



**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: D 0041/21

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 1 March 2022**

**Appellant:** N.N.

**Decision under appeal:** Decision of the Examination Board dated  
21 June 2021 concerning the European  
Qualifying Examination 2021.

**Composition of the Board:**

**Chairman:** W. Sekretaruk

**Members:** C. Brandt

S. Colombo

## **Summary of Facts and Submissions**

- I. The appeal lies from the decision of the Examination Board of 21 June 2021, in particular against the marking of Paper C, claims 1 and 3 of part I. Paper C was awarded 43 marks and a "FAIL" grade. The appellant was awarded 10 out of 12 marks for claim 1 and 3 out of 5 marks for claim 3.
- II. By letter dated 21 July 2021, received on 26 July 2021, the appellant filed a notice of appeal including a statement of grounds of appeal. The appeal fee was also validly paid.
- III. By letter of 10 August 2021, the Examination Secretariat remitted the appeal to the Disciplinary Board of Appeal notifying that the Examination Board had decided not to rectify its decision.
- IV. The appellant argues that her answer for claim 1 and for claim 3 included the points as specified in the marking scheme with respect to these claims.
- V. The President of the Council of the EPO and the President of the European Patent Office were given the opportunity to comment pursuant to Article 12 of the Regulation on discipline for professional representatives (RDR, Supplement 1/2022 to OJ EPO, 142), in conjunction with Article 24(4) of the Regulation on the European qualifying examination for professional representatives (REE, Supplement 2/2019 to OJ EPO, 2). No written observations were received.
- VI. The appellant requests,

- (a) to set aside the decision of the Examining Division of 21 June 2021 to award a "FAIL" grade for the appellant's Paper C and instead to award a "COMPENSABLE FAIL" grade on the basis of additional marks for claim 1 and/or claim 3, in the appellant's answer for paper C. In this case, reimbursement of the appeal fee is also requested.
  
- (b) to accelerate the appeal procedure. Pursuant to the DG3 Vice-President Communication of March 17, 2008 (OJ EPO 2008, 220) the Parties can have a legitimate interest to a quick procedure of the appeal they filed. The legitimate interest of the appellant is based on the fact that the decision should be issued before the time limit for registration of the 2022 EQE has expired.
  
- (c) After having been informed by the Disciplinary Board of Appeal that it is intended to set aside the decision under appeal and to remit the case to the Examination Board for further examination under observation of the Disciplinary Board of Appeal's consideration in this decision the appellant withdrew its originally request for oral proceedings with letter dated 18 February 2022.

## **Reasons for the Decision**

*Request that the contested decision be set aside*

1. In accordance with Article 24(1) and (4) REE and the Disciplinary Board's of Appeal consistent case law (following 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 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 in their evaluation which is subject to only limited judicial review by the appeal board. Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the Board take this into account. The alleged mistake must be so obvious that it can be established without reopening the entire marking procedure. An example of an obvious mistake would be a question whose wording was ambiguous or incomprehensible (D 13/02). That would be clear straight away, without any reference to marks awarded, from the meaning that common sense would ascribe to the wording of the question concerned.

2. Even if according to its case law it is not the function of the Disciplinary Board of Appeal to reconsider the entire examination procedure on the merits, what would be necessary in order to evaluate and conclude whether more or at least two more marks were to be awarded, the Board considers the appeal to be allowable. This conclusion can be arrived at on the basis of the appellant's submissions in the statement of grounds of appeal by a comparison between the marking scheme and the excerpt from the appellant's answer paper without reopening the entire marking procedure. The appellant demonstrated in the statement of grounds of appeal that the answer regarding Paper C, claims 1 and 3 complied with the Examiners' Report using the correct citation of the specific reference in the relevant documents. There are only a few minor deviations and differences compared to the Examiners'

Report as set out below (points 3. and 4.) and also pointed to by the appellant itself, which, however, do not render the answer wrong or incomplete.

3. Claim 1

3.1 The appellant has correctly identified paragraphs [0003] and [0009] in Annex 3 disclosing an underwater energy storage device as indicated in the marking scheme and has also provided respective arguments. Even if the appellant did not explicitly mention that the second embodiment of Annex 3 was considered, the mere reference to paragraph [0009] of Annex 3 leaves no doubt that the second embodiment was considered. A deduction of marks appears not to be justified.

3.2 Concerning the feature "comprising: a reservoir (according to Annex 3 paragraphs [0002] and [0003] the vessel 10 has walls, a compartment, and water can be pumped in and out, so it is a reservoir, see Annex 1 paragraph [0002])" the appellant identified Annex 3 paragraph [0003] and Annex 1 paragraph [0002]) as the relevant citations required by the Examiners' Report. It is not apparent, if that was the case, why not mentioning Annex 3 paragraph [0002] in contrast to the Examiners' Report should lead to any reduction of marks, since this citation appears to be much less relevant compared to Annex 3 paragraph [0003] and Annex 1 paragraph [0002].

3.3 Regarding the feature "a structure providing buckling resistance (Annex 3 paragraph [0002])" the appellant in her answer referred to Annex 3 paragraph [0001] instead of Annex 3 paragraph [0002], which would be the correct citation as also indicated in the Examiners' Report. However, the appellant's submission that the reference to paragraph [0001] in Annex 3 is a transcription error

is absolutely credible. It is evident that nothing else could have been intended, since the appellant has stated verbatim from paragraph [0002] of Annex 3 the phrase "*upright cylinder made to be buckling resistant*", which is the only place in Annex 3 where these words are present. Therefore, the reference to Annex 3 paragraph [0001] would have made no sense, so that an Examiner reading the answer of the appellant could not reasonably assume that this was the intended answer but rather could recognise that it is a matter of transcription error.

3.4 Concerning the feature "anti-buoyancy means having a ballast body (the weight of pedestal 21 provides a downward force, Annex 3 paragraph [0005], so it is a ballast body, according to the definition given in Annex 1 paragraphs [0005]/[0009])" the appellant correctly referred to Annex 1 paragraph [0005] and Annex 3 paragraph [0005]. It is true, that Annex 1 paragraph [0009] was not referred to by the appellant. However, the essential aspect, that the ballast body (the weight of pedestal 21 provides a downward force) is disclosed in Annex 1 paragraph [0005], so that there appears to be no reason for a possible deduction of marks.

3.5 The appellant's answer regarding feature "with holding means (rim sections 32 clamp down, see Annex 3 paragraph [0009])" also does not give rise to a deduction of marks. The appellant, i.a., identifies in her answer that rim sections 32 as being first disclosed in Annex 3 paragraph [0007] by stating that such holding means are disclosed in Annex 3 in paragraph [0007] as a pair of rim sections 32 each having a respective straight section 33 which releasably engage with the reservoir's bulge or

protrusion 12 as explained in paragraph [0009] to facilitate servicing (see paragraph [0009] of Annex 3. The appellant has therefore recognised the disclosure in Annex 3 paragraph [0009] that rim section 32 are the holding means and also recognised the disclosure of the feature relating to the releasable engagement of the holding means with the protrusion and the link between the ballast body and the holding means. The Board therefore agrees with the appellant, that, if the Examining Division were to argue that the appellant has not recognised rim sections 32 as holding means based on Annex 3 paragraph [0009], this could not be considered as a reason for any deduction of marks.

- 3.6 Concerning the feature "said holding means releasably engage (Annex 3 paragraph [0009]: the straight sections 33 are movable (hinges 34) so the holding means as a whole can releasably engage)" the appellant in her answer paper correctly referred to Annex 3 paragraph [0009] and gave reasons in this respect. The Board agrees with the appellant that in Annex 3 paragraph [0009] the hinge is given as an example and a way to have the bulge easily pass the rim sections when the vessel is brought into or taken out of the array and that, whether a reference was made to the hinge, as mentioned in the Examiner's Report, or whether a reference was made, as did the appellant, to the easy in and out engaging for service purpose, the same feature with the same function was meant. Therefore, it would be unfair to penalise the appellant for having not exactly the same reference as that of the Examiner's Report, in particular as both arguments have a common basis originating from the same paragraph.

4. Claim 3

The Board considers that the appellant's answer to claim 3 is correct and complete and included the points as specified in the marking scheme. It is neither apparent nor comprehensible for what reason 2 of possible 5 marks were deducted by the Examination Board.

*Request that the contested decision be corrected*

5. For these reasons the Board has come to the decision to allow the appeal and **remit the case to the Examination Board for re-evaluation of the awarding of marks for the appellant's answer regarding claim 1 and claim 3** on the basis of the considerations of the Board as set out in points 3. and 4 above. The Board in the present appeal case considers that special reasons within the meaning of Article 12 of the Additional Rules of Procedure of the Disciplinary Board of Appeal (Supplement to OJ EPO 1/2022, 67) for not remitting the case to the Examination Board for a new decision are not on hand. The issue how much additional marks for claim 1 and/or claim 3 should be awarded would clearly be an exercise which could not be done without making a value judgement, which is not a function of the Disciplinary Board of Appeal.
  
6. Since the decision under appeal is set aside the request for reimbursement of the appeal fee is granted (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 for re-evaluation of the awarding of marks for the appellant's answer regarding Paper C, part I, claim 1 and claim 3.
  
3. The appeal fee is reimbursed.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated