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Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-3014

Case Number: D 0002/24

D E C I S I O N
of the Disciplinary Board of Appeal
of 9 August 2024

Appellant: N.N.

Decision under appeal: **Decision of the Examination Board dated 10 April 2024 concerning the pre-examination of the European Qualifying Examination 2024**

Composition of the Board:

Chair: I. Beckedorf
Members: R. Winkelhofer
P. Walser

Summary of Facts and Submissions

I. The appellant sat the pre-examination of the European qualifying examination 2024. By decision of the Examination Board of 10 April 2024, the appellant was awarded 69 marks for their answer paper, and the grade "FAIL".

II. In their appeal the appellant requests that this decision be amended to the effect that the answer to statement 12.4 (in the framework of question 12) be considered correct, so that a total of 5 marks be awarded for question 12, bringing the total number of marks from 69 to 71, and consequently the award of the grade "PASS". Reimbursement of the appeal fee, "accelerated proceedings" and (in the alternative) oral proceedings are also requested.

III. The Examination Board did not rectify the decision.

IV. No comments pursuant to Article 24 (4) of the Regulation on the European qualifying examination for professional representatives (REE) in conjunction with Article 12 of the Regulation on discipline for professional representatives (RDR) were made, neither by the President of the EPO nor the President of the Institute of Professional Representatives before the EPO (epi).

V. The Examiners' Report on the pre-examination 2024 is available online: www.epo.org/en/learning/professional-hub/european-qualifying-examination-eqe/compendium/pre-examination

Reasons for the Decision

1. The decision is issued in written proceedings. The appellant's request for oral proceedings is auxiliary to their main request that the decision under appeal be amended and that the appeal fee be reimbursed. Thus, since the appellant's main request is followed, the aforementioned auxiliary request remains procedurally inactive.

2. The admissible appeal is well founded.

3. In accordance with Article 24(1) and (4) REE and the consistent jurisprudence of the Boards of Appeal, decisions of the Examination Board in relation to the European qualifying examination (Article 1(1) REE) are subject to only limited judicial review on appeal.

4. In principle, a board has only cassatory decision-making power, i.e. it can only refer a matter back to the Examination Board for re-evaluation, instead of substituting its own discretion for that of the Examination Board and awarding additional points or marks directly (see D 15/22, D 26/22, D 6/23 etc.).

5. Article 12 of the Additional Rules of Procedure of the Board of Appeal in Disciplinary Matters of the European Patent Office also expressly provides for this consequence in case of fundamental procedural deficiencies, but also for an exceptional power of reformatory decision if there are special reasons against remittal. In particular, special reasons may exist if the contested decision is based on serious and obvious errors which can be ascertained without reopening the entire marking procedure (following D 1/92, OJ EPO 1993, 357; see e.g. the summary of the jurisprudence in D 6/23).

6. This established jurisprudence applies mutatis mutandis to the pre-examination, just as the provisions of the REE apply mutatis mutandis to the pre-examination (Article 1(7) REE; see e.g. D 6/21, D 7/21).

7. In particular, an unclear and confusing examination question in the pre-examination may constitute a serious and obvious error (D 13/02; D 3/19; D 4/21, D 6/21, D 7/21).

8. In the present case, the appellant claims to have answered statements 12.1, 12.2, and 12.3 of question 12 correctly, in line with the Examiners' Report, while their answer to statement 12.4 "FALSE" was considered incorrect in the Examiners' Report, where "TRUE" was stated as the correct answer.

The appellant argues that the Examiners' Report's explanation in that context had referred to paragraphs [002] and [003] of D1, disclosing a disposable cartridge with a liquid solution and an atomiser, while paragraph [004] of D1 further disclosed that the atomiser activated vapour production. The first part of the 12.4 statement "an electronic cigarette that provides a liquid solution" was therefore incorrect, because the electronic cigarette in D1 provided vapour, not a liquid solution. This led to the conclusion that the whole 12.4 statement was incorrect. The expression "an electronic cigarette that provides a liquid solution" should be assessed in the light of the knowledge of the person skilled in the art, and considering D1 as a whole. The term "to provide" should be defined as "to put (something) into the possession of someone for use or consumption", and in the given context such that the electronic cigarette "produces" or "administers" or

"delivers" (vapour). D1 clearly pointed out that a liquid is heated by the atomiser, transforming the liquid into vapour to be inhaled by the user, with the vapour being something clearly distinct from a liquid.

It was also clear from paragraphs [003], [006], and [011] of the application that electronic cigarettes provide nicotine to the user in an aerosol which simulates the smoke of a conventional cigarette and which is also different from the state of a liquid solution. Only such an aerosol containing nicotine could be inhaled by the user, whereas the liquid solution containing nicotine could not be used in the same way. The purpose for the user of an electronic cigarette was to get nicotine in a form similar to real smoke. A user bought liquid to be vaporised, not to use it as it was. Electronic cigarettes delivered vapour with nicotine, and not its liquid solution.

