



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 0054/21

D E C I S I O N
of the Disciplinary Board of Appeal
of 25 April 2022

Appellant: N.N.

Decision under appeal: Decision of the Examination Board dated
11 August 2021 concerning the European
Qualifying Examination 2021

Composition of the Board:

Chairman: W. Sekretaruk

Members: C. Brandt

C. Rebbereh

Summary of Facts and Submissions

- I. An appeal was filed against the decision of the Examination Board for the European qualifying examination (EQE) 2021 as communicated to the appellant by letter dated 21 June 2021, which was that he had failed the EQE. On his answer papers he was awarded the following marks: B: 49 COMPENSABLE FAIL, C: 40 FAIL.
- II. By letter dated 25 June 2021, received on 28 June 2021 in the EPO, the appellant filed a notice of appeal including a statement setting out the grounds for appeal regarding both Paper B and Paper C.
- III. With decision dated 11 August 2021 the Examination Board decided to allow the appellant's appeal of 28 June 2021 by awarding the following marks: A: 49 (2019), B: 50 (2021), C: 50 (2021), D: 45 (2019).
- IV. With letter dated 30 August 2021 the appellant filed an appeal including a statement setting out the grounds for appeal against the decision of the Examination Board dated 11 August 2021 awarding him 50 marks for Paper B. With letter dated 31 August 2021 the appellant filed further arguments.
- V. By letter of 20 September 2021, the Examination Secretariat informed the appellant that his appeal had not been allowed by the Examination Board and, consequently, had been submitted to the Disciplinary Board of Appeal (hereinafter "DBA").
- VI. With letters dated 26 September 2021, 10 February 2022 and 29 March 2022 the appellant submitted further arguments and comments in order to support his appeal.

VII. The President of the Council of the EPO and the President of the European Patent Office (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.

VIII. In his submissions filed during the appeal proceedings as outlined above the appellant argued in essence that the marking of his answer paper was wrong and the examination conditions were unfair. The submissions as far as relevant for the present decision of the DBA can be summarised as follows:

- (a) The marking was unfair because correct solution elements by the candidate remained unrewarded. He made expected amendments, for which he received no marks, due to the fact that one single wrong amendment, such as the addition of the feature "housefly eggs", caused 0 marks being awarded to claims 1 and 5 and the corresponding amendment arguments. This was unfair double penalty.

According to the Examiners' Report the reference to "housefly eggs" was a severe Article 123(2) EPC violation and lead to loss of all marks. It seemed not reasonable that one is penalized with the loss of 4 marks in claim 1 and with the loss of all marks in claim 5 for one and the same reason. The appellant assumed that he was penalized two times in the section "Claims" and two more times in the section "Amendments arguments" for one and the same

issue. Such a penalisation was not in line with marking practice of past papers where double penalisation was avoided.

- (b) The examination paper was erroneous. This constituted an obvious and serious mistake, and also caused unequal treatment. There had been 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: "b. a titre facultatif, ajuster l'humidité des déchets **en pulvérisant de l'eau sur lesdits déchets**". However, 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 instruction of the client was easily overlooked, namely the addition of the feature "by spraying water on said refuse". Leaving out this feature was penalised by the marking scheme. 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.

IX. Furthermore, some of the arguments and allegations put forward and considered as relevant by the appellant can be summarised as follows:

- (a) The appellant alleged at length that Paper B (2021) did not have "the same syllabus and character as before". In Paper B examinations of 2014 to 2019 the candidates were much less penalized by reduction of marks. His answer to Paper B 2021

would have scored many more marks if any marking schemes of the previous twenty years would have applied.

- (b) The appeal dated 25 June 2021 specified that a maximum of 38 marks could possibly not have been awarded despite the fact that his answers were either almost identical or even more detailed when compared to the model solution.

X. The appellant requests that

the decision under appeal is set aside,
the answers to Paper B are remarked in view of the grounds described above,
the answer paper B 2021 is remarked with at least 56 marks,
the grade "PASS" is awarded for Paper B 2021 with at least 56 marks,
the appeal fee is reimbursed.

Oral proceedings are requested in case the Disciplinary Board of appeal intended to dismiss the appeal.

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 the Disciplinary Board of appeal intended to dismiss the appeal. As the appeal is

not dismissed for the reasons given below, it was not necessary to hold oral proceedings.

3. In accordance with Article 24(1) REE and the established jurisprudence of the Disciplinary Board of Appeal (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 Board to reconsider the entire examination procedure on the merits. 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 re-opening the entire marking procedure.

