



**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: D0024/17

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 22 August 2018**

**Appellant:** N.N.

**Decision under appeal:** Decision of 06 July 2017 of the Examination Board for the European Qualifying Examination that the appellant failed Paper A to D of the European Qualifying Examination 2017

**Composition of the Board:**

**Chairwoman:** T. Karamanli  
**Members:** I. Beckedorf  
T. L. Johnson

## Summary of Facts and Submissions

- I. The appellant sat papers A to D at the European qualifying examination (EQE) 2017. For her performance in paper A she was awarded 39 marks, 43 marks for paper B, 39 marks for paper C and 36 marks for paper D. Based on these marks, the Examination Board awarded a "fail" grade to any of the appellant's papers A to D.
- II. The appellant appealed the Examination Board's decision in due time and form.
- III. The Examination Board remitted the appeal to the Disciplinary Board of Appeal (hereinafter: the DBA or the Board) without rectifying its decision.
- IV. In essence the appellant found fault with the marking of the solutions proposed by her in each of the four papers. She argued that the marking of her papers was inconsistent with "the answers that had been made available to the candidates via the model solution and the Examiner's Comment's", the examiners marking her papers either did not fully consider parts of her papers or they awarded insufficient points. The appellant's essential arguments will be dealt with in more detail in the Reasons of this decision.
- V. From the appellant's "statement of appeal" the DBA infers that the appellant requests
  - a) that the decision under appeal be set aside with regard to all the appellant's papers A to D;
  - b) that the marking of her answers to papers A to D be re-evaluated and that she be awarded higher marks;

- c) that the appeal fee be refunded "should the appeal be dismissed";
- d) that the examination fees be refunded for those examinations the appellant would not have to re-sit, "if the appeal is partly or wholly successful".

VI. On 18 January 2018, the Board issued a communication pursuant to Article 14 of the Additional Rules of Procedure of the Disciplinary Board of Appeal of the European Patent Office (RPDBA - OJ EPO 2018 Supplement 1, 51) in which the appellant's facts and submissions as well as her requests, as understood by the Board, were summarised. In said communication the Board expressed its rather negative preliminary opinion in respect of all parts of the appellant's EQE-papers for lack of substantiation of the alleged marking errors (cf. points 7.2, 8.3, 8.4, 9.2 and 10.4 of the communication). Only the clarity issue of part B was identified as potentially being well-founded and justifying a remittal to the Examination Board for a limited re-evaluation of the appellant's paper B (cf. points 8.2 and 8.5 of the communication). The appellant was invited to comment within a period of two months on the Board's preliminary opinion.

Since the appellant did not reply to it, the Board issued a second communication on 9 May 2018 informing her that it considered the case ready for decision and, in the absence of a request for oral proceedings, intended not to hold oral proceedings, but to issue the final decision in the written proceedings in due course.

VII. Pursuant to Article 24(4) of the Regulation of the EQE for professional representatives (REE, OJ EPO 2018, Supplementary publication 2, 2) in conjunction with

Article 12 of the Regulation on discipline for professional representatives (RDR, OJ EPO 2018, Supplementary publication 1, 127) the President of the EPO and the President of the Council of the Institute of Professional Representatives (epi) had been invited to file observations on the appeal case but did not do so.

### **Reasons**

1. The decision is taken in written proceedings because the appellant did not request oral proceedings and the Board does not consider oral proceedings expedient.
2. The appeal is admissible.
3. The following considerations largely correspond to the Board's preliminary opinion. In the absence of any counter-argument filed by the appellant in reply to the Board's communication pursuant to Article 14 RPDBA and after having reconsidered the entire case, the Board sees no reason to deviate from its preliminary opinion and gives a ruling on the merits of the present appeal as follows.
4. According to Article 1(1) REE, it is the object of the qualifying examination to establish whether the candidate is fit to practise as a professional representative. Possession of the required knowledge and abilities is demonstrated by the examination results alone, not by completion of the prescribed training or by paper qualifications. A candidate incapable of achieving a high enough mark, as provided for in

Article 14 REE and Rule 6 of the Implementing provisions to the REE (IPREE, OJ EPO 2017, Supplementary publication 2, 18)), to satisfy the examination standards is not fit to practise as a professional representative.

5. The purpose of paper A is to assess candidates' ability to draft claims and the introductory part of a European patent application as defined in Article 1(4) REE and Rule 23(1) IPREE.

The purpose of paper B is to assess candidates' ability to reply to an official communication in which prior art has been cited as defined in Article 1(4) REE and Rule 24(1) IPREE.

Paper C is meant be to assess candidates' ability to draft a notice of opposition to a European patent as defined in Article 1(4) REE and Rule 25(1) IPREE.

Paper D is aimed to assess candidates' ability to answer legal questions and to draft legal assessments as defined in Article 1(4) REE and Rule 26(1) IPREE

6. The appellant's line of arguments is directed essentially against the evaluation of some of her answers given in all papers A to D by the Examination Committee and Examination Board and towards a higher marking or rather a remarking.
7. However, Examination Board decisions in EQE are subject only to limited review.

Article 24(1) REE 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".

In accordance with the consistent case law of the DBA, in particular D 1/92, OJ EPO 1993, 357, and D 6/92, OJ EPO 1993, 361, 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. In these two cases, the DBA therefore concluded that its functions did not include reconsidering the examination procedure on its merits. Accordingly, the Examination Board's value judgment concerning the number of marks that an examination paper deserves is not subject to review by the DBA. As held in decision D 6/13 (points 8 and 9 of the reasons), 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.

Only if the appellant can show that the contested decision is based on serious and obvious mistakes the DBA may consider this. The alleged mistake must be so obvious that it can be established without re-opening the entire marking procedure, for instance if an examiner is alleged to have based his evaluation on a technically or legally incorrect premise on which the contested decision rests. Any further claims regarding

alleged defects in the assessment of candidates' work fall outside the DBA's jurisdiction, since value judgments are not subject to judicial review (cf. D 11/07, point 3 of the reasons; D 9/11, points 13 and 14 of the reasons; Case Law of the Boards of Appeal, 8<sup>th</sup> edition 2010, V.2.6.3, with further references).

As set out in D 7/05 (OJ EPO 2007, 378, 394 et seq.), the DBA can only consider facts constituting a mistake in the examination procedure which can be established without re-opening the whole marking procedure. The actual marking of examination performance in terms of how many marks an answer deserves is not subject to review by the DBA; nor are the Examination Board's criteria for determining the weighting of the expected answers (cf. D 20/96, point 9 of the reasons) to the examination questions (D 13/02, point 5 of the reasons).

The DBA does not have the power to reconsider the entire examination procedure on the merits and set its evaluation of the merits above that of the Examination Board. Review of the marking of an answer in terms of whether it is objectively correct or appropriate, is denied to the DBA by virtue of Article 24(1) REE.

8. The appellant's requests and submissions have to be evaluated and judged against this background.

The Board is well aware of e.g. decisions D 13/17 and D 15/17 where other appeals directed against the marking of papers A and C of the EQE 2017 were found allowable by the DBA in a different composition.

However, whereas the appellants in those appeal cases filed detailed objections and supported arguments why the marking of their respective papers was incorrect, the appellant in the case at hand does not substantiate in detail in what respect the solution according the examiners' report was incorrect. She essentially reiterates her solution and made a general reference to the solution in the examiners' report. As already mentioned in the Board's preliminary opinion and with the exception of one aspect in paper B ("clarity", cf. point 8.2 of the communication and point 10.2 below), the appellant leaves it entirely to the Board to establish on its own motion whether and to what extent the official solution and the marking of her papers based upon it was, or could have been wrong, and whether she could have been or should be awarded more points for her answers (cf. points 7.2, 8.3, 8.4, 9.2 and 10.4 of the communication and points 9.2, 9.3, 10.3, 10.4, 11.2, 12.3 and 12.4 below). This, however, would go beyond the scope of the review as outlined in point 7. above.

9. *Paper A*

9.1 With respect to paper A, the appellant objects to the marking of her solution concerning the dependent claims with 3 of 15 possible points and concerning the method claims with 9 of 32 possible points (pages 17 to 19 of the statement setting out the grounds of appeal). She submits that her solution was either not marked at all (dependent claims) or inconsistently with the official answer (method claims).

9.2 The Board notes that the appellant's submissions are essentially limited to repeat and to justify her



solution. No specific mistake or incorrectness of the official solution or of the marking has been alleged. Any such mistake or incorrectness is far from being obvious. The sample solution proposed in the examiners' report on paper A and applied by the examiners to the appellant's paper A appears to be well justifiable, at least it is not evidently unreasonable. The examiners' report contains a comprehensive reasoning for its proposal. In this respect, the DBA cannot identify any serious and obvious mistake affecting the marking itself. The decision that the Examination Committee and the Examination Board took is one to which they were entitled to come, and which shows no obvious mistake that would allow the DBA to review the exercise of discretion by the Examination Board.

The appellant's entire submission appears to be rather primarily based on the appellant's opinion that an objective evaluation of her answer paper should have led to her being awarded higher grades. Her arguments are confined to her view of the meaning and the degree of correctness and completeness or at least acceptability of her answer to paper A. What is being contested, therefore, are value judgments specific to the examination. What is involved are differences of opinion between the appellant and the examiners over the "correct" marking of the appellant's papers. As these aspects of the marking of the EQE answer paper are not subject to judicial review, the DBA cannot concern itself with the substance of her arguments.

That the appellant disagrees with the contested decision and holds a different opinion from the Examination Board might be understandable, but such differences of opinion

are reflections of value judgments which are not, in principle, subject to judicial review (see point 7 above). There is no evidence that, in marking the appellant's paper A, the examiners made a serious mistake that could be regarded as e.g. an abuse of their powers.

9.3 Thus, the appeal is not well-founded in as far as it concerns paper A of the EQE 2017.

10. *Paper B*

10.1 Regarding paper B, the appellant objects to the marking of her solutions concerning clarity with 0 of 8 possible points, concerning novelty with 4 of 6 possible points and concerning inventive step with 11 of 32 possible points. She essentially argues that she answered the three issues correctly and in line with the official answer but that the Examination Committee and the Examination Board failed to take her allegedly correct or at least arguable answer into account.

10.2 The appellant's submissions in respect of the clarity issues (pages 2 to 4 of the statement setting out the grounds of appeal) are (partly) well-founded. When comparing the appellant's answers and the solution according to the examiners' report it is not apparent why no points at all were awarded. Even without evaluating the appellant's answers on the merits, it is evident that the appellant addressed at least some of those issues that are considered relevant in the examiners' report (point 5.3). It is therefore incomprehensible that no point at all was awarded by the Examination Committee and the Examination Board. An

incomprehensible marking amounts to a serious and obvious mistake which affects the marking itself.

This, however, does not lead to automatically award the appellant all available 8 points for this part of paper B as requested by the appellant.

Although the mere decision to award the maximum possible marks for an undisputedly correct solution might perhaps not require a value judgment, the Board notes in the present case that, contrary to the appellant's allegation, her answers deviate to some extent from the official solution.

For the Board to decide whether an answer, while not completely corresponding to the expected solution, is in fact correct or not, would certainly be a value judgment, in the sense that this would require a careful technical assessment. It is rather for the Examination Board to re-evaluate the appellant's answers concerning the clarity issue.

- 10.3 About the appellant's objection to the marking of her answer on the issue of novelty, the Board notes that her detailed reasoning (pages 4 and 5 of the statement setting out the grounds of appeal) is rather focussed on repeating her answer and on concluding that her answer fully matched the official answer. However, when comparing the appellant's answers on novelty with the relevant section 5.4 of the examiners' report, the alleged identity or equivalence is far from obvious.

