



**Europäisches
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in Disziplinarangelegenheiten

**European
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Disciplinary
Board of Appeal

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Chambre de recours statuant
en matière disciplinaire

Case Number: D 0001/15

**D E C I S I O N
of the Disciplinary Board of Appeal
of 4 May 2016**

Appellant: N.N.

Decision under appeal: **Decision of the Examination Board of the European Qualifying Examination dated 27 March 2015.**

Composition of the Board:

Chairman: I. Beckedorf
Members: T. Bokor
B. van Wezenbeek

Summary of Facts and Submissions

- I. The present appeal is against the decision, posted by registered letter dated 27 March 2015, of the Examination Board that the appellant had not been successful in the 2015 European Qualifying Examination ("EQE"), Pre-examination. He has been awarded 67 marks for his paper, while 70 marks were necessary for passing.
- II. The notice of appeal is dated 24 April 2015, and it was received at the EPO on 27 April 2015. The appeal fee was paid on 4 May 2015.
- III. The Examination Board decided not to rectify its decision, and transmitted the case to the Disciplinary Board of Appeal with letter dated 21 May 2015.
- IV. The appellant submitted that the decision was defective because of serious and obvious mistakes in the content of the examination. The examination paper was not suitable for testing a candidate for the purposes of Article 1(1) REE and Rule 10(3) IPREE. Two examination questions, namely question 19.2 and 20.4 were formulated in a manner that did not permit a TRUE or FALSE answer with any reasonable degree of certainty. The ambiguity was of such an extent that the answers essentially had to be given randomly. In this manner it was clear that the questions were not suitable for establishing whether a candidate is qualified to practice. Furthermore, given that there was no room for setting out the arguments how a candidate could have arrived to his answer, he could also not demonstrate in the examination paper that in fact both a TRUE and

FALSE answer could have been supported with reasonable arguments.

V. As to question 19.2, it was argued that the answer TRUE, given by the appellant, could have been argued convincingly. The statement 19.2 stated that over D1, claim II.2 solved the objective problem of providing a fire door imitating the appearance of ancient doors. The description of the invention made it clear that D1 would resemble a metal door under any circumstances. The description also explicitly stated that the shape and appearance of the solid wood plate door could imitate old doors, even when covered with a metal plate. Thus this effect was derivable from the application, and according to the Guidelines this effect could support the solution of the objective technical problem.

VI. As to question 20.4, it was argued that the answer FALSE, given by the appellant, could have been argued convincingly. The question only made reference to D1. Rule 22(3) IPREE instructed candidates to limit themselves to the facts given. Accordingly, only this document had to be considered, but no combination with other documents. D1 did not teach away from using aluminium, it did not mention aluminium at all, on the other hand it proposed various metals beside steel. D1 did not set out what melting point of the metal cover would be desirable or how long it was supposed to withstand fire. In short, D1 contained no relevant teaching on aluminium and therefore could not teach away from it. Even if the description of the invention were also considered in combination with D1, a technical analysis of D1 demonstrated that aluminium

would be suitable, so that the skilled person had incentive at least to try it.

VII. In a Communication dated 14 January 2016 the Board informed the appellant of its provisional view that the appeal has no chance of success and that the Board intended to dismiss the appeal, for reasons essentially corresponding to reasons discussed below in this decision. The Board also gave the Appellant opportunity to comment within two months.

VIII. With letter dated 22 March the appellant responded to the Communication of the Board. He expressed his disappointment that the appeal was not concluded before September 2015, when the appellant should have applied for the main examination, and that the appeal was not even concluded when the appellant sat Pre-Examination 2016, taking place on 29 February 2016. In this manner the appeal became a "wasted exercise" for the appellant. He also referred to appeal D3/14, where the deciding board found that concluding an appeal on pre-examination should be regarded as an urgent matter. He stated that the lack of urgency shown by the present Board represents a procedural violation, and for this reason he considers a reimbursement of the appeal fee equitable. Concerning the opinion of the Board, the appellant argued that the Board was wrong to state that no manifest errors were apparent in the examination paper or the marking instructions. On the contrary, the Examiner's Report itself demonstrated that there were manifest errors, given the fact that for several questions, marks were awarded for both TRUE and FALSE answers. This was an acknowledgement of wrongly formulated questions. In this manner it was also clear

that candidates were caused unnecessary anxiety, which had a negative impact on their time management. Even the Board's comments demonstrate that the examination papers contained misleading statements.

IX. The appellant requests that his examination paper be awarded four additional points for his correct answers, and as a result he should be awarded the grade PASS. Reimbursement of the appeal fee is requested with a view to the alleged procedural violation, and also conditionally on the allowing of the appeal, under Article 24(3) REE.

Reasons for the decision

1. The appeal is admissible.

General considerations

2. It is well established by the jurisprudence of the Disciplinary Board of Appeal that it only has jurisdiction in EQE matters to establish whether or not the Examination Board has infringed the Regulation on the European Qualifying Examination ("REE") or a provision implementing the REE. This follows from Article 24(1) REE which reads: "An appeal shall lie from decisions of the Examination Board ... only on the grounds that this Regulation or any provision relating to its application has been infringed". Thus the Disciplinary Board of Appeal 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 of Appeal 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. All other claims to the effect that papers have been marked incorrectly are not the responsibility of the Disciplinary Board of Appeal. Value judgments are not, in principle, subject to judicial review. (See, for example, D 1/92 (OJ EPO 1993, 357), points 3-5 of the Reasons; D 6/92 (OJ EPO 1993, 361), points 5-6 of the Reasons; and D 7/05 (OJ EPO 2007, 378), point 20 of the Reasons, all cited in the Case Law of the Boards of Appeal, 7th Edition 2013, Chapter V.2.6.3.).

3. The Board considers that this settled jurisprudence of the Disciplinary Board of Appeal is also applicable to appeals concerning pre-examination, even if the marking of the papers, the latter being understood as the according of the marks on the basis of the answers, is hardly ever in dispute, given the simple marking scheme of a multiple choice test where the answers are merely "TRUE" or "FALSE", so that their evaluation is straightforward and objective. However, the review requested here is clearly not directed at the marking itself, but to the content of the examination as presented to the candidates. As the present case also illustrates, in order to be able to decide on those issues which the appellant himself considers as being decisive, the Board in fact would have to review if not all, but at least a substantial part of the examination paper and would have to perform a detailed, partly technical analysis of the facts presented. Also this exercise appears to be well beyond the powers of the

Board, as this would in fact be tantamount to reviewing the content of the examination material, which is solely the responsibility of the Supervisory Board (Article 3(2) REE), the Examination Board (Article 6(2) REE) and in particular the Examination Committees (Article 8(1) REE). The limited competence of the Disciplinary Board of Appeal to review the examination material from a technical point of view can also be inferred from the fact that the majority of the members of any given Disciplinary Board of Appeal deciding on EQE matters need not have any technical qualification (Article 24(3), third sentence, REE), see also D 6/13, point 10 of the Reasons.

4. The appellant did not state explicitly which provisions of the REE or the IPREE were infringed, but the Board considers that the repeated references to Article 1(1) REE and Rule 10(3) IPREE in the grounds of appeal seek to demonstrate that at least these provisions were not complied with, hence infringed. Article 1(1) REE stipulates that the EQE is designed to establish whether a candidate is qualified to practise as a professional representative before the EPO, while Rule 10(3) IPREE stipulates that the purpose of the pre-examination is to assess candidates' ability to answer legal questions and questions relating to the drafting of claims as defined in Article 1(4) REE. According to the appellant, these provisions require that the examination questions are formulated so that the correct answer can be found with a reasonably high degree of certainty.
5. The Board accepts that the cited provisions, together with the overall purpose of the EQE imply the

compilation of reasonably well drafted case scenarios and corresponding reasonably unambiguous examination questions, which will then permit the establishment and application of a fair marking scheme. To that extent the Board can also accept that the Examination Board has an implied obligation to prepare the examination papers accordingly, in the sense that the questions in the pre-examination paper should only permit a single correct answer which can be answered with TRUE or FALSE with a reasonable certainty

6. However, the question arises if the Disciplinary Board of Appeal has any competence to allow an appeal on the grounds that an examination paper and the corresponding marking scheme are wrong, in the sense that the questions cannot be answered with the desired, i.e. high degree of certainty. It is clear that the competence of the Disciplinary Board of Appeal is limited, given that Article 24(1) REE obviously excludes certain appeal grounds. These considerations led to the established principle that the Disciplinary Board of Appeal has only a limited competence to examine on appeal any given examination paper and the corresponding marking scheme concerning their content. Indeed, if the Board were to extend the examination of appeals to an in-depth examination of the totality of the examination materials, it would in effect reduce to zero the scope of the restriction concerning the possible grounds of appeal and the corresponding scope of the limitation of the Boards competence, as stipulated by Article 24(1) REE. Against this background, decision D 6/13 found that it cannot be qualified immediately as an infringement of a provision of the REE or IPREE, if the Examination Board does not

"perfectly" fulfil its implied obligation to draw up an impeccable examination paper and corresponding impeccable marking scheme, as such a finding would in the given case require a value judgement, which is normally beyond the powers of the Board. See points 8 and 9 of the Reasons.

7. The situation before the present Board appears to be comparable. In the present case the appellant invites the Board to examine if the official solution and the solution offered by the appellant both can be recognised as reasonably acceptable, as the appellant argues, or rather that the official solution is the only reasonable one, as it would follow from the above discussed implied obligation of the Examination Board. In the opinion of the Board, the examination of the line of argument put forward by the appellant, namely that both the FAIL and TRUE solutions are defendable, would be an exercise which obviously cannot be done without a value judgement, which would weigh up the arguments for and against the competing solutions, and inevitably would have to be based on the totality of the facts presented in the examination paper. However, such value judgements are beyond the powers of the Board, as stated above in point 2. The Board holds that the appeal is to be dismissed already on this basis. This assessment of the Board concerning the limited competence of the Disciplinary Board of Appeal was also known to the appellant, who did not comment on it.
8. Furthermore, the Board also does not see any manifest errors either in the objected questions of the examination paper or in the corresponding marking instructions in the Examiner's Report. For the sake of

completeness, even though the Board cannot be expected to perform a complete and detailed analysis of the relevant parts of the examination paper, the Board provides a brief comment on the arguments of the Appellant as outlined below.

Question 19.2

9. The issue is whether imitating old doors is an objective technical problem solved by the claim. The appellant argues that the TRUE answer is correct, as the application explicitly refers to the possibility of imitating ancient doors with the claimed construction. The appellant refers to the Guidelines, Chapter G.VII.5.2, which also permits the reformulation of the technical problem on the basis of a technical effect derivable from the application.
10. The Board notes that Question 19.2 refers to a technical problem solved over D1. Thus the technical problem not only has to be mentioned, but also demonstrably solved. The application teaches that the solution to imitate an ancient door consists in making the door in a particular shape, ostensibly imitating the particular shape of an ancient door. While this is a clear possibility, the claim itself does not limit the claimed fire door to any particular shape. Thus the claimed door does not necessarily imitate an ancient door and as such does not solve the objective technical problem.
11. The cited chapter of the Guidelines also makes it clear that it is not sufficient that the technical effect relied on is mentioned in the application. Rather, the

"problem may be regarded as being solved only if it is credible that substantially all claimed embodiments exhibit the technical effects upon which the invention is based", see in the Guidelines, Chapter G.VII.5.2 (page VII-5 in Chapter G.VII, third paragraph). It seems obvious that not all claimed doors will imitate ancient doors, so that this technical problem does not appear to be solved by all claimed embodiments. To that extent the solution given by the appellant does not appear correct.

Question 20.4

12. The appellant argues that his FALSE answer is correct on the basis that D1 makes no reference to aluminium at all. He also submits that in view of Rule 22(3) IPREE the question would have lead him away from considering D1 in combination with either D2 or the application, so that the question must have been understood as "does D1 as such teach away from using aluminium".
13. The Board accepts that the relatively terse statement 20.4 may easily mislead a reader into the belief that the statement only concerns D1. However, on a closer look at the examination paper it should become apparent that the question is more complex than the contents of D1 alone. The explanation given to Question 20 (page 30) and the following introduction to the statements 20.1-20.4 (top of page 31 of the examination paper) makes it clear that the statement must be read in a specific context, namely as a statement defending a specific claim against a combination of documents (D2 as closest prior art in combination with D1 for statement 20.4), as part of fictional opposition proceedings. Against

this background there could have been no reasonable assumption that D1 had to be analysed completely independent of any other information, and statement 20.4 had to be judged accordingly. Rather, the statement 20.4 had to be understood as a possible and reasonable (but not necessarily irrefutable) argument against an inventive step attack against the claim (identified as the auxiliary request in Question 20).

14. Furthermore, the Board considers that the appellant misinterprets Rule 22(3) IPREE. This rule merely instructs the candidates to limit themselves to the facts given in the examination paper, (as opposed to the individual examination questions, see e.g. Rule 10(4)(b) IPREE). Otherwise this rule does not prohibit the consideration of various facts or other similar information given in another parts of the same examination paper. It is noted that for example the original application documents are presented as an introduction to all questions 11-20, while the Claim set II and documents D1, D2 and D3 are presented as relevant for all questions 17-20. This is also not contradicted by the instructions given in the examination paper, which merely requires candidates to consider each statement within a question independently of the other statements (see point 1(a), last sentence on page 1), but does in no way convey that other facts obviously forming part of the examination paper as a whole should be disregarded.
15. The Board also takes note of the additional explanation at page 4, fifth paragraph in the grounds of appeal in support of the appellant's offered solution. However, the Board is of the opinion that this line of argument

is not convincing. The technical explanation given by the appellant may give good reasons why a skilled person would consider using aluminium in a door construction according to D1, but it is difficult to see how D1 would bring the skilled person to the idea of covering the door of D2 with aluminium. The cooling effect relied on is not apparent in the D2 door, and D1 suggests the use of steel. If the skilled person were to improve the fire protection capabilities of the D2 door, as suggested by the opponent, see last sentence of page 30, steel would be the obvious choice.

