



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-3014

Case Number: D 0008/19

D E C I S I O N
of the Disciplinary Board of Appeal
of 25 February 2021

Appellant: N.N.

Decision under appeal: **Decision of the Examination Board dated 1 July 2019 concerning the European Qualifying Examination 2019.**

Composition of the Board:

Chairman: L. Bühler
Members: T. Karamanli
S. Arkan

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examination Board for the European qualifying examination (EQE) 2019, notified to the appellant by registered letter with advice of delivery dated 1 July 2019, which held that his answer paper to the European qualifying examination 2019, Paper D, had been awarded 43 marks and therefore the grade "FAIL".

The relevant details of the marking by the two members of Examination Committee III were enclosed with the contested decision.

- II. By letter dated 8 August 2019 and received at the EPO in Munich on 14 August 2019, the appellant filed notice of appeal including the statement of grounds for appeal against the Examination Board's decision dated 1 July 2019. He paid the prescribed appeal fee on time. The appellant objected to the marking of his answers to Question 1 of Part I and Questions 1b, 1c, 2b and 3 of Part II of Paper D.

The appellant requested that the Examination Board's decision to award him a "FAIL" grade for Paper D be set aside and that his paper instead be awarded a "PASS" (main request), or, alternatively, a "COMPENSABLE FAIL" (auxiliary request). In addition, he requested reimbursement of the appeal fee.

The appellant further requested oral proceedings, in case it was anticipated that neither the main nor the auxiliary would be found allowable.

III. By letter of 11 September 2019, the Examination Secretariat informed the appellant that his appeal had not been allowed by the Examination Board and had consequently been forwarded to the Disciplinary Board of Appeal (hereinafter "Appeal Board").

This letter also stated:

"The Examination Board wishes to add the following comment:

'After remarking, the Examination Board considers that the main request is not allowable. However, the auxiliary request could be allowable. The candidate could be awarded 45 marks: 1.5 marks extra for Part 1, Question 1 and 0.5 marks extra each in Part 2, Questions 1b and 1c.'"

IV. By letter of 11 September 2019, the Examination Board remitted the appeal to the Appeal Board without rectifying its decision.

V. The Appeal Board invited the Presidents of the EPO and of the Institute of Professional Representatives before the EPO (epi) to comment on the case under Article 24(4) of the Regulation on the European qualifying examination for professional representatives (REE, OJ EPO 2019, Supplementary publication 2) and Article 12 of the Regulation on discipline for professional representatives (RDR, OJ EPO 2019, Supplementary publication 1). Neither of them commented on the appeal.

VI. The appellant was summoned to attend oral proceedings scheduled for 6 March 2020.

In a communication dated 20 February 2020, the Appeal Board informed the appellant of its preliminary opinion and gave reasons why it had doubts that the appeal was admissible and why it considered that the appellant's main request would have to be refused while his auxiliary request was allowable (requests as set out in point II above). With respect to the appellant's request for reimbursement of the appeal fee, the Appeal Board referred to Article 24(4), last sentence, REE, and indicated its view that a partial reimbursement would be equitable given that the main request appeared not to be allowable.

VII. By letter dated 24 February 2020 and received at the EPO on the same day, the appellant replied to the Appeal Board's preliminary opinion. Regarding the admissibility of his appeal, he submitted that his letter dated 8 August 2019 had been posted by airmail and express courier at the national postal service, but because of a general dislocation in transmission of the mail, it was not received at the EPO on 12 August 2019 but only on 14 August 2019. By letter dated 11 March 2020, he filed evidence in support of his submissions.

The appellant withdrew his main request filed with the notice of appeal and stated that his previous auxiliary request filed with the notice of appeal was now his (new) main request.

He also requested partial reimbursement of the appeal fee. If the (new) main request could be allowed, the request for oral proceedings filed with the notice of appeal was withdrawn.

VIII. The oral proceedings appointed for 6 March 2020 were cancelled.

IX. By a further communication dated 3 August 2020, the Appeal Board informed the appellant that in view of the submissions and evidence filed by letters dated 24 February and 11 March 2020, it considered the appeal admissible. It further informed the appellant that it considered that the grade "COMPENSABLE FAIL" should be awarded to the appellant's Paper D and that the appeal fee should be reimbursed in full (point 2 of the communication). The appellant was also informed in point 3 of the communication that, in the meantime, however, the Appeal Board had reason to raise the question of whether and to what extent the pilot project allowing a small group of candidates to write the 2019 Papers A, B, C and D on a computer might affect the evaluation of the appellant's paper D such that, in the present appeal, a better grade than "COMPENSABLE FAIL" might be justified. Therefore, the appellant was invited to inform the Appeal Board within a period of two months from notification of the communication whether he wished the appeal proceedings to be continued so that this new issue could be examined further. The Appeal Board also indicated that, if the appellant did not wish the appeal proceedings to be continued, then the Appeal Board would issue a decision in writing in accordance with point 2 of its communication.