The examiners' report contains a comprehensible reasoning for its proposal. In this respect, the Board

cannot identify any serious and obvious mistake affecting the marking itself. The decision that the examination committee and the Examination Board took is one to which they were entitled to come, and which shows no obvious mistake that would allow the Board to review the exercise of discretion by the Examination Board.

The appellant's entire submission is primarily based on the appellant's opinion that an objective evaluation of her answer paper should have led to her being awarded higher grades. Her arguments are confined to her view of the meaning and the degree of correctness and completeness or at least acceptability of her answer to paper B concerning the issue of novelty. What is being contested, therefore, are value judgments specific to the examination. What is involved, thus, are differences of opinion between the appellant and the examiners over the "correct" marking of the appellant's papers. As these aspects of the marking of the EQE answer paper are not subject to review, the Board cannot concern itself with the substance of her arguments (see points 7 and 9.2 above).

There is no evidence that, in marking the appellant's paper B on the issue of novelty, the examiners made a serious mistake that could be regarded as an abuse of their powers.

- 10.4 Virtually the same is true regarding the appellant's objection to the marking of her answer on the issue of inventive step (pages 5 to 9 of the statement setting out the grounds of appeal). Again, the appellant argues that her answer matched the official solution.

The examiners' report contains a detailed discussion of the issue of inventive and what the candidates were expected to address in their answers (see point 5.5). Again, the Board notes differences in the appellant's answer when compared with the official solution.

At any rate, the Board cannot find any mistake so obvious that it can be established without re-opening the entire marking procedure.

- 10.5 Hence, whereas the appellant's objections to the markings of her answers concerning the issues of novelty and inventive go beyond the scope of judicial review for which the Board is competent, her objection in respect of the marking of her answer concerning the issue of clarity is well-founded only to an extent that her respective answer needed to be re-evaluated; therefore, the Board cannot award all or even some of the points available for this part of paper B as requested by the appellant.

In view of the above, the appeal is well-founded in as far as it concerns paper B of the EQE 2017 and the appellant's answer concerning the aspect of clarity.

11. *Paper C*

- 11.1 Regarding paper C, the appellant objects to the marking of her solutions for claims 1 to 3 with 6/7 of 20 possible points each (claims 1 and 2) and with 4 of 10 possible points (claim 3). She argued that she had identified correctly and discussed in detail most attacks but was awarded insufficient points on her correct answers. In particular she was right in determining the right effective dates and the prior art

and in analysing the attacks on claims 1 and 3 (pages 10 to 16 of the statement setting out the grounds of appeal).

- 11.2 The appellant essentially submits by repeating her answers that she got all attacks correct, except on claim 2, and argued in great detail for each attack. However, no specific error in the marking has been identified by the appellant.

Thus, she leaves it entirely to the Board to compare her solution with the relevant parts of the examiners' report and to evaluate whether and to what extent her answers could be considered as correct or arguable and whether she could have been or should be awarded more points for her answers. However, this goes beyond the scope of the judicial review as outlined in points 7 and 9.2 above.

The examiners' report contains a comprehensible reasoning for its proposal. In this respect, the Board cannot identify any serious and obvious mistake affecting the marking itself. The decision that the Examination Committee and the Examination Board took is one to which they were entitled to come, and which shows no obvious mistake that would allow the Board to review the exercise of discretion by the Examination Board.

- 11.3 Consequently, the appeal is not well-founded in as far as it concerns paper C of the EQE 2017.

12. *Paper D*

- 12.1 As regards paper D, the appellant objects to the marking of her answer to question 5 of part I with 1/1,5 of 10

available points and of her answers to questions 1 and 2 of part II with 2,5 of 10 possible points (question 1a), 2 of 5 available points (question 1b), 2 of 11 available points (question 1c), 3 of 9 available points (question 1d) and 5,5/6 of 18 available points (question 2).

- 12.2 As to paper D-I, the appellant reasons her objection by arguing that questions 5 a) and c) were worded interchangeably and, while referring to decision D 13/02 (*supra*), that this was to be considered an obvious mistake (page 20 of the statement setting out the grounds of appeal). The fact that she interchanged questions 5a and 5c should not be held against her because those questions could well be answered that way. It is clear from her answers that she understood the legal concept of priority being the core of the two questions.

Regarding paper D-II, the appellant alleged that several of her observations, although matching the official answers, had not been taken into account by the examiners. She "believes" that the examiners either did not understand her handwriting or simply failed to mark huge portions of her paper. Although she made some mistakes, her answers nevertheless contain enough support for at least 30 points (pages 21 to 28 of the statement setting out the grounds of appeal).

- 12.3 As to the first objection, the Board notes that the appellant in her further reasoning admits that she had interchanged the two sub-questions and that the appellant considered her answer nevertheless arguable.

Contrary to the appellant's opinion, the Board considers question 5 with all the sub-questions to be clearly enough drafted to allow answering them in a manner as proposed in the examiners' report. Thus, the Board does not find that this question contains an unclear or misleading wording; the decision D 13/02 (*supra*, in particular point 4 of the reasons) referred to by the appellant does not support the appellant's opinion.

12.4 With view to the second objection, the appellant's submissions are restricted to a repetition of her answers, leaving it once again entirely to the Board to compare her solution with the relevant parts of the examiners' report and to evaluate whether and to what extent her answers could be considered as correct or arguable and whether she could have been awarded more points for her answers. However, this would go beyond the scope of the judicial review as outlined in points 7 and 9.2 above.

The examiners' report contains a comprehensible reasoning for its proposed solution. In this respect, the Board cannot identify any serious and obvious mistake affecting the marking itself. The decision that the Examination Committee and the Examination Board took is one to which they were entitled to come, and which shows no obvious mistake that would allow the Board to review the exercise of discretion by the Examination Board.

12.5 Hence, the appeal is not well-founded in as far as it concerns paper D of the EQE 2017.



13. Thus, the appeal is well-founded on its substance only in part as far as it concerns paper B of the EQE 2017 concerning the clarity issue. With the exception of this issue, the Board cannot find any evidential support in the appellant's submissions that, in marking the appellant's papers, the examiners made a serious mistake that could be regarded as e.g. an abuse of their powers.

14. *Request for reimbursement of the examination fees*  
There is no legal basis for granting the appellant's request for reimbursement of the examination fees in case of an allowable appeal in part or in full.

15. *Conclusion, remittal of the case and reimbursement of the appeal fee*  
For the above reasons, the appeal is well-founded only with regard to paper B, but not in respect of papers A, C and D. Thus, the decision under appeal is to be set aside and the case to be remitted to the Examination Board for a re-evaluation of the appellant's paper B concerning the clarity issue. An assessment of the appellant's answers in terms of how many marks they deserve involves a review of the marking on the merits and thus value judgments which, according to the established jurisprudence (following D 1/92, OJ EPO 1993, 357), falls outside the competence of the Board. Therefore, the Board decides to remit the case to the Examination Board with the order to instruct the competent Examination Committee to undertake a new marking of the appellant's Paper B of the European qualifying examination 2017. However, this does not mean that the re-evaluation would necessarily result in additional 8 points.

If the Board of Appeal allows the appeal, it orders reimbursement in full or in part of the fee for appeal if this is equitable in the circumstances of the case (Article 24(4), third sentence, REE). In view of the outcome of the present appeal, *i.e.* that the present appeal is only well-founded in respect of one aspect of paper B, but not in respect of papers A, C and D, reimbursement in part of the appeal fee is equitable in the circumstances. Therefore, the appeal fee is to be reimbursed at 25%.

## **Order**

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The case is remitted to the Examination Board with the order to instruct the competent Examination Committee to re-mark the appellant's Paper B of the European qualifying examination 2017 with respect to the clarity issue.
3. Reimbursement of the appeal fee at 25% is ordered.

The Registrar:

The Chairwoman:

G. Rauh

T. Karamanli