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

Case Number: D 0030/05

D E C I S I O N
of the Disciplinary Board of Appeal
of 24 November 2006

Appellant: N.N.

Decision under appeal: **Decision of the Examination Board for the European Qualifying Examination dated 28 September 2005.**

Composition of the Board:

Chairman: C. Holtz
Members: C. Rennie-Smith
W. Kovac

Summary of Facts and Submissions

I. The appellant appealed, by a notice of appeal both dated and received by fax on 24 October 2005, against the decision, posted by registered letter on 4 October 2005, of the Examination Board that, having been awarded 48 marks, he had been unsuccessful in paper D of the 2005 European Qualifying Examination ("EQE"). The written statement of the grounds of appeal was both dated and received by fax on 8 November 2005.

II. By letters from the Board of 5 January 2006, the President of the European Patent Office and the President of the Institute of Professional Representatives were invited, pursuant to Articles 27(4) REE and 12 RDR, to comment on the case. Neither President replied.

III. The appellant's arguments in his grounds of appeal, which fell into two categories, can be summarised as follows. First, he made the general remark that for candidates who, like himself, write their answer in a language which is not their mother tongue, style and grammar can occupy some of the limited time available to answer the exam questions. He referred to Rule 3 of the Implementing provisions to the Regulation on the EQE (OJ 2004, 14) which says (so far as relevant but at greater length than cited by the appellant):

"Members of the examination committees shall bear in mind that candidates may have written their papers in a language other than their mother tongue. Faults of grammar or style shall therefore not be penalised."

IV. The appellant's second line of argument, covering seven of the eight pages of his statement of grounds of appeal, consisted of a detailed analysis by him of his answers to paper D in which he sought to demonstrate, by reference to most if not all the matters raised in each section of the paper, that his answers were not just correct but correct to a standard meriting a higher mark than 48.

V. In a communication of 11 August 2006 containing its preliminary views, the Board observed that (for the reasons set out in paragraph 2 below) its jurisdiction is limited to infringements of the REE or its implementing provisions or any higher-ranking law and the Board can neither reconsider the examination procedure on its merits nor entertain claims that papers have been marked incorrectly except as regards mistakes which are serious and so obvious that they can be established without re-opening the entire marking procedure. The appellant's arguments had to be assessed in the light of this principle. On that basis, neither of the appellant's arguments in his grounds of appeal (see III and IV above) was likely to succeed for the reasons below (see 4 and 5). The communication concluded by saying the Board was of the provisional opinion that the appeal would have to be dismissed and invited the appellant to make any further submissions within the following two months.

VI. The appellant replied by written submissions both dated and faxed on 16 August 2006 in which he put forward two additional arguments. First, he said there had been a serious and obvious mistake, which could be established without re-opening the marking procedure, in respect of

the marking of question 4 of paper D1. The appellant argued that candidates should have been able to answer this question, which concerned the consequences for examination if a priority document is not filed, from the legal sources listed in the syllabus set out in Article 12 REE. This was not in fact the case. To the appellant's knowledge there were only two references to such consequences in EPO materials neither of which was listed in Article 12 REE. These were the then current edition of the publication "How to get a European Patent", part 2, page 27, section 334, second paragraph (which stated "substantive examination cannot begin until the priority document is furnished"), and the "Guidelines for Examination", part A-VII 3.5, third paragraph (which stated "if the priority document is not on file substantive examination may nevertheless be started"). The appellant accordingly submitted that, first, question 4 was not within the examination syllabus prescribed by Article 12 REE; second, even if the Board should consider the question to be within the syllabus, candidates should not have been penalised for failing to show knowledge only obtainable from sources outside Article 12 REE; and third, the only two sources of information available for answering the question conflicted with each other. In each of these cases, there had been an infringement of the REE. The appellant supported this argument by referring to the Examiners' Report (in the 2005 Annual Compendium) from which he quoted, from the paragraph regarding question 4, "Nearly all candidates had difficulty with this question". He argued this showed most candidates received no marks for this question which he attributed to the fact that, as he alleged, the answer was not to be found in the syllabus.