X. By reply dated 2 October 2020 and received at the EPO on the same day, the appellant informed the Appeal Board that he did not wish the appeal proceedings to be continued in respect of the issue of the pilot project mentioned in point 3 of the Appeal Board's communication and that he respectfully awaited a decision in accordance with point 2 of the communication.

Reasons for the Decision

1. The appeal is admissible.
2. Appellant's main request

The appellant requests that the Examination Board's decision awarding his Paper D of the European qualifying examination 2019 a "FAIL" grade be set aside and that the paper be awarded a "COMPENSABLE FAIL". The present main request corresponds to the auxiliary request filed with his notice of appeal.

3. In accordance with Article 24(1) REE and the established jurisprudence of the Disciplinary Board of Appeal (following decisions 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. It is not the function of the Disciplinary Board of Appeal to reconsider the entire examination procedure on the merits. This is because the Examination Committee and the Examination Board have some latitude of evaluation that is subject to only limited judicial review by the Disciplinary Board of Appeal.
4. On the basis of the appellant's submissions, the Appeal Board finds no infringement of the REE, the provisions relating to its application, or higher-ranking law. The Appeal Board therefore takes the view that the contested decision is not based on serious and obvious mistakes with respect to Paper D which could be

established by the Appeal Board without re-opening the entire marking procedure. Therefore, the allegedly incorrect, and insufficient, number of points awarded to the appellant's answers to Question 1 of Paper D, Part I, and Questions 1b, 1c, 2b and 3 of Paper D, Part II are not open for review by the Appeal Board. Consequently, based on the appellant's submissions, the Appeal Board sees no way of establishing that awarding higher marks for these questions, and thus possibly also a higher grade for Paper D, would be justified.

5. However, the appellant was also informed by the Examination Secretariat's letter dated 11 September 2019 that, after re-marking the appellant's paper D, the Examination Board considered that the main request was not allowable, but that *"the auxiliary request could be allowable"* because the *"candidate could be awarded 45 marks: 1.5 marks extra for Part 1, Question 1 and 0.5 marks extra each in Part 2, Questions 1b and 1c"* (see point III above).
6. In view both of this statement, which is based on a re-marking of the appellant's Paper D by the Examination Board, and of the way in which the Examination Board handled the present appeal, the Appeal Board, applying the principle of good faith, considers it justified to remit the case to the Examination Board with the order to award the grade "COMPENSABLE FAIL" for this answer paper. Therefore, the appellant's main request can be allowed.
7. In reaching its decision, the Appeal Board has taken the following considerations into account:
8. The Appeal Board understands from the Examination Secretariat's letter dated 11 September 2019 that the

Examination Board would have rectified the appealed decision under Article 24(3), first sentence, REE, if the auxiliary request at that time had been the appellant's main or only request.

9. Article 24(3), first sentence, REE stipulates that, if the Examination Board considers the appeal to be admissible and well-founded, it must rectify its decision and order reimbursement of the appeal fee.
10. However, since the Examination Board considered only the auxiliary request and not the main request to be allowable, it is understandable that it did not rectify its decision, but remitted the case to the Appeal Board.
11. The Appeal Board appreciates that the way in which the Examination Board dealt with the appeal in the present case, i.e. forwarding to the appellant the result of its re-marking of his Paper D and informing him that his auxiliary request "**could be allowable**", was aimed at avoiding a dismissal of the appeal by the Appeal Board, because the Disciplinary Board of Appeal does not have the power to reconsider the entire examination procedure on the merits (see point 3 above). However, the statement that the auxiliary request "**could be allowable**" could also be understood as meaning that the Examination Board intended this as a second written decision which would supersede its contested (first) decision dated 1 July 2019 by which it awarded the appellant's paper D the grade "FAIL". If this was the meaning, then the question arises whether this manner of proceeding was in line with Article 24(3), first sentence, REE.

12. By way of exception to the devolutive effect of an appeal, Article 24(3), first sentence, REE empowers the Examination Board to rectify a decision if it considers the appeal to be admissible and well-founded. The term "well-founded" (German "begründet", French "fondé") refers to a situation in which the Examination Board considers that the reasons which it gave for a decision which is then appealed no longer hold in light of the submissions on appeal. This is namely the case if the appeal removes the reasons underlying the contested decision, for example, if parts of the appellant's answers to a paper have been overlooked and not marked. In this context, the word "rectify" (German "abhelfen", French "faire droit") is to be understood as meaning "correct" or "amend", even if the French wording as well as the second sentence of Article 24(3) REE suggest that rectification also requires the appeal to be allowed. However, the brevity of the period provided for in Article 24(3) REE does not always allow the Examination Board to review the matter in full before the period expires. To impose such a constraint can hardly have been the legislator's intention, and so it is reasonable to infer that, within the period for rectification, the Examination Board may also opt to set aside the contested decision (simple annulment) and resume the proceedings before it.
13. If, on the other hand, the Examination Board considers the appeal to be either inadmissible or unfounded, it must refer the case to the Disciplinary Board of Appeal, as a rule without giving reasons, since such reasons would amount to a decision on the merits of the appeal.
14. In summary, if there is an appeal against its decision, the Examination Board normally has the following

options under Article 24(3), first and second sentences, REE: it can either annul the contested decision and replace or not replace it by a rectified decision, or it can refer the case to the Disciplinary Board of Appeal without giving reasons.

15. This interpretation of Article 24(3) REE is in line with the purpose of interlocutory revision, the main purpose of which is to shorten the appeal proceedings in the interests of procedural expediency and economy, which is to the benefit of both the appellant and the EPO. Moreover, if rectification is granted, unnecessary work is avoided for the Disciplinary Board of Appeal. Even though it entails resuming the administrative proceedings, the Examination Board can normally be expected to resolve the contentious issues more expediently by this means than on remittal after a full consideration of the appeal by the Disciplinary Board of Appeal. Given the limited powers of review accorded to the Disciplinary Board of Appeal under Article 24(1) REE, a resumption of the proceedings before the Examination Board can even be to an appellant's advantage in the sense that - in contrast to the appeal procedure before the Disciplinary Board of Appeal - it allows a review of the entire examination procedure, including the re-marking of an appellant's answer to an examination question.

16. It follows from the above that it could be said that the Examination Board could have either set aside its decision dated 1 July 2019 and resumed the proceedings with a view to taking a decision based on its re-marking of the relevant answers, or referred the case to the Appeal Board without further comment. It could even be said that the Examination Board exceeded its powers under Article 24(3), first sentence, REE by

referring the case to the Appeal Board together with a statement on the allowability of the appellant's requests.

17. On the other hand, the wording of Article 24(3) REE does not deal with a situation in which, as in the present case, the Examination Board considers the appeal to be "well-founded" in part only and therefore cannot accede to the appellant's main request but only to their auxiliary request. The Appeal Board in its present composition therefore raises the question whether, in these particular circumstances, Article 24(3) REE actually rules out the possibility of the Examination Board replacing the appealed decision by a corrected decision pending the final decision of the Disciplinary Board of Appeal, even if the corrected decision does not grant the appellant's main request. Such an interpretation of Article 24(3) REE beyond its literal meaning may be justified by the following. It is not in the interests of procedural expediency and economy to require the Examination Board to maintain the contested decision despite considering it partly untenable. Maintaining the decision means the Disciplinary Board of Appeal having to deal with the appeal in full and possibly remitting the case for further prosecution, as has happened in the present case. Decisions by the Examination Board in application of the REE and its Implementing provisions do not involve issues of legal security that might speak against this interpretation. Proceedings before the Examination Board and the Disciplinary Board of Appeal are non-public. There can be no doubt that, when assessing whether to rectify a decision in part, the Examination Board would seek to act according to a uniform, legally sound practice. Moreover, the appellant would not be obliged to file a second appeal.

Unlike a successful appeal, a partly rectified decision could not terminate the appeal proceedings but would render the appeal moot to the extent that it resolved issues raised in the appeal. A possible option would therefore be for the Examination Board to replace its initial decision in part and, assuming that the appellant maintained their other requests, remit the case to the Disciplinary Board of Appeal if the appeal could not be allowed in its entirety. The Board of Appeal would then take a decision on the remaining issues only.

18. However, in the present case, the Appeal Board does not need to take a stance on the approach described above because it cannot be clearly concluded from the wording of the statement of the Examination Board quoted in the letter dated 11 September 2019 that this was to be a second decision superseding the decision under appeal. On the other hand, the Examination Board did suggest that it could allow the then auxiliary request, with its reasons for that. Whether the Examination Board thereby exceeded its powers under Article 24(3), first sentence, REE has no consequences for the present appeal proceedings, since the Appeal Board has not decided to remit the case to the Examination Board without considering the merits, but, in accordance with the principle of good faith, has dealt with it by accepting the Examination Board's re-marking of the appellant's Paper D (see points 6 and 13 above).

19. The Board considers it equitable in the circumstances of the case to order the reimbursement of the appeal fee in full in accordance with Article 24(4) REE.

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 award the grade COMPENSABLE FAIL for the appellant's Paper D of the European qualifying examination 2019.
3. Reimbursement of the appeal fee in full is ordered.

The Registrar:

The Chairman:



N. Michaleczek

L. Bühler

Decision electronically authenticated