



Case Number: D 0004/03

**D E C I S I O N**  
of the Disciplinary Board of Appeal  
of 19 July 2004

**Appellant:** N.N.

**Decision under appeal:** Decision of the Examination Board for the  
European Qualifying Examination dated  
18 September 2002.

**Composition of the Board:**

**Chairman:** B. Schachenmann  
**Members:** B. Günzel  
K. F. Büchel

## Summary of Facts and Submissions

- I. By letter dated 25 September 2002 the appellant was informed of the decision of the Examination Board of 18 September 2002, that the appellant was not successful in the European Qualifying Examination ("EQE") held in March 2002.
- II. The appellant's performance had been marked as follows:
- |             |              |
|-------------|--------------|
| A: 30(2001) | B: 57 (2001) |
| C: 49       | D: 0         |
- III. The appellant appealed against the decision of the Examination Board in relation to the awarding of 49 marks for Paper C, by letter received on 22 October 2002. The appeal fee had been paid on 15 October 2002. The statement setting out the grounds of appeal was filed on 21 November 2002.
- IV. The appellant requested that 50 marks be awarded for her performance in paper C and that paper C be declared as passed.
- V. The appellant's submissions can be summarised as follows:

According to decisions D 4/88 and D 1/92 it was not the task of the Disciplinary Board of Appeal to reconsider the examination procedure on its merits. Only serious and obvious mistakes, on which the contested decision was based, could be considered. There was, however, also the examining bodies' discretion, the exercise of

which, according to decision D 12/97, was the major element in the marking procedure.

In her case both examiners had awarded a total of 49 Marks to her performance in Paper C which was only one point less than the 50 marks needed for passing the paper. Moreover, for two of the categories into which the marking schedule for the evaluation of candidates' answers to Paper C is subdivided i.e. the categories "argumentation" and "legal aspects" the examiners' markings of the appellant's answers differed by one mark. For the sub-category "argumentation" the first examiner had awarded 22 marks and the second examiner 23 marks. For the sub-category "legal aspects" the first examiner had awarded 7 marks and the second examiner 6 marks. Had each of the examiners exercised his discretion so as to confirm the other examiner's higher marks for the respective sub-category both examiners would have arrived at a total of 50 marks and thus at a "pass" for her Paper C. In view of the minimal difference in the said markings in her case, and as being decisive for the decision on the "pass" or "fail" in her paper, it represented an abuse of discretion that the Examination Board had confirmed the different intermediate marks and the total of 49 marks and declared paper C failed.

- VI. In response to a communication setting out the Board's preliminary view of the appeal the appellant indicated that she had no further comments to make.

## Reasons for the Decision

1. As the appellant herself has submitted, according to the established jurisprudence of the Disciplinary Board of Appeal, the Disciplinary Board cannot reconsider the examination procedure on its merits nor can it entertain claims that papers should have been marked differently, save to the extent of mistakes which are serious and so obvious that they can be established without re-opening the entire marking procedure (See, for example, D 1/92, OJ EPO 1993, 357, points 3 to 5 of the reasons, and D 6/92, OJ EPO 1993, 361, points 5 to 6 of the reasons.) Otherwise, differences of opinion with regard to the number of marks to be awarded for a given answer are a reflection of value judgments which are not, in principle, subject to judicial review (see D 1/92, supra, para. 6). The appellant did not submit that the marking of her answers to Paper C would have to be regarded as having been influenced by a mistake made by one or both of the examiners in the evaluation of the merits of her answers other than that they should have exercised their discretion so that each of them should have awarded to the sub-category concerned the respective higher mark awarded by the other examiner.
  
2. In decision D 3/00, OJ EPO 2003, 365, the Disciplinary Board of Appeal ruled that a candidate is not per se entitled to claim for each answer to a sub-question or sub-element of an examination paper the highest mark awarded by one of the examiners whenever the two examiners differ in their marking to such a sub-question or sub-element because the evaluation of a candidate's performance is a unitary process for each

examiner and therefore the evaluation of an examiner on a part of a candidate's answer cannot be isolated from its context which is the value judgment of this examiner on the merits of the candidate's answers as a whole (for the details of the reasons for that finding see point 3.) Therefore, in the present case, the fact that the number of marks awarded by the examiners differed for the sub-categories concerned is not in itself a reason why the examiners should have increased their individual markings to the respective higher marking of the other examiner.

3. It is clear, however, that where the overall number of marks intended to be awarded to a paper would result in a "fail" but comes as close to a "pass" as in the present case, the examiners, after having marked the papers individually and separately, will have to re-examine whether it would be justified to increase the number of marks so as to result in a pass or to stick to their original marks. This applies, in particular, where differences between the two examiners in the number of marks for sub-categories are such as to result in a pass if the higher number of marks awarded by one of the examiners was allocated to the sub-categories concerned.

The appellant has referred to decision D 12/97, OJ EPO 1999, 566, and to the explanations of the President of the EPO contained therein, as to how the marking system operated in practice (V of the Summary of Facts and Submissions). It is explained there that after having first marked the papers separately the two markers come together and, if necessary, try to agree on the grade to be awarded to the paper. It is clear that such

practice applies in particular to cases, in which differences in the markings by the two examiners are decisive for the "pass" or "fail" of a paper. This includes cases as the present one where the difference between the marking by the examiners does not lie in the total number of marks to be awarded to the candidate's performance in the paper but lies in different numbers of marks allocated to sub-categories only.

The appellant did not doubt in any way and the Board also sees no reasons to doubt that in her case discussions of this kind indeed took place between the two examiners, in accordance with the established practice described by the President of the EPO in decision D 12/97, before the examiners came to their final marks allocated to the appellant's performance in Paper C, as they appear from the schedule of marks of Paper C 2002 of Examination Committee II. Thus, from the fact that in the appellant's case neither of the two examiners eventually changed his marks in correspondence with the higher marks awarded by the other examiner for the sub-category concerned, it has to be concluded that each of the examiners was of the opinion that the candidate's performance did not justify a higher number of marks and that her overall performance in the paper did not justify a "pass". This is, however, precisely the kind of value judgment which is not, as such, subject to judicial review by the Disciplinary Board of Appeal (see 1 above).

4. Accordingly, there is also no misuse of discretion by the Examination Board, which according to 7(3) REE determines the grades for each paper and decides

whether a candidate has passed or failed on the basis of the grades proposed to it by the examination committees. It is to be observed that, in practice, when the marks are as close to a "pass" as in the present case, the Examination Board, before taking a decision on a "fail", satisfies itself that not increasing the marks to a pass is the right decision. (This practice relates to the decision on "pass" or "fail" of the individual paper concerned and is not to be confused with the former "borderline case assessment" which is no longer applicable under the present examination provisions, see D 8/96, OJ EPO 1998, 302.) Moreover, whether or not to increase the marks to a "pass" is justified, is examined again by the Examination Board after the filing of the appeal and the grounds of appeal, when the Examination Board has to decide in accordance with Article 27(3) REE whether to rectify its decision or to remit the case to the Disciplinary Board of Appeal. The appellant did not submit anything to this effect and the Board has no reason to doubt that both these examinations were indeed carried out by the Examination Board before finally deciding on the appellant's "fail" and before remitting the appeal to the Board.

Accordingly, the appellant's request could not be acceded to and the appeal is to be dismissed.

The Registrar:

The Chairman:

P. Martorana

B. Schachenmann