16. In light of the findings above, the Board does not accept that the "FALSE" answer given by the appellant can be validly argued to be the correct answer.
17. Again, this assessment of the Board of the Questions 19.2 and 20.4 was known to the appellant, who did not rebut any of the findings of the Board concerning specifically these questions. The appellant merely pointed to the fact that the Examiner's Report clearly recognised that the examination paper and/or the marking scheme as a whole was not free from errors. In this regard the Board was wrong to state that there were no manifest errors.
18. However, the Board could not be expected to review the whole paper and marking scheme, and indeed did not do so. The objected statement of the Board was made in the context of the objected questions and their corresponding marking instructions, and was only limited to these questions. Furthermore, the fact that the Examination Board indeed exercised its powers under Article 6(5) REE to make corrections to the marking

scheme is a clear indication of the fact that appealing candidates were not left completely without any genuine opportunity for review, even concerning marking errors. This further demonstrates that the restricted competence of the Disciplinary Board of Appeal for reviewing marking errors is not only legal from a formal point of view, but also equitable concerning its substantive scope.

19. Also the argument concerning the adverse effect of the acknowledged wrongly formulated questions on the time management of the candidates must fail. The Board does not dispute that such an adverse effect could have existed. However, it is questionable if this can be taken into consideration by the Disciplinary Board of Appeal for correcting the marking of **other** questions. Rather, it appears that this is also an issue for the Examination Board under its powers pursuant to Article 5(6) REE, as mentioned above, all the more as this must have affected each and every candidate, and not only the present appellant. Otherwise, time management during the examination in general is a personal responsibility of any candidate. In the opinion of the Board, candidates should generally be prepared for the eventuality that some examination questions may have to be skipped if proving to be excessively difficult, for whatever reason.
20. On the basis of the above assessment, the Board does not perceive any infringement of the applicable provisions of REE or IPREE, nor of any higher ranking law. Therefore, the appeal must be dismissed on the merits.

Reimbursement of the appeal fee

21. Given that the appeal does not succeed on the merits, a reimbursement of the appeal fee under Article 24(4) REE, third sentence, is also not possible. The question whether reimbursement is also possible under certain equitable circumstances even where the appeal is not allowed, in analogy to certain case law of the Boards of Appeal of the European Patent Office (see CLBA 7th Edition 2013, Chapter IV.E.8.5.3, page 1059 in the English language edition), can be left open in light of the findings of the Board, as explained below.
22. The Board notes that the reimbursement also does not appear equitable on the grounds that the appellant was left in a state of uncertainty or that any procedural violation occurred. The Board of course recognises that a speedy decision on appeals concerning pre-examinations is desirable, but points out that the case D3/14 was treated with particular urgency because it appeared allowable and indeed was allowed. Furthermore, the reasoning in point 16 of the Reasons cannot support the contention that any non-urgent treatment of a pre-examination related appeal is necessarily a procedural violation. The cited point was made by the deciding board in D3/14 to justify a direct order from the Board to award a "PASS" grade to the candidate, instead of a remittal to the Examination Board. No instructions were, or indeed could be given to other Disciplinary Boards of Appeal.
23. The situation is completely different in the present case, and the Board considers that the appellant did not suffer significant disadvantage. At first sight, it

appears understandable that the appellant subjectively perceives the appeal as useless, and as such a wasted effort, given that neither the sitting of the main examination in 2015 nor the omission of the pre-examination 2016 would be now possible, even if the appeal were allowed. However, given that the appeal is not allowed, he could not have sat the main examination, and he would have had to enrol for and re-sit the pre-examination 2016 under any circumstances. Furthermore, he was informed of the fully detailed reasoned opinion of the Board about the expected dismissal of the appeal well before sitting the pre-examination 2016, at which point even a withdrawal of the appeal would have been possible with a corresponding possible refund of the appeal fee. All in all, in the end it is simply not apparent that the timing of the present decision forced him to make unnecessary efforts. It is another matter that he had to prepare without knowing if his efforts would be necessary in the end. However, viewed objectively, in the end his appeal inevitably had to be considered "a wasted exercise" not because of the perceived unacceptably long delay of the Board, but because the appeal turned out to be unfounded on its merits.

24. On the basis of the reasons above, the request for reimbursement of the appeal fee is to be refused.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for reimbursement of the appeal fee is refused.

The Registrar

The Chairman

P. Martorana

I. Beckedorf