



**Beschwerdekammer in Disziplinarangelegenheiten**  
**Disciplinary Board of Appeal**  
**Chambre de recours statuant en matière disciplinaire**

Boards of Appeal of the  
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Case Number: D 0001/17

**D E C I S I O N**  
of the Disciplinary Board of Appeal  
of 16 November 2017

**Appellant:** N.N.

**Decision under appeal:** Decision dated 31 March 2017 of the Examination Board of the European Qualifying Examination.

**Composition of the Board:**

**Chairman:** E. Dufrasne  
**Members:** C.-P. Brandt  
E. J. Christiansen

## Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examination Board of 31 March 2017 awarding the appellant the grade "FAIL" in the pre-examination for the European qualifying examination 2017 (hereinafter "pre-examination 2017"), his answer paper having been awarded 69 marks. 70 marks are necessary for awarding a "PASS" grade (Rule 6(2)(a) IPREE).
- II. By letter dated 8 May 2017, received on the same day, the appellant filed a notice of appeal including a statement of grounds of appeal. The appeal fee was also validly paid.
- III. By letter of 2 June 2017, the Examination Secretariat remitted the appeal to the Disciplinary Board of Appeal notifying that the Examination Board had decided not to rectify its decision.
- IV. The appellant argues that the answer in the Examiner's Report contains clear and manifest errors in the evaluation of statements 18.4 (main request), 4.3 (first auxiliary request) and 13.3 (second auxiliary request).
- V. Question 18 of the pre-examination 2017 reads as follows:

For questions 18 to 20, assume that claim III is a single independent claim filed with the client's patent application.

Claim III reads as follows:

Toothbrush with a body, wherein the body comprises a brush head with a bristle zone, bristle bundles held by the bristle zone, a handle and a neck between the bristle zone and the handle, wherein the neck is connected to the handle by means of a connection section, and wherein the body comprises a battery and an electrically operated element, and wherein the battery is located in the handle, characterised in that

- the electrically operated element is an electrically operated vibrator located in the handle;
- the connection section comprises a connection hole and a connection protrusion; and
- the toothbrush has a total length of between 18 and 25 cm.

For each of the statements 18.1 - 18.4 indicate on the answer sheet whether the statement is true or false:

.....

18.4 The technical feature "the electrically operated element is an electrically operated vibrator located in the handle" distinguishes claim III from document D2.

[003] of the description of D2 reads as follows:

"As long as a child holds the toothbrush in his hand, the sensor 27 is in contact with his skin and thereby generates an electric signal. That signal is transmitted to the controller 24, which then supplies electric energy to the music module 26 as long as the controller 24 receives that signal. As long as electric

energy is supplied to the music module, it plays a melody over its loudspeaker, the vibrations of which are converted into vibrations of the air. The maximum duration of the melody is two minutes. Children want to listen to the entire melody, and therefore will be motivated to brush their teeth long enough."

VI. The answer to statement 18.4 as given in the Examiner's Report is "false". The reasons given for this answer are as follows:

"Although there is a slight difference of the German language version compared to the French and English versions, paragraph [003] of D2 clearly discloses in all three languages that vibrations are generated via the loudspeaker. The melody is played over the loudspeaker of the music module, which is located in the handle. The loudspeaker converts the electrical signal so as to play a melody and generate vibrations in the air. Hence, the music module 26 and its loudspeaker is an electrically operated vibrator in the handle."

VII. The appellant submits that the correct answer to statement 18.4 should be "true", at least both "true" and "false" should be accepted.

He essentially argues that the following sentences in the English and French version of [003] of D2  
"As long as electric energy is supplied to the music module, it plays a melody over its loudspeaker, the vibrations of which are converted into vibrations of the air",

"Tant que le module de musique est alimenté en énergie électrique, une mélodie est diffusée via le haut-parleur, dont les vibrations sont converties en vibrations de l'air"

were not clear for the following reasons: both versions did not allow the Candidate to understand whether the pronoun "which" and "dont" respectively refer to the melody or the loudspeaker. Hence, it was not clear whether the vibrations belong to the melody or the loudspeaker. If the Candidate interprets the pronoun as referring to the melody, he could only arrive to the conclusion that the speaker is predisposed to generate a melody (not disclosed) and that the vibrations of the melody (not disclosed) are converted into vibrations in the air (the conversion not being disclosed as due to the loudspeaker). Following this interpretation the Candidate had to deal with a significant problem of clarity. It was not possible to derive from D2 that the vibrations of the melody were generated or caused by the music module or the loudspeaker or something else.

VIII. Further, the German version "Solange das Musikmodul mit elektrischer Energie versorgt wird, spielt es über seinen Lautsprecher eine Melodie ab, deren Vibrationen in Luftvibrationen umgewandelt werden" indicated that the vibrations belong to the melody and not to the loudspeaker. In this case the Candidate would consider the loudspeaker as a mere emitter of a melody (the way on which the vibrations of the melody occurs in the air being not disclosed in D2 and unknown), the vibration of the melody could be independent and not due to the loudspeaker or the music module. Therefore, a Candidate answering statement 18.4 according to the German version or resorting to the German version in an

attempt to solve the ambiguity of the English and French versions, would not consider that the vibrations are generated via the loudspeaker. A candidate working with the English or French version would be provided with different information compared to Candidates working with the German version.

The appellant also relied on Rule 22(3) IPREE according to which candidates shall not use any special knowledge they may have on the technical field of the invention.

- IX. The appellant also raised objections on the basis of technical considerations.
- X. In view of the reasons below and the Board's conclusion on the appellant's "main request" it is unnecessary for the Board to reproduce and comment on the appellant's objections to statements 4.3 and 13.3 as well as to take a decision on these issues.
- XI. The President of the Council of the epi and the President of the European Patent Office were given the opportunity to comment pursuant to Article 12 of the Regulation on discipline for professional representatives (RDR, Supplement 1/2017 to OJ EPO, 127), in conjunction with Article 24(4) of the Regulation on the European qualifying examination for professional representatives (REE, Supplement 2/2017 to OJ EPO, 2). No written observations were received.
- XII. Following the appellant's request the Disciplinary Board of Appeal summoned to a non-public oral proceedings to be held on 17 August 2017, which had to be postponed due to unavailability of the appellant

then hold on 16 November 2017. The oral proceedings took place in the presence of the appellant and of Ms. Benlakhlef on behalf of the President of the EPO. During the oral proceedings the allowability of the appellant's appeal with regard to statement 18.4 was discussed. The appellant in essence reiterated his reasons as brought forward in the statement of grounds of appeal, thereby in particular relying on the language issues and also referring to references from Wikipedia allegedly demonstrating the common general knowledge regarding the question whether a sound, which is a vibration and emitted by a loudspeaker could also be emitted by other technical means. Questioned by the Chairmen Ms. Benlakhlef confirmed that the Candidates sitting the pre-examination for the EQE receive the papers in the three official languages, i.e. in English, French and German and were allowed to compare the wordings in the papers of the two other languages different of the preferred language for clarification.

XIII. The appellant's requests as maintained in the oral proceedings are as follows:

- 1) (main request) revising the answer to question 18, statement 18.3 (should be 18.4 according to the reasons in the SGA) and consequently reversing the contested decision and awarding the appellant the grade PASS for the pre-examination for the European qualifying examination 2017;
- 2) (first auxiliary request) revising the answer to question 4, statement 4.3 and consequently reversing the contested decision and awarding the appellant the grade PASS for the pre-examination for the European qualifying examination 2017;

3) (second auxiliary request) revising the answer to question 13, statement 13.3 and consequently reversing the contested decision and awarding the appellant the grade PASS for the pre-examination for the European qualifying examination 2017;

4) in the event that one of the requests is allowed, reimbursing the appeal fee according to Article 24(4) REE;

5) the appeal proceedings be accelerated in order that the decision to the appeal is issued in advance of the deadline for enrolling to the European qualifying examination in 2018 or to the European qualifying examination - Pre-examination in 2018.

6) in the event that the appeal decision is not issued in advance of the deadlines at point 5) above, extending the deadline for applying for the European qualifying examination - Pre-examination in 2018 in case the appellant is not informed about the result of the appeal by 2 June 2017 and the appeal is dismissed;

Auxiliary request 7) as filed with the statement setting out the grounds of appeal was withdrawn by the appellant during the oral proceedings.

## **Reasons for the Decision**

*Request that the contested decision be set aside*

1. In accordance with Article 24(1) and (4) REE and the Disciplinary Board's of Appeal (DBA) consistent case law (following D 1/92, OJ EPO 1993, 357), decisions of the Examination Board may in principle only be reviewed for the purposes of establishing that they do not



infringe the REE, the provisions relating to its application, or higher-ranking law. It is not the function of the DBA to reconsider the entire examination procedure on the merits. This is because the Examination Committee and the Examination Board have some latitude in their evaluation which is subject to only limited judicial review by the appeal board. Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the Board take this into account. The alleged mistake must be so obvious that it can be established without reopening the entire marking procedure. An example of an obvious mistake would be a question whose wording was ambiguous or incomprehensible (D 13/02). That would be clear straight away, without any reference to marks awarded, from the meaning that common sense would ascribe to the wording of the question concerned.

