



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
European Patent Office
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Case Number: D 0042/21

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: L. Bühler
D. Korper Žemva

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examination Board for the European qualifying examination posted on 21 June 2021 to award the appellant's answer paper to the European qualifying examination 2021, Paper B, 38 marks and therefore the grade "FAIL".
- II. By letter dated 19 July 2021 and received at the EPO on 22 July 2021, the appellant filed notice of appeal including the statement of grounds for appeal against the Examination Board's decision dated 21 June 2021. He paid the prescribed appeal fee.
- III. The Examination Secretariat remitted the appeal to the Disciplinary Board of Appeal by letter of 10 August 2021, stating that the Examination Board had decided not to rectify its decision.
- IV. The President of the Council of the Institute of Professional Representatives before the European Patent Office and the President of the European Patent Office were given the opportunity to comment. No comments were received.
- V. On 11 August 2021 and 16 September 2021, the appellant filed further submissions.
- VI. Oral proceedings were held on 1 March 2022. In accordance with Article 14 RDR, a representative of the President of the Council of the Institute of Professional Representatives before the European Patent Office was present. At the end of the oral proceedings, the appellant consented to the withdrawal of those arguments that were identified by the Board as not

successful. The appellant requested that the contested decision be set aside and the case be remitted to the Examination Board. The refund of the Appeal fee was also requested.

VII. The appellant alleged an unequal treatment in view of a mark-up error in the examination paper. In the French version of the amended claims (i.e. client's claims), feature b. of claim 5 included an amendment of the client which is emphasized by bold print, namely the feature "by spraying water on said refuse". The corresponding feature b. of claim 5 in the English version of the paper was not emphasized by a bold print. This error meant that an amendment by the client was easily overlooked. Discovering the error was made difficult under the conditions of the online examination. This error was not present in the French version. Thus candidates taking the paper in either German or English were not treated equally.

VIII. For the details of the examination paper 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/0/3003815DE4A96079C125868E00487577/\\$File/B_2021_en.pdf](https://documents.epo.org/projects/babylon/eponot.nsf/0/3003815DE4A96079C125868E00487577/$File/B_2021_en.pdf) and [https://documents.epo.org/projects/babylon/eponot.nsf/0/7043D0BB750F0825C12586F8002C8336/\\$FILE/Compendium_ExRep_2021_B_EN.pdf](https://documents.epo.org/projects/babylon/eponot.nsf/0/7043D0BB750F0825C12586F8002C8336/$FILE/Compendium_ExRep_2021_B_EN.pdf) at the time of writing.

Reasons for the Decision

1. It is settled case law of the DBA that equal treatment of candidates is an issue which may be the subject of appeals under Article 24(1) REE (see the recent decision D 11/19, point 8.2.2 of the Reasons and the cases cited). The principle of equal treatment requires that candidates should take part in the examination under equal conditions. Thus it follows from this principle of equal treatment that unequal conditions which may cause unjustified disadvantages for candidates should be compensated, to the extent feasible. It is an undisputed fact that there had been a mark-up error in the examination paper. This is apparent when comparing the English and French versions of the Paper B 2021, page 24. The amended claim 5 as suggested by the client contains an amendment as compared with the originally filed claims. The client inserted the feature "by spraying water on said refuse", among other amendments made. All amendments made by the client were highlighted with bold, except this amendment. The error meant that an amendment proposed by the client was easily overlooked, namely the addition of the feature "by spraying water on said refuse".

2. The Board finds the appellant's arguments plausible that this error was difficult to discover under the circumstances of the online examination, and even if discovered, the candidates were faced with a confusing set of facts. They had to speculate if the error to mark the amendment in bold was part of the difficulty of the examination, or rather it was an error in the sense that this was not an amendment wished by the

client. Other explanations for the error may also have appeared plausible.

3. On this basis, the Board accepts that this difference between the French and the English version may have had an impact on the answer paper of a candidate, and in this manner candidates writing the French and English versions had to write the Paper B 2021 under different conditions. The Board considers that these different conditions amount to an unequal treatment of the candidates, namely in terms of time available for answering Paper B. Such unequal treatment deserves some form of compensation, but such is not apparent from the Examiners' Report or the marking of the candidate. In this regard the Board refers to decision D 8/21, points 10.1 to 10.3 and point 12.1 of the Reasons. The Board explicitly endorses these reasons of D 8/21 and agrees with the conclusion stated in point 12.1 that the unequal treatment must be compensated.

4. The Board holds that the case must be remitted for new marking by the Examination Board, taking into account the difference that exists between the papers (as held also by D 8/21, point 10.4 of the Reasons). The Board recognises that it may not be possible to achieve a perfectly equitable compensation, or it may be very difficult to determine objectively the measure of an equitable compensation (D 11/19, point 8.3.5 of the Reasons). In the present case, the awarding of additional marks on the basis of the estimated time loss would seem as one possibility (see in this regard the considerations in decisions D 11/19, point 8.3.5 b) and c) of the Reasons, and D 37/21, point 23 of the Reasons).

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 a new decision to be taken.
3. The reimbursement of the appeal is ordered.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated