



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 0007/21

D E C I S I O N
of the Disciplinary Board of Appeal
of 14 February 2022

Appellant: N.N.

Decision under appeal: Decision of the Examination Board dated 31 March 2021 concerning the pre-examination of the European Qualifying Examination 2021

Composition of the Board:

Chairman: W. Sekretaruk
Members: T. Bokor
D. Korper Zemva

Summary of Facts and Submissions

- I. The appeal is against the decision of the Examination Board posted on 31 March 2021 to award the appellant's answer paper the grade FAIL in the pre-examination of the European qualifying examination 2021 (hereinafter "the pre-examination 2021") in accordance with Rule 6(2) of the Implementing provisions to the Regulation on the European qualifying examination (IPREE, OJ EPO 2019, Supplementary publication 2, 18) because her answer paper had been awarded 69 marks.

- II. By letter dated 10 April 2021, received on 19 April 2021 in the EPO, the appellant filed a notice of appeal including a statement setting out the grounds for appeal. The appeal fee was paid on 13 April 2021.

- III. The appellant contested the marking of statement 12.4 in question 12 and statement 18.1 in question 18 of the pre-examination 2021. The Examination Secretariat forwarded the appeal to the Disciplinary Board of Appeal stating that the Examination Board had decided not to rectify its decision.

- IV. The President of the Council of the epi and the President of the EPO were given the opportunity to comment pursuant to Article 12 of the Regulation on discipline for professional representatives (RDR, OJ EPO 2022, Supplementary publication 1, 147), in conjunction with Article 24(4) of the Regulation on the European qualifying examination for professional representatives (REE, OJ EPO 2019, Supplementary publication 2, 2). No comments were received.

- V. In her appeal the appellant argued in essence that "True" was the correct answer to the statement 12.4 in question 12 of the pre-examination 2021 - or that at least it was also acceptable beside the expected answer "False" - essentially for the following reasons.

The reasoning given in the Examiner's Report, namely why the term "low temperature" could not be objected to as unclear under Article 84 EPC, was wrong. The cited parts of the Guidelines, F-IV, 4.6.1., did not support the inverse conclusion drawn. The examination paper also did not permit to infer the meaning of "low temperature" from those parts of the examination paper where "high temperature" was discussed. It remained that "low temperature" could very well be regarded as unclear under Article 84 EPC in the context of the examination paper.

- VI. The appellant requested that the decision under appeal be set aside and that her answer paper be awarded a PASS grade. For this purpose, the answer to Question 12.4 should either be deemed TRUE, or that this question and also Question 18.1 should be neutralised, accepting both a TRUE or a FALSE answer. She also requested oral proceedings in case these requests were to be rejected, and the reimbursement of the appeal fee.

- VII. For the details of the examination questions in dispute, reference is made to the published examination paper and the corresponding Examiner's report, available on the website of the European Patent Office at [https://documents.epo.org/projects/babylon/eponot.nsf/0/A59F259BD67213D4C12586B000434183/\\$FILE/PreEx2021_EN.pdf](https://documents.epo.org/projects/babylon/eponot.nsf/0/A59F259BD67213D4C12586B000434183/$FILE/PreEx2021_EN.pdf)

and

[https://documents.epo.org/projects/babylon/eponot.nsf/0/8298DC45DE6A404AC12586AF00428C17/\\$FILE/](https://documents.epo.org/projects/babylon/eponot.nsf/0/8298DC45DE6A404AC12586AF00428C17/$FILE/)

ExRep_PreEx2021_EN_.pdf

at the time of writing.

Reasons for the Decision

1. The appeal is admissible.
2. The decision can be taken in written proceedings. The appellant requested oral proceedings on an auxiliary basis, i.e. in the event that her request to be awarded a PASS grade was not granted. As her request can be granted for the reasons given below, it was not necessary to hold oral proceedings.
3. The appellant requested that the contested decision be set aside. She alleged obvious and serious errors in the assessment of his answers to statement 12.4 in question 12 and statement 18.1 in question 18 of the pre-examination 2021. She essentially argued that in the Examiners' report to the pre-examination 2021 the answers to the statements 12.4 and 18.1 and the reasoning given for them were not correct.
4. In accordance with Article 24(4) REE and the consistent case law of the Disciplinary Board of Appeal (hereinafter "the DBA"), which followed decision D 1/92 (OJ EPO 1993, 357), 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 DBA to reconsider the entire examination procedure on the merits. This is because the Examination Committees and

the Examination Board have some latitude in their evaluation which is subject to only limited judicial review by the DBA. Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the DBA take this into account. The alleged mistake must be so obvious that it can be established without reopening the entire marking procedure. This is for instance the case if an examiner is found to have based his evaluation on a technically or legally incorrect premise upon which the contested decision rests (D 2/14). Another example of an obvious mistake would be a question whose wording is ambiguous or incomprehensible (D 13/02). All other claims to the effect that the papers have been marked incorrectly are not the responsibility of the DBA. Value judgments are not, in principle, subject to judicial review (see e.g. D 1/92, *supra*, points 3 to 5 of the Reasons).

5. This established case law on the limitation of judicial review in relation to the European qualifying examination within the meaning of Article 1(1) REE ("EQE"), applies *mutatis mutandis* to the pre-examination, in the same way as the provisions of the REE apply *mutatis mutandis* to the pre-examination pursuant to Article 1(7) REE. However, insofar as the award of points for the pre-examination paper is based on a pre-determined solution scheme (e.g. a multiple-choice test), the pre-examination leaves no room for discretionary marking. In the pre-examination, candidates are expected to respond to clearly defined statements in a multiple-choice mode, to which they can only answer "True" or "False" by ticking a box; they have no possibility to add any reasons or explanatory notes. Any such indications will not be taken into account (for the pre-examination 2021, see the Instructions for answering the pre-examination paper

and marking scheme for the pre-examination 2021, No. 1. (d), accessible at [https://documents.epo.org/projects/babylon/eponot.nsf/0/F174C552F0E5DC4EC1258679004B17AF/\\$FILE/Notice_MarkingScheme_PreEx2021_EN.pdf](https://documents.epo.org/projects/babylon/eponot.nsf/0/F174C552F0E5DC4EC1258679004B17AF/$FILE/Notice_MarkingScheme_PreEx2021_EN.pdf)). The formulation of the facts and the statements to be evaluated in a question are therefore of utmost importance in the pre-examination. The questions to be answered and the statements to be evaluated in a multiple-choice test such as the pre-examination should therefore be formulated clearly and unambiguously (see also decisions D 5/16 and D 6/16). Therefore, when setting an examination question for the pre-examination, it must be ensured that only one answer can be given to the respective statement when taking an informed and objective view or interpretation of the wording of the facts and the respective statements in the question (D 15/16, point 2.3 of the Reasons). It is thus crucial to formulate the statements in such a way that clearly only one answer, i.e. either "True" or "False", is possible and "correct" under the given circumstances (see also decisions D 5/16 and D 6/16). In particular, terms and formulations are to be avoided which initially may lead candidates to an interpretation, which, as a result, partly leads them away from the answer and technical and/or legal assessment actually pursued by the authors of the paper, and which thus leads the candidates to considerations and results which do not do justice to the sense and purpose of the pre-examination (see e.g. D 5/16, point 32 of the Reasons; D 6/16, point 19 of the Reasons). Contradictory, misleading or ambiguously formulated facts and/or statements can have the consequence that candidates judge them differently from the solution scheme of the Examination Board without having the possibility to present a different opinion which is not wrong but justifiable. Unlike in the

examination, such deficiencies in the pre-examination paper can therefore not already be recognised in the course of the correction of the papers and taken into account in the marking, but can only be corrected - if at all - in the course of an appeal (see also D 15/16, point 2.3 of the Reasons). Therefore, in a pre-examination, unclear and confusing facts or statements may constitute a serious and obvious mistake (see also D 3/19, point 2.3 of the Reasons with reference to D 13/02, point 4 of the Reasons).

6. However, if a statement is logical and makes sense, so that, using common sense, it is clear what answer was expected, candidates cannot rely on exceptions to the rule or explore alternative interpretations with a view to showing that a different answer might also be conceivable in specific instances (see e.g. D 5/16, point 33 of the Reasons). It follows that in the case of a pre-examination, the review requested by the appellant does not concern the question of whether the evaluation of the assessment of the respective statement *stricto sensu*, i.e. the appellant's assessment of the statement concerned as "True" or "False", is correct. It is rather a question of the correct interpretation or the general understanding of the statement concerned, including the facts underlying the pre-examination question and the conclusion to be drawn therefrom as to whether the statement concerned is clearly to be assessed as "True" or "False". The assessment itself, i.e. the awarding of points, is then usually carried out on the basis of the simple solution scheme of a multiple-choice test with solution statements that are either "True" or "False", i.e. on a completely objective basis (see also decision D 15/16, point 2.2 of the Reasons).

7. Statement 12.4 of Question 12 of Part 3 of the pre-examination 2021 reads: "Claim I-8 is unclear due to the use of the term low." According to the Examiner's report, statement 12.4 had to be answered "False", instead of "True" as the appellant did. Consequently, the appellant's answer was considered not to be correct and, as only one of the answers to the four statements within question 12 were considered correct, 0 mark was awarded for question 12.
8. However, the present Board of Appeal considers that taking into account the facts derivable from the paper and underlying the statement 12.4, the question cannot be answered clearly and unambiguously with "False".
9. In this regard the Board refers to decisions D 0002/21 of 3 February 2022, Reasons 8-16, and D 0004/21 of 24 January 2022, Reasons 3-6 and explicitly endorses these reasons in support of the above finding of the Board.
10. Since in a pre-examination unclear and confusing facts or statements constitute a serious and obvious mistake, the appeal is well founded and allowable. The further objection concerning statement 18.1 need not be dealt with in this decision, for the reasons given in point 12 below. According to Article 24(4), second sentence, REE, the contested decision is to be set aside.

Request that the contested decision be altered to a PASS grade

11. The appellant further requests that her answer paper be awarded a PASS grade for the pre-examination 2021. The Board follows the case law of the DBA (see e.g. decisions D 2/14, points 5 et seq. of the Reasons, D 3/14, points 12 et seq. of the Reasons, and D 4/14, points 11 et seq. of the Reasons) and considers that

special reasons within the meaning of Article 12 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (OJ EPO 2021, Supplementary publication 1, 67) present themselves for not remitting the case to the Examination Board. These reasons allow the Board of Appeal - rather than the Examination Board or the competent Examination Committee - to determine the marks to be given for the answer to statement 12.4 in the appellant's answer paper and to decide whether her answer paper is to be awarded a PASS or a FAIL grade on the basis of the revised marking.

12. The appellant's answer "TRUE" to statement 12.4 is to be considered correct for the reasons given above. In the appellant's answers to the statements of question 12, one answer was already marked as correct by the Examination Board and, in accordance with the marking scheme for the pre-examination 2021, 0 mark was awarded for question 12. Taking into account the correction with respect to the appellant's answer to statement 12.4, question 12 is to be awarded now 1 mark pursuant to the marking scheme. The total marks awarded for the appellant's answer paper in the pre-examination 2021 thus rise from 69 to 70. For this reason alone, the appellant's answer paper is to be awarded the grade PASS pursuant to Rule 6(2)(a) IPREE. Consequently, there was no need to rule on the appellant's further objection concerning statement 18.1.

Reimbursement of the appeal fee

13. The appellant requested reimbursement of the appeal fee. If the Board of Appeal allows the appeal, it orders reimbursement in full or in part of the appeal fee if this is equitable in the circumstances of the case (Article 24(4), third sentence, REE). Given that

the present appeal is successful, a full reimbursement of the appeal fee is equitable. Therefore, the appeal fee is to be reimbursed in full.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The appellant's answer paper for the pre-examination of the European qualifying examination 2021 is awarded the grade PASS pursuant to Rule 6(2)(a) IPREE.
3. The appeal fee is to be reimbursed in full.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated