

**UNITED STATES PATENT AND TRADEMARK OFFICE**

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE
WASHINGTON, D.C. 20231
www.uspto.gov

JAN 5 2001

In re

DECISION ON
PETITION FOR REGRADE
UNDER 37 C.F.R. § 10.7(c)

MEMORANDUM AND ORDER

(petitioner) petitions for regrading his answers to questions 1, 29, 32, 37 and 44 of the morning section, and questions 16, 21, 28, 36, 45 and 49 of the afternoon section of the Registration Examination held on April 12, 2000. The petition is denied to the extent petitioner seeks a passing grade on the Registration Examination.

BACKGROUND

An applicant for registration to practice before the United States Patent and Trademark Office (USPTO) in patent cases must achieve a passing grade of 70 in both the morning and afternoon sections of the Registration Examination. Petitioner scored 65. On July 28, 2000, petitioner requested regrading, arguing that the model answers were incorrect.

As indicated in the instructions for requesting regrading of the Examination, in order to expedite a petitioner's appeal rights, all regrade requests have been considered in the first instance by the Director of the USPTO.

OPINION

Under 37 C.F.R. § 10.7(c), petitioner must establish any errors that occurred in the grading of the Examination. The directions state: "No points will be awarded for incorrect answers or unanswered questions." The burden is on petitioners to show that their chosen answers are the most correct answers.

The directions to the morning and afternoon sections state in part:

Do not assume any additional facts not presented in the questions. When answering each question, unless otherwise stated, assume that you are a registered patent practitioner. Any reference to a practitioner is a reference to a registered patent practitioner. The most correct answer is the policy, practice, and procedure which must, shall, or should be followed in accordance with the U.S. patent statutes, the PTO rules of practice and procedure, the Manual of Patent Examining Procedure (MPEP), and the Patent Cooperation Treaty (PCT) articles and rules, unless modified by a subsequent court decision or a notice in the *Official Gazette*. There is only one most correct answer for each question. Where choices (A) through (D) are correct and choice (E) is "All of the above," the last choice (E) will be the most correct answer and the only answer which will be accepted. Where two or more choices are correct, the most correct answer is the answer which refers to each and every one of the correct choices. Where a question includes a statement with one or more blanks or ends with a colon, select the answer from the choices given to complete the statement which would make the statement *true*. Unless otherwise explicitly stated, all references to patents or applications are to be understood as being U.S. patents or regular (non-provisional) utility applications for utility inventions only, as opposed to plant or design applications for plant and design inventions. Where the terms "USPTO," "PTO," or "Office" are used in this examination, they mean the U.S. Patent and Trademark Office.

Petitioner has presented various arguments attacking the validity of the model answers.

All of petitioner's arguments have been fully considered. Each question in the Examination is worth one point.

Petitioner has been awarded an additional point for morning question 44. Accordingly, petitioner has been granted an additional point on the Examination. However, no credit has been

awarded for morning questions 1, 29, 32 and 37, and afternoon questions 16, 21, 28, 36, 45 and 49. Petitioner's arguments for these questions are addressed individually below.

Petitioner has listed morning question 1 as one for which he is requesting reconsideration. However, petitioner has provided no comments or arguments directed at this question. The correct answer for morning question 1 is choice (A). Petitioner selected choice (D). No error in grading has been shown. Petitioner's request for credit on morning question 1 is denied.

Morning question 29 reads as follows:

29 You are attorney of record appointed by XYZ Corp. to prosecute a patent application directed to an invention assigned to the XYZ Corp. by an employee-inventor. In the course of prosecution, you receive an Office action rejecting all the claims as anticipated by a patent to Williams. After carefully reviewing the Office action and discussing the same with XYZ officers, it is concluded that the rejection is sound. In accordance with instructions from XYZ officers, you file in the PTO a certification by XYZ Corp. that it is the assignee of the invention, and an express abandonment signed by you under 37 C.F.R. § 1.138. An appropriate PTO official acknowledges receipt and accepts the express abandonment. Shortly thereafter, you receive an urgent call from the employee-inventor, who informs you that she just learned of the action taken to abandon the application, and that she has reviewed the Williams patent and concluded that her invention differs therefrom in a subtle but significant manner. Which of the following courses of action, if any, are properly available to you to successfully revive the application in accordance with proper PTO practice and procedure?

- (A) Request reconsideration of the abandonment on the ground that the filing of the express abandonment was without the inventor's consent.
- (B) Request reconsideration of the abandonment on the ground that the filing of the express abandonment was the result of a mistake.
- (C) File a petition to revive the application with all the elements required under 37 C.F.R. § 1.137(a) on the ground that the filing of the express abandonment was unavoidable.
- (D) File a petition to revive the application with all the elements required under 37 C.F.R. § 1.137(b) on the ground that the filing of the express abandonment was unintentional.
- (E) None of the above.

The model answer is choice (E). None of the other choices are properly available to successfully revive the application in accordance with proper PTO practice and procedure.

Petitioner argues that the most correct answer is choice (D). Petitioner argues that the abandonment decision was based on mistakes on the part of the client, and therefore the abandonment should be considered "unintentional."

Petitioner's arguments have been fully considered but they are not persuasive. Choice (E) is the correct answer because the express abandonment was the result of a deliberative, intentional course of action. MPEP 711.03 (c) states:

Where the applicant deliberately permits an application to become abandoned (e.g., due to a conclusion that the claims are unpatentable, that a rejection in an Office action cannot be overcome, or that the invention lacks sufficient commercial value to justify continued prosecution), the abandonment of such application is considered to be a deliberately chosen course of action, and the resulting delay cannot be considered as "unintentional" within the meaning of 37 CFR 1.137 (b). See *In re Application of G*, 11 USPQ2d 1378, 1380 (Comm'r Pat. 1989). An intentional course of action is not rendered unintentional when, upon reconsideration, the applicant changes his or her mind as to the course of action that should have been taken. See *In re Maldague*, 10 USPQ2d 1477, 1478 (Comm'r Pat. 1988).

An intentional abandonment of an application precludes a finding of unavoidable or unintentional delay pursuant to 37 C.F.R. 1.137. Choice (D) is incorrect.

Morning question 32 reads as follows:

32. Nonobviousness of a claimed invention may be demonstrated by:

- (A) producing evidence that all the beneficial results are expected based on the teachings of the prior art references.
- (B) producing evidence of the absence of a property the claimed invention would be expected to possess based on the teachings of the prior art.
- (C) producing evidence showing that unexpected results occur over less than the entire

claimed range.

(D) producing evidence showing that the unexpected properties of a claimed invention have a significance less than equal to the expected properties.

(E) (A), (B), (C) and (D).

The model answer is choice (B). Nonobviousness may be demonstrated by producing evidence of the absence of a property the claimed invention would be expected to possess based on the teachings of the prior art.

Petitioner argues that answer (D) is also correct. Petitioner asserts that both choice (B) and choice (D) would be correct in some scenarios, but incorrect in other scenarios. In regard to choice (D), petitioner argues that producing evidence showing that the unexpected properties of a claimed invention have a significance less than equal to the expected properties may demonstrate nonobviousness in some scenarios. In regard to choice (B), petitioner argues that the evidence provided in choice (B) would not be sufficient to demonstrate nonobviousness in every case.

Petitioner's arguments have been fully considered but they are not persuasive. Choice (D) is incorrect. Producing evidence showing that the unexpected properties of a claimed invention have a significance less than equal to the expected properties may NOT demonstrate nonobviousness. See MPEP 716.02 (c) and *In re Nolan*, 193 USPQ 641, 645 (CCPA 1977). The evidence being described in choice (D) is the evidence showing a lack of significance compared to expected properties, NOT evidence of the unexpected properties themselves. While evidence of unexpected properties of a claimed invention may demonstrate nonobviousness, evidence of a lack of significance of such unexpected properties compared to expected properties may NOT demonstrate nonobviousness. As described in MPEP 716.02 (c), such evidence of relative insignificance actually hurts the potential for the evidence of the unexpected properties to

rebut evidence of obviousness.

Petitioner's arguments that the evidence provided in choice (B) would not be sufficient to demonstrate nonobviousness in every case is misplaced. The question is which choice **may** demonstrate nonobviousness of a claimed invention, **not** whether such evidence would be sufficient to demonstrate nonobviousness in every case, or any particular case. Nonobviousness may be demonstrated by producing evidence of the absence of a property the claimed invention would be expected to possess based on the teachings of the prior art. See MPEP 716.02 (a), "ABSENCE OF AN EXPECTED PROPERTY IS EVIDENCE OF NONOBVIOUSNESS". See also, *Ex parte Mead Johnson & Co.*, 227 USPQ 78 (Bd. Pat. App. & Inter. 1985). Choice (B) is the only correct answer.

Morning question 37 reads as follows:

37. You are preparing a patent application for your client, Perry. The invention is disclosed in the specification as a doodad making machine comprising elements A, B, and means C for performing a function. The specification discloses two specific embodiments for performing the function defined by means C, namely C' and C". The specification also discloses that components D or E may be combined with A, B, and means C to form: (i) A, B, D, and means C; or (ii) to form A, B, E, and means C. The specification also discloses that component G may be used, but with only means C' to improve the machine's performance. The specification also states that the machine is rendered inoperative if component G is used with C", or whenever components D or E are present. The first three claims in the application are:

1. A doodad making machine comprising A, B, and means C for performing a function.
2. A doodad making machine as claimed in Claim 1 wherein means C is C'.
3. A doodad making machine as claimed in Claim 1 or 2 further comprising D.

Which of the following would be a proper claim 4 and be supported by the specification?

- (A) A doodad making machine as claimed in Claim 2, further comprising E.
- (B) A doodad making machine consisting essentially of A, B, means C for performing a function, D and G.

- (C) A doodad making machine as claimed in Claim 1 or 2, further comprising D.
- (D) A doodad making machine as claimed in Claims 1 and 2, further comprising G.
- (E) A doodad making machine as claimed in any of the following claims, wherein means C is C", and further comprising G.

The model answer is choice (A).

Petitioner argues that no answers are correct, so credit should be given for any answer.

Petitioner appears to argue that any potential claim which includes element D or E would be improper.

Petitioner's arguments have been fully considered but they are not persuasive. Petitioner appears to have misinterpreted the following sentence in the question: "The specification also states that the machine is rendered inoperative if component G is used with C", or whenever components D or E are present." Petitioner appears to think that this sentence means that the machine is inoperative whenever components D or E are present. However, proper interpretation of the sentence's meaning is that the machine is rendered inoperative whenever component G is combined with elements C" or D or E in an embodiment. This meaning is clear from the sentence structure itself, as well as from the context of the question in which it appears. The question states elsewhere that elements D or E may be included in operative embodiments. Thus, an attempt to interpret this sentence as meaning that the machine would be inoperative whenever components D or E are present would be contradictory and illogical. Choice (A) is correct.

Afternoon question 16 reads as follows:

Please answer questions 16 and 17 based on the following facts. On February 15, 1999, Debbie conceived a unique system for humanely caging hunting dogs and automatically feeding them at appropriate times. Debbie told her husband, Ted, about her idea that night, and the two spent the next four months working regularly on the concept. Ted built a cage that implemented the

concept on June 17, 1999, and tested it on his own dogs for a week. It worked perfectly for its intended purpose. The next day, Ted visited a family friend, Ginny, who happened to be a registered practitioner, and asked her to prepare a patent application on Debbie's behalf. Ginny declined representation, explaining that she was in the middle of trial preparation and would not be able to work on the application for at least four months. Ginny gave Ted the names of a number of qualified patent practitioners, suggesting he consider retaining one of them to promptly prepare the patent application, and explained that a delay in filing the patent application could prejudice Debbie's patent rights. Ted, however, felt uncomfortable going to a practitioner he did not know personally, and did not contact any of the individuals recommended by Ginny. After Ginny had completed her trial and was back in the office, Ted visited her on December 1, 1999. At that time Ginny agreed to represent Debbie. An application was filed in the PTO within 10 days.

On May 15, 1999, Billie conceived an idea substantively identical to Debbie's. Billie immediately prepared a detailed technical description including drawings and visited a registered practitioner. Billie filed a patent application on June 14, 1999. Later, on July 9, 1999, Billie built a cage that implemented the concept and had fully tested it by August 11, 1999.

16. Assuming Debbie's patent application is substantively identical to Billie's patent application, which of the following statements is most correct?

- (A) Nearly simultaneous invention by Debbie and Billie is proof that the invention is obvious and precludes patentability.
- (B) Nearly simultaneous invention by Debbie and Billie may be evidence of the level of skill in the art at the time of the invention.
- (C) Nearly simultaneous invention by Debbie and Billie may be evidence of a long-felt need for the invention.
- (D) Nearly simultaneous invention by Debbie and Billie may be evidence of commercial success of the invention.
- (E) Statements (A), (B), (C) and (D) are each incorrect.

The model answer is choice (B). Nearly simultaneous invention by Debbie and Billie may be evidence of the level of skill in the art at the time of the invention.