2. It is undisputed and also admitted in the Examiner's Report that there is a "slight difference" of the German language version compared to the French and English version in the third sentence of paragraph [003] of document D2. While according to the English and French versions the vibrations of the loudspeaker are converted into vibrations of the air, due to the reference "deren" in the German version the vibrations of the melody are converted into vibrations of the air. In the decision in case D 2/17, which concerned the same question as the present appeal and where the appellant used the German language version in the pre-examination, the Board held that the formulation "vibrations of the melody" (Vibrationen der Melodie) does not have an accepted technical meaning. The Board in that case (point 2.5 of the Reasons) qualified the

- divergence in the English and French version and the German version respectively as a substantial and clear error ("schwerer und eindeutiger Fehler").
3. As confirmed by the representative of the President of the EPO during the oral proceedings the candidates sitting the pre-examination for the EQE receive the papers in the three official languages, i.e. in English, French and German and are allowed to compare the wordings in the papers of the two other languages different of the preferred language for clarification. Due to this fact the Board considers that the translation error did not only have a disadvantageous effect on those Candidates which sat the pre-examination using the German language as held by the Board in case D 2/17 (point 2.2 of the Reasons), but equally at least on those Candidates, for which none of the three official languages English, French and German, is the native language, as it applies to the appellant.
  4. Taking into account all these circumstances the Board cannot sufficiently exclude the appellant's submission that due to the translation error the candidate was not able to clearly answer question 18.4 as "true" or "false". At least when referring to the German version "Solange das Musikmodul mit elektrischer Energie versorgt wird, spielt es über seinen Lautsprecher eine Melodie ab, deren Vibrationen in Luftvibrationen umgewandelt werden" the Candidate could arrive at the conclusion that the vibrations belong to the melody and not to the loudspeaker. When resorting to the German version the Candidate in an attempt to solve any possible ambiguity emanating from the English and French versions could consider that the vibrations of

the melody could be independent and not generated via the loudspeaker. A Candidate resorting only to the English or French version was therefore provided with different information compared to Candidates also referring to the German version. When taking into account the German version there could also be some doubts whether or not the Candidate had to revert to common general knowledge or even whether any special knowledge on the technical field underlying question 18.4 was necessary what, however, would have contravened Rule 22(3) IPREE. This provision provides that Candidates shall accept the facts given in the examination paper and limit themselves to those facts and that they shall not use any special knowledge they may have on the technical field of the invention.

5. Hence, the Board considers that for an examination question statement 18.4 has not been formulated in a sufficiently clear, comprehensible and unambiguous manner to ensure that the answer could be only "true" or "false" what is required by a "multiple-choice" question of the pre-examination. An unclear and confusing examination question constitutes an obvious mistake (D 13/02, point 4 of the Reasons).
  
6. Therefore, the contested decision is based on an obvious mistake which has been established without reopening the entire marking procedure. The appeal is thus allowable. According to Article 24(4) REE the contested decision has to be set aside. In the circumstances of the case the Board also deems equitable (Article 24(4) REE) and orders that the appeal fee be reimbursed.

*Request that the contested decision be corrected*

7. The appellant requests that he be awarded a "PASS" grade for the pre-examination for the European qualifying examination 2017.

Following decisions D 2/14 (point 5 ff. of the Reasons), D 3/14 (point 12 ff. of the Reasons), D 4/14 (point 11 ff. of the Reasons), D 5/14 (point 6 ff. of the Reasons) and D 6/14 (point 9 ff. of the Reasons) and the respective reasoning in these decisions, the Board in the present appeal case considers that special reasons within the meaning of Article 12 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (Supplement to OJ EPO 1/2017, 52) are given for not remitting the case to the Examination Board for a new decision. These reasons allow the Disciplinary Board of Appeal rather than the Examination Board or the competent Examination Committee to scrutinise the marks given for statement 18.4 of the appellant's examination paper and decide whether he is to be awarded a "PASS" or a "FAIL" grade on the basis of the revised marking.

8. The appellant's answers to statements 18.1, 18.2 and 18.3 were correct. In accordance with the marking scheme for the pre-examination he was thus awarded 3 marks. Taking into account the correction with respect to statement 18.4 the appellant is given a total of 5 marks for question 18. The total marks awarded for the pre-examination thus rise from 69 to 71. Therefore, the grade "PASS" is to be awarded for the appellant's paper pursuant to Rule 6(2)a) IPREE.

9. In view of the above, the appellant's "main request" is allowable and the further objections concerning statements 4.3 (first auxiliary request) and 13.3 (second auxiliary request) need not be dealt with in this decision.
  
10. Regarding the appellant's request 5) that the appeal proceedings be accelerated in order that the decision to the appeal is issued in advance of the deadline for enrolling to the European qualifying examination in 2018 the Board notes that the case was referred to the Disciplinary Board of Appeal on 2 June 2017, that the appellant was summoned to oral proceedings for the first time on 17 August 2017 and thus before the expiration of the said deadline in September 2017. However, the appellant submitted with letter dated 1 September 2017 that he will not attend the oral proceedings on 17 August 2017 due to booked holiday, so that oral proceedings on 17 August 2017 were cancelled and the appellant was summoned to oral proceedings on 16 November 2017.
  
11. The appellant's request 6) concerning deadline for applying for the pre-examination 2018 is rendered without object by the present decision.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The appellant's answer paper for the pre-examination for the European qualifying examination 2017 is awarded 71 marks and therefore, pursuant to Rule 6(2)a) IPREE, the grade "PASS".
3. The appeal fee is reimbursed.

The Registrar:

The Chairman:

G. Rauh

E. Dufrasne