VII. The appellant's second new argument was that, while agreeing that the Disciplinary Board cannot re-mark examination answers, it was well-known that the review by the Examination Board of the marking of a candidate's answers in the event of appeal was normally entrusted to the same two examiners who originally marked the paper. Even if other markers conducted the review, they could be influenced by their colleagues' opinions. The appellant was not aware that the review had ever led to a change of the original marks. Since, unlike a Technical Board of Appeal, the Disciplinary Board may not enter into the merits of a case, the procedure open to failed candidates is unfair in that "the right to be heard is not fully given" and he suggested the Board should refer this to the Enlarged Board of Appeal.

VIII. The appellant requested oral proceedings which took place on 24 November 2006, attended by the appellant and a representative of the President of the EPO. The arguments presented by the appellant were largely by way of elaboration of the first issue raised in his written reply to the Board's communication (see VI above). Following the debate, the appellant's request was that the decision under appeal be set aside and that he be awarded a "pass" grade for paper D.

Reasons for the Decision

1. The appeal is admissible.

2. It is well established by the jurisprudence of the Disciplinary Board that it only has jurisdiction in EQE matters to establish whether or not the Examination Board has infringed the REE or a provision implementing the REE. This follows inexorably from Article 27(1) REE which is the basis of the Board's jurisdiction in EQE matters and which reads:

"An appeal shall lie from decisions of the Board and the Secretariat only on grounds of infringement of this Regulation or of any provision relating to its application."

Thus the Disciplinary Board may only review Examination Board decisions for the purposes of establishing that they do not infringe the REE, its implementing provisions or a higher-ranking law. It is not the task of the Disciplinary Board to reconsider the examination procedure on its merits nor can it entertain claims that papers have been marked incorrectly, 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 1993, 357), Reasons, points 3-5 and D 6/92 (OJ 1993, 361), Reasons, points 5-6). The nature of such mistakes comes close to errors which may be corrected under Rule 89 EPC (see D 23/97, unpublished, Reasons, point 5). The appellant's arguments must be seen in the light of this principle as applied according to the established case-law.

3. If appellants consider that this principle need not apply if they supply the Disciplinary Board with a detailed analysis of their examination performance - and thereby, as they might see it, avoid the need to re-open the marking procedure - they are misinterpreting the case-law and misdirecting themselves. The Disciplinary Board cannot itself re-mark examination answers or review the detailed marking as assessed by the examiners and references in the case-law to not re-opening the entire marking procedure must be read accordingly. Even if the Board could theoretically re-assess the examination performance based on the grounds of appeal without consulting the examination file, the Board would in doing so exceed its competence i.e. it would in fact have re-opened the marking procedure.

4. As regards the appellant's first argument in his grounds of appeal (see III above), this was presented as a general observation with no allegation, let alone any evidence, of any infringement of the REE or its implementing provisions. If the appellant was contending that, as a candidate who was not using his native language, he should have been allowed more time or that his answers should have been marked more leniently, the case-law of the Disciplinary Board shows such contentions cannot succeed. That the time allowed inconveniences candidates whose first language is not one of the official languages, was considered by the Disciplinary Board in D 2/95 (unpublished, see Reasons, point 6) not to be an infringement of the relevant legislation; and the inevitably different circumstances of candidates whose native language is not one of the

official languages was considered and explained by the Disciplinary Board in D 9/96 (unpublished, see Reasons, points 3.4-3.6) as not justifying "any additional bonus to be given to candidates whose mother tongue is not an official language of the EPO". Moreover, the Board notes such circumstances may be avoided if candidates avail themselves of the opportunity provided by Article 15(3) REE to submit their answers in the official language of a Contracting State, provided this is requested on enrolment.

5. As regards the appellant's analysis in his grounds of appeal of his examination answers (see IV above), the detailed way in which he has done this illustrates the very essence of the reason why the Disciplinary Board cannot entertain such submissions. This analysis shows in the clearest way possible that the appellant's opinion and that of the examiners as to his answers are different and the Board cannot review the decisions of the examiners in the absence of a mistake so obvious that it can be established without re-opening the marking procedure. Otherwise, such differences of opinion reflect value judgments which are not, in principle, subject to judicial review (see D 1/92 and D 23/97, supra, paragraph 2).

6. A specific example of such a difference arises in relation to the first additional argument presented in the appellant's reply to the Board's communication (see VI above). The appellant's submissions concerning question 4 of paper D1 appear incorrect for a number of reasons. First, Article 12 REE, which sets out the EQE syllabus including the EPC and the PCT, must be read in conjunction with other provisions relating to the

requirements made of candidates. Thus Article 13 REE also provides that

"(3) The examination papers shall at least cover....
(d) the answering of legal questions and the legal assessment of a specific situation."

Further, the Instructions to candidates for preparing their answers (Supplement to OJ 12/2004, page 25 *et seq*) say, in their "General Provisions" applicable to all papers of the EQE:

"1. Candidates are expected to be familiar with
- the Guidelines for Examination in the EPO and
- the content of the Official Journal of the EPO
as published up to the end of the year preceding their examination."

The same Instructions say, in paragraph 22:

"Paper D Part 1 comprises questions relating to different areas of candidates' legal knowledge. Candidates must answer all the questions. Answers should be brief and to the point. For all questions candidates must cite any articles, rules or other legal basis relevant to their answer."

Accordingly, it appears that the EQE tests *inter alia* any relevant legal knowledge including the Guidelines and their application to specific legal issues, as well as knowledge and application of formal legal sources such as the EPC and PCT.

7. Second, it is apparent not only from the Examiners' Report quoted by the appellant but also from the specimen candidate's answer (both in the 2005 Annual Compendium) that question 4 could in fact be answered by reference to legal sources identified in Article 12 REE, namely the EPC and the PCT. The entire comment on question 4 from the Examiners' Report reads as follows:

"Nearly all candidates had difficulty with this question. At least some candidates realized that the requirements of Rule 17.1(b) PCT had been fulfilled and that the EPO shall not request the applicant to furnish the priority copy according to Rule 17.2(a) PCT. Still, very few candidates knew how the EPO would act in such a situation."

The model answer referred to two PCT Rules, two EPC Rules and three EPC Articles. While, as the representative of the EPO President observed at the oral proceedings, the specimen answers in the Compendium are not necessarily entirely correct, the answer supplied for this question shows that at least one other candidate was able to answer the question from a knowledge of the syllabus set out in Article 12 REE.

8. Third, the complete extract from the Examiners' Report (quoted in the previous paragraph) also shows that the reason many candidates received few or no marks for question 4 was not, as the appellant claimed, because the question was outside the syllabus but because most candidates quite simply did not know the answer. This appears to be the case of the appellant. He argues that "to his knowledge" question 4 could only be answered

from sources not listed in Article 12 REE - the examiners clearly thought otherwise. Since in their opinion the appellant did not demonstrate the appropriate legal knowledge, he received no marks for his answer to the question. That opinion is not one which can be reviewed by the Board in the absence of a serious and obvious mistake.

9. As regards the appellant's final argument (see VII above), this amounts to no more than a complaint about the system of review and appeal open to a failed EQE candidate and is clearly based on no more than the appellant's perception of the system unsupported by any evidence of what actually happens let alone of anything incorrect or unfair in his particular case. As already observed, the Board's jurisdiction is severely circumscribed and certainly does not extend to considering general challenges to the fairness or otherwise of that system. If, as the appellant suggests, the present system of re-evaluation is unfair, the appropriate measure would be to change the system by amending legislation. Since the appellant has not been able to demonstrate, or indeed even suggest, that his own case has in fact been treated unfairly, the Board is powerless to intervene.

10. Finally, the Board must observe that it has no power to refer matters to the Enlarged Board of Appeal as suggested by the appellant (see D 5/82 (OJ 1983, 175), Reasons, point 5 and D 6/82 (OJ 1983, 337), Reasons, point 6).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

P. Martorana C. Holtz