Petitioner argues that the most correct answer is choice (E), because (A), (B), (C) and (D) are each incorrect. Petitioner argues that none of the statements regarding the relevance of "nearly simultaneous invention" by Debbie and Billie are correct. Petitioner asserts that since MPEP 2141.03 does not refer to "nearly simultaneous invention" as being evidence of the level of

skill in the art, choice (B) is not correct. Petitioner further argues that since the MPEP, PCT, U.S. patent statutes, patent rules (listed in the examination instructions) do not refer to "nearly simultaneous invention", choices (A), (B), (C) and (D) are incorrect. Petitioner also argues that case law which pre-dates the date of the MPEP should not be considered.

Petitioner's arguments have been fully considered but they are not persuasive. Nearly simultaneous invention may be evidence of the level of skill in the art at the time of the invention. See *In re Merck & Co.*, 231 USPQ 375 (Fed. Cir. 1986); *International Glass Co. v. U.S.*, 159 USPQ 434 (US Cl Ct 1968). Further, note that the examination instruction's reference to "subsequent" court decisions is in reference to ones which **modify** policy or procedures found in the MPEP, PCT, U.S. patent statutes, patent rules ("... unless modified by a subsequent court decision or a notice in the *Official Gazette*"). This does not remove **all** case law which pre-dates the date of the MPEP from consideration. Choice (B) is correct, and choice (E) is incorrect.

Afternoon question 21 reads as follows:

21. Mr. Roberts, an American citizen touring a vineyard, saw a unique grape-squeezing machine in France. The machine was highly efficient, and produced excellent wine. The vineyard owner was not hiding the machine. It was out of public view and was the only one of its kind. The vineyard owner had built it himself several years earlier, and no drawing or technical description of the machine was ever made. The vineyard made only local sales of its wines. Using his photographic memory, Roberts went back to his hotel and made technical drawings of what he had seen. Upon his return to the United States, Roberts promptly prepared and filed a patent application directed to the machine. Which of the following statements is correct?

- (A) Roberts may not obtain a patent on the machine because it was known by others before Mr. Roberts made technical drawings of the machine.
- (B) Roberts may not obtain a patent on the machine because wine made by the machine had been sold more than a year before Roberts' application filing date.
- (C) Roberts is entitled to a patent because a goal of the patent system is public disclosure of technical advances, and the machine would not have been disclosed to the public without Roberts' efforts.

(D) Roberts may not obtain a patent on the machine because the vineyard owner was not hiding the machine and therefore the machine was in public use more than a year before Roberts' application filing date.

(E) Statements (A), (B), (C) and (D) are each incorrect.

The model answer is choice (E). Statements (A), (B), (C) and (D) are each incorrect.

Petitioner argues that the most correct answer is choice (A). Petitioner argues that he read the phrase "known by others" in choice (A) as meaning Roberts "copied" the invention and Roberts "did not invent" it himself.

Petitioner's arguments have been fully considered but they are not persuasive. Petitioner attempts to stretch the wording of choice (A) to include things which are not contained therein. Petitioner attempts to transfer choice (A), which sets forth a 35 U.S.C. 102 (a) rationale ("known or used by others") into a 35 U.S.C. 102(f) rationale ("he did not himself invent the subject matter sought to be patented"). The language of choice (A) does not support such a position. Choice (A) is not correct because the invention was not known or used by others "in this country" under 35 U.S.C. 102(a). Choice (E) is the correct answer.

Afternoon question 28 reads as follows:

28. Which of the following is true?

(A) On appeal of a rejection of ten claims to the Board of Patent Appeals and Interferences, each appealed claim stands or falls separately as a result of appellant pointing out differences in what the claims cover.

(B) The 2-month period for filing a petition mentioned in 37 CFR 1.181(f) is extendable under 37 CFR 1.136(a).

(C) An examiner may enter a new ground of rejection in the examiner's answer to an applicant's appeal brief.

(D) After filing a notice of appeal, an applicant is estopped from further prosecuting the same claims in a continuation application.

(E) When desiring to claim foreign priority, the oath or declaration in a reissue

application must claim foreign priority even though the priority claim was made in the original patent.

The model answer is choice (E). When desiring to claim foreign priority, the oath or declaration in a reissue application must claim foreign priority even though the priority claim was made in the original patent.

Petitioner argues that the most correct answer is choice (A). Petitioner argues that choice (E) is incorrect because an additional certified copy does not need to be filed in a reissue application under MPEP 201.14 (b). Petitioner argues that choice (A) is correct because if you argue claims separately on appeal, they do not rise and fall together.

