to document the performance of an examiner who has:

1. changed positions after serving in the position for at least 120 days;
2. completed a detail or temporary promotion of at least 120 days;
3. transferred to another Federal Agency after serving in a position for at least 120 days.

An interim rating is factored into the final summary rating assigned to the examiner at the end of the appraisal year. The interim rating is completed on form CD-516, "Classification and Performance Management Record" by the losing rating official, signed by the losing approving official, and forwarded to the gaining rating official. A copy is also given to the employee.

An interim rating could become a rating of record if the examiner changes positions when the time remaining in the appraisal year is less than 120 days.

An interim rating that was completed for an examiner for service in another position should be considered as follows when preparing the final summary rating for the position of record:

The SPE appraises the examiner on his/her current position (if in that position for 120 days or more of the appraisal period) and assigns a total score. That score is doubled and added to the interim rating score(s) given by any other supervisors. This new total is then divided by the number of positions occupied for 120 days or more plus 1, i.e., either 3 or 4, and a final total score is assigned. (Scores with decimals should be rounded to the next highest number.) For example:

4/19/12

Example 1:

Interim rating score:	360 x 1 = 360
Current rating official's score	480 x 2 = <u>960</u>
	1320

$1,320 / 3 = 440$

The examiner's recommended rating would be 440 or Commendable.

Example 2:

Interim rating score:	390 x 1 = 390
Interim rating score:	375 x 1 = 375
Current rating official's score	450 x 2 = <u>900</u>
	1,665

$1,665 / 4 = 417$

The examiner's recommended rating would be 417 or Commendable.

In computing a final performance rating using this formula, the rating assigned by the current supervisor (the one that is to be doubled) must be checked carefully to make sure that a noncritical element is not given more weight (because of the doubling) than any critical element in the other interim ratings. (OPM regulations prohibit giving more weight to non-critical elements than to critical elements in deriving final ratings.) If, because of the doubling, the non-critical element score exceeds that of any of the critical element scores, the point score of the non-critical element must be reduced to its original total (before the doubling) and the summary point total adjusted appropriately.

The final rating combining any interim rating(s) must be documented on Form CD-516C.

## SIGNATORY AUTHORITY PROGRAM AND PAP DENOMINATORS

12-22-10

Signatory Authority Program		Performance Appraisal Plan
CAT 2 DENOMINATOR FOR PARTIAL SIGNATORY AUTHORITY	CAT 3 DENOMINATORS FOR FULL SIGNATORY AUTHORITY	TOTAL ACTIONS NUMBER ON PALM 3205 FOR PAP
1. Non-final rejection	1. Notice of Allowability	1. Non-final rejection
2. Requirement for Restriction/Election	2. Final Rejections	2. Requirement for Restriction/ Election
3. Pilot - First Action Interview Office Action		3. Pilot - First Action Interview Office Action
4. Pilot - First Action without FA Interview		4. Pilot - First Action without FA Interview
		5. Pilot Pre Interview Communication
		6. Pre Interview Communication
		7. Abandonment after Board of Appeals
		8. Express Abandonment (during examination)
		9. Disposal for a RCE/CPA
		10. Notice of Allowability
		11. Final rejections
		12. Examiner Answers for Appeal Brief
		13. Advisory Actions
		14. Independent communication under rule 105
		15. Disposal Credit for SIR
		16. Ex Parte Quayle
		17. Interference Initial Memo Disposal
		18. Interference Initial Memo non- Disposal
		19. Misc. Action with SSP
		20. Letter of Suspension-Examiner Initiated

\*Reissues are treated as regular cases

\*\*Allowance after Board decision and Allowance after Examiner's Answer are covered by # 10.