For these reasons, statement 12.4 was not worded in such a way that the only possible answer was "TRUE". However, the examination questions in the pre-examination should ensure that only one answer could be given when considering an informed and objective view or interpretation of the wording of the facts and the respective statements. The formulation used in statement 12.4, and the unclear and confusing facts or statement thus constituted a serious and obvious error. With the other statements in question 12 answered correctly, a total of 5 marks should be awarded, giving a total number of 71 marks, and the mark "PASS".

9. This is essentially - as a result - to be agreed with.

10. Statement 12.4 including the examiners' response taken from the Examiners' Report reads:

"Question 12

…

***12.4** D1 discloses an electronic cigarette that provides a liquid solution to avoid the health risks caused by high nicotine concentrations.*

***TRUE** – Paragraph [002] of D1 discloses an electronic cigarette provided with such components of liquid solutions, directed to comply with health regulations in paragraph [003]."*

11. The appellant's argument essentially boils down to the understanding of the term "to provide" in the given context, and whether the electronic cigarette in D1 "provides" only vapour, which is the appellant's understanding, or (also) a liquid solution (to avoid the health risks caused by high nicotine concentrations), which is the understanding of the Examiners' Report.

12. The verb "to provide" generally means to give someone something they need or to make something available (see, for example, the Cambridge Dictionary). In a technical context, it can refer to the act of making something available or supplying it, thus emphasising the act of delivering or enabling access to resources or functions. It therefore refers to the very purpose of (here) the electronic cigarette, which is not to provide a liquid solution that cannot be directly used by the smoker, but the vapour produced from the liquid therewith. Similarly, the application and its claims I. 1 and I.2 relate to vapour production by an electronic cigarette, and the term "to provide" is used in the description only as to "provide nicotine to the user in

an aerosol that simulates the smoke of a conventional cigarette, together with other substances that provide flavour".

13. The appellant's understanding is not necessarily the only possible or the most straightforward, but it is justifiable as also not being - from the point of view of the skilled person - illogical, without making technical sense, or against the laws of thought (cf. as to the interpretation of claims in the Boards' jurisprudence Case Law of the Boards of Appeal, 10th edition 2022, II.A.6.1, II.E.1.3.9). Statement 12.4 was also not concerned with novelty of claim I.1 over D1, which could have involved other considerations going way beyond the interpretation of the term "to provide" (and which was, in fact, covered by statement 12.2 which was correctly answered by the appellant, and all the more so it deems justified for them to apply a narrow approach in the understanding of the terms used in statement 12.4).

14. The teachings of the application, and those of D1 alike, are ambiguous also for a further reason: The application in [003] mentions that electronic cigarettes provide nicotine to the user in an aerosol – thus in the form of condensed droplets suspended in air – whereas [006] of the application, as well as [004] of D1, only mention vapour for inhalation. The term "liquid solution" is only used for the liquid as present in the cartridge/container before atomisation. Maybe, for a person having specific background knowledge of the physical processes involved, this does not necessarily lead to a contradiction: The atomiser produces, from the liquid solution, vapour in the physical sense (a substance in the gas phase) that condenses into small droplets of the liquid solution suspended in the

air, thus an aerosol, sometimes also referred to as "wet steam". However, it cannot be expected that the candidates have this kind of background knowledge; to the contrary, they must not use any specific knowledge they may have of the technical field of the invention (Rule 21(3) Implementing provisions to the Regulation on the European qualifying examination (IPREE)). Thus, the fact that the term "liquid solution" is, in the application and in D1, only used to designate the liquid as initially present in the cartridge may lead to further confusion. It may likewise result in the conclusion that the statement according to which D1 discloses an electronic cigarette that "provides" a "liquid solution" is not correct.

15. It follows from the setup of the pre-examination with its multiple-choice questions that they must be formulated clearly and unambiguously, and that remaining doubts which cannot be sorted out at the time of taking the examination, but only by way of the appeal, cannot be to the detriment of the candidate (cf. D 5/16, D 6/16, D 15/16, D 2/21, D 7/21).

16. In the light of the above considerations, statement 12.4 is an unclear and confusing examination question that constitutes a serious and obvious error (D 13/02; D 3/19; D 4/21), and the answer given by the appellant must be counted correct.

17. According to the Marking scheme for answering the pre-examination paper, a total of 5 marks are to be awarded for question 12, bringing the total number of marks from 69 to 71, and, consequently, the award of the grade “PASS”.

18. In accordance with Article 24(3) and (4) REE and the principles set out above, there are therefore, in the specific circumstances of the present case, special reasons for an immediate reformatory decision of this kind (cf. D 2/14, D 14/17, D 3/19, D 4/21, D 17/22, D 30/22). The contested decision must be amended accordingly, and the full appeal fee reimbursed.

Order

For these reasons it is decided that:

1. The decision under appeal is amended to read as follows:
   „The answer paper for the pre-examination for the European qualifying examination 2024 is awarded the grade 'PASS'".
2. The appeal fee is reimbursed.

The Registrar: The Chair:

N. Michaleczek I. Beckedorf

Decision electronically authenticated