Petitioner's arguments have been fully considered but they are not persuasive. In regard to choice (E), see MPEP 1414 Content of Reissue Oath/Declaration and 37 CFR 1.175(a) which states that reissue oaths/declarations must meet the requirements of 37 CFR 1.63, including 1.63(c) relating to a claim for foreign priority. When desiring to claim foreign priority in a reissue application, the reissue oath or declaration must include the claim foreign priority. That an additional certified copy of the foreign priority document does not need to be filed (as described in MPEP 201.14 (b)) is not relevant to the issue as set forth in choice (E).

Choice (A) is incorrect. Choice (A) does NOT state "arguing the claims separately", but rather states "pointing out differences in what the claims cover." Appealed claims do not stand or fall separately as a result of appellant pointing out differences in what the claims cover. 37 CFR 1.192(c)(7) requires appellant to state that the claims do not stand or fall together. Appellant must present appropriate argument under 37 CFR 1.192(c)(8) why each claim is separately patentable. Merely pointing out differences in what the claims cover is not argument why the

claims are separately patentable. See 37 CFR 1.192(c)(7) and MPEP 1206.

Afternoon question 36 reads as follows:

36. Which of the following is true?

- (A) As a registered practitioner, it is not necessary to notify the Director of Enrollment and Discipline of your address changes as long as you file a change of address in each individual application for which you are responsible.
- (B) At any time the Director of Enrollment and Discipline may send out letters to registered practitioners for the purpose of ascertaining whether they wish to remain on the register and if no reply is received, without further warning, the name may be removed from the register.
- (C) A practitioner may not refuse to aid or participate in conduct that the practitioner believes to be unlawful, even though the client presents some support for an argument that the conduct is legal.
- (D) Any person who passes this examination and is registered as a patent agent or patent attorney is entitled to file and prosecute patent applications and trademark registration applications before the PTO for the same client.
- (E) It is permissible to give examiners gifts valued at between \$25 and \$250 so long as the gift is made after issuance of all patent applications that the practitioner or the practitioner's firm has before the Examiner.

The model answer is choice (B). At any time the Director of Enrollment and Discipline may send out letters to registered practitioners for the purpose of ascertaining whether they wish to remain on the register and if no reply is received, without further warning, the name may be removed from the register.

Petitioner argues that there is no correct answer because all of the statements are false. Petitioner argues that 37 CFR 10.11 (b) requires publication in the OG as additional or further warning that a practitioner's name "is to be removed" from the register.

Petitioner's arguments have been fully considered but they are not persuasive. The rule does not require notice to be published before the names of individuals are removed. 37 C.F.R. §

10.11(b). The rule states “[t]he name . . . will be removed from the register and the names of individuals so removed will be published in the Official Gazette.” Thus the names have already been removed from the register prior to such publication in the OG. The only “warning” function of such publication in the OG is to inform the public that the practitioner’s name **has been removed** from the register.

Afternoon question 45 reads as follows:

45. You obtained a patent for inventor Jones. The patent, although disclosing a use for her invention, and the best mode contemplated by Jones at the time the application was filed for making and using her invention, through error and without deceptive intent, failed to describe an embodiment of her invention. The embodiment has become a commercial success. Eighteen months after the patent issued, you filed a reissue application adding a claim and new, necessary supporting disclosure directed to the omitted embodiment, together with Jones’ declaration explaining the error, and other required papers. In accordance with proper PTO practice and procedure:

- (A) The claim is subject to a new matter rejection under 35 U.S.C. § 132.
- (B) The specification is subject to rejection under 35 U.S.C. § 101 for failure to disclose the best mode for achieving commercial success.
- (C) The claim is subject to a rejection under 35 U.S.C. § 251 and a rejection under 35 U.S.C. § 112, first paragraph.
- (D) The claim is allowable.
- (E) (B) and (D).

The model answer is choice (C). The claim is subject to a rejection under 35 U.S.C. § 251 and a rejection under 35 U.S.C. § 112, first paragraph.

Petitioner argues that choice (A) should also be considered a correct answer. Petitioner argues that a new matter rejection could be made under 35 U.S.C. § 132 in a reissue application.

Petitioner’s arguments have been fully considered but they are not persuasive. 35 U.S.C. 132 does not provide the grounds for making a “new matter” rejection. Such grounds are found in 35 U.S.C. 112, first paragraph. Further, in accordance with proper PTO practice and procedure, the

claim is subject to a rejection under 35 U.S.C. § 251 and a rejection under 35 U.S.C. § 112, first paragraph. Choice (C) is the "most" correct answer, and the only correct answer.

Afternoon question 49 reads as follows:

49. A parent application A was filed on September 9, 1988, and became abandoned on October 19, 1993. Application B was filed on October 21, 1993, and referred to application A as well as claimed the benefit of the filing date of application A. Application B issued as a patent on June 17, 1997. Application C was filed on October 29, 1993, and referred to application B as well as claimed the benefit of the filing date of application B. Application D was filed on December 20, 1996. Application D referred to application B and claimed the benefit of the filing date of application B. Both applications C and D were abandoned for failure to file a timely reply to Office actions that were mailed on April 20, 1999. Application E was filed on July 22, 1999 and is drawn to the same invention as claimed in applications C and D. Application E claims the benefit of the filing dates of applications A, B, C, and D, and makes reference to all preceding applications. The earliest effective filing date of application E with respect to any common subject matter in the prior applications is:

- (A) October 21, 1993.
- (B) December 20, 1996.
- (C) October 29, 1993.
- (D) September 9, 1988.
- (E) July 22, 1999.

The model answer is choice is (E). The earliest effective filing date of application E with respect to any common subject matter in the prior applications is July 22, 1999.

Petitioner argues that the most correct answer is choice (A). Petitioner argues that the earliest effective filing date of application E with respect to any common subject matter in the prior applications is October 21, 1993. Petitioner argues that under Rule 134, an applicant has six months to respond to an Office Action, unless informed in "writing" of a shorter period. Since the facts do not state that a three month shortened period was set, petitioner assumes applicant had six months to respond, and thus the applications were not abandoned until October 1999. It is petitioner's position that application E properly claims benefit to Applications B, C and D.

Petitioner's arguments have been fully considered but they are not persuasive. The applications C and D were abandoned after midnight of July 21, 1999. There is no copendency between applications E and any prior application. MPEP § 201.11 ("If the first application is abandoned, the second application must be filed before the abandonment in order for it to be copending with the first."). See MPEP § 710.01(a), fourth paragraph. According to the instructions, "[t]he most correct answer is the policy, practice, and procedure which must, shall, or should be followed in accordance with the U.S. patent statutes, the PTO rules of practice and procedure, the Manual of Patent Examining Procedure (MPEP). . . ." Under the authority given him by 35 U.S.C. 133, the Commissioner has directed the examiner to set a shortened period for reply to every action. See MPEP 710.02(b). Since the Examiner would have followed the practice and procedure in accordance with the U.S. patent statutes, the PTO rules of practice and procedure, and the MPEP, a shortened period of would have been set and applications C and D would have been abandoned after midnight of July 21, 1999. Therefore, there is no copendency and choice (E) is correct.

No error in grading has been shown as to morning questions 1, 29, 32 and 37, and afternoon questions 16, 21, 28, 36, 45 and 49. Petitioner's request for credit on these questions is denied. The regrade of the petitioner's examination has been conducted fairly and without discrimination pursuant to a uniform standard using the PTO's model answers. See *Worley v. United States Patent and Trademark Office*, No. 99-1469, slip op. at 4 (D.D.C. Nov. 8, 2000)(The court held that the PTO's Model Answers are a uniform standard. "[S]ince all exams are graded in reference to [the Model Answers], use of the Model Answers fosters uniformity in grading and preclude[s] unfair and individually discriminatory grading." *Id.*, slip opinion at 5. The court concluded that "the decision of the Commissioner of the USPTO not to regrade Mr. Worley's examination answers as correct

In re

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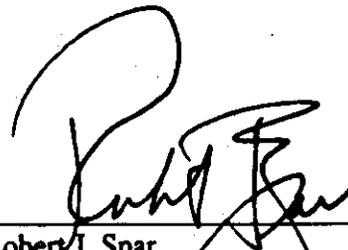
when the answers did not conform with the USPTO's Model Answers was not arbitrary and capricious." *Id.*, slip opinion at 5-6.)

ORDER

For the reasons given above, one point has been added to petitioner's score on the Examination. Therefore, petitioner's score is adjusted to 66. This score is insufficient to pass the Examination.

Upon consideration of the request for regrade to the Director of the USPTO, it is ORDERED that the request for a passing grade on the Examination is denied.

This is a final agency action.



Robert J. Spar
Director, Office of Patent Legal Administration
Office of the Deputy Commissioner
for Patent Examination Policy