Unrewarded solution elements

4. As far as the appellant contends in his various letters filed during the appeal proceedings that his answers were either almost identical or even more detailed when compared to the model solution or would at least be equivalent to the solutions provided in the Examiners' Report the appeal is without success. With regard to each individual contention the Board would not only have to perform a detailed technical analysis of the facts and features in the opposed patent and their relevance in respect of the respective documents representing the relevant state of the art according to the appellant, as well as of the communication pursuant to Article 94(3) EPC, the client's letter and the third party observation. The Board would also have to evaluate whether the appellant's arguments and proposals deviating from those in the Examiners' Report

could be regarded as equivalent technical and reasonable solution and equally valid for the assessment of the aforementioned requirements under the EPC which had then to be awarded a certain amount of marks as requested by the appellant. However, it is not the function of the DBA to reconsider the entire examination procedure on the merits, what would be necessary in order to evaluate and conclude whether a sufficient amount of marks were to be awarded for a "PASS" grade or whether a definite amount of marks could be awarded in view of Rule 6(4)c) IPREE. Thus, examining these arguments put forward by the appellant would clearly be an exercise which could not be done without making a value judgement, which is not a function of the DBA.

5. In this context the Board notes that candidates cannot expect that they will be awarded the full marks for certain partial solutions under any circumstances, even if these are doubtless correct on their own. According to Rule 24 IPREE, in the Paper B part of the EQE candidates are expected to respond to all points raised in the official communication and to provide amended claims that meet the requirements of the EPC, i.e. all requirements of the EPC. Thus answering Paper B cannot be reduced to the simple exercise of collecting marks for certain solution elements that are derivable from the Examiners' Report. It is also required that the totality of the claims and the corresponding arguments constitute a complete and in itself consistent solution.

Paper B in previous examinations

6. A comparison of Paper B 2021 with Papers B in previous EQE cannot be regarded as a suitable and reasonable

basis for the evaluation of the allowability of an appeal filed against the awarding of marks regarding Paper B 2021. In this respect it is irrelevant for the present appeal whether Paper B 2021 did have "the same syllabus and character as before" or whether in Paper B examinations of 2014 to 2019 the candidates were much less penalized by reduction of marks. Rather, each annual examination, e.g. Paper B, has to be regarded and assessed separately and on its own, since the technical and legal facts as well as the factual circumstances and conditions underlying the EQE vary each year and hence do not allow a valid and reasonable comparison. However, what is decisive in this regard is, that the conditions were equal for all candidates taking part in the EQE 2021, so that no candidate was disadvantaged in comparison to other candidates in the examination 2021 by the scope, conditions underlying the EQE and the marking system applied for Paper B 2021. The difficulty, the extent of documents and the technical conditions underlying the examination as well as the marking scheme in the EQE in previous years do not affect or influence the assessment, in particular the awarding of marks of Paper B 2021, even if assuming that the previous Paper B examinations actually did not have "the same syllabus and character" compared to Paper B 2021 as alleged by the appellant.

Potential effects of the "housefly eggs" amendment

7. In Paper B 2021, candidates were expected to prepare a claim set comprising three independent claims, namely a device claim directed to a waste composting container, a method claim directed to a method of producing a fertilizer from composted waste with the help of a composting container, and a further method claim in the form of a computer-implemented calculation method for

use in a composting process. The client's letter (Rule 24(2) IPREE) expressed the wish of the client to replace the term worms/earthworms with "earthworms (8) and/or housefly eggs (8a)".

8. According to the Examiners' Report, accepting these suggested amendments of the client - in the following the "housefly eggs" amendment - was an error. If a candidate kept these amendments, various deductions resulted. The potential deductions caused by the amendment could affect the marks for the claims and the amendment arguments as well (points 3 and 5.2 of the Examiners' report). All claims, except claim 1 could lose all marks, and all marks for amendment arguments could also be lost. In this manner claim 1 could lose 4 marks on the "housefly eggs" amendment while claim 5 could lose 9 marks.

Double penalty was not excluded by the marking scheme

9. The Examiners' Report does not draw the attention of the Examiners to the problem of double penalty (unlike the Examiners' Report for Paper B 2019), and even less is there any explicit instruction to avoid it. The fact that all marks (9) are lost for the "housefly eggs" amendment in claim 5, as opposed to only 4 marks in claim 1 does not seem to lead to the conclusion that the mentioning of the "housefly eggs" deduction in claim 5 is in fact a mere reminder of the previous deduction for this feature as specified for claim 1. On the contrary, it suggests that both of these deductions must be made, independent from the other. The same conclusion seems to hold when comparing the potential deductions for the amendment arguments for claims 1 and 5. Thus the Board recognises that double penalty was not excluded by the marking scheme. At least the same

error in claim 1 and claim 5 could be penalised, although the error - the inadmissible "housefly eggs" amendment under Article 123(2) EPC - was effectively the same. This error was also made by the appellant both in claim 1 and claim 5, so that the double penalty also affected his answer paper. **The Board holds that the paper B deserves a re-marking in view of this double penalty.**

10. The Board can establish directly from the appealed decision that the appellant obtained 5/5 marks for his independent claims, 0/0 marks for the dependent claims and 2/2 marks for his amendments arguments by the respective markers. A cursory review of his claims confirm that the argued correct solution elements are present in his answer paper. In view of these details the Board finds it plausible that the total marks awarded were decisively influenced by the marking of the "housefly eggs" amendment, without directly accepting the argued amount of the marks possibly lost due to the "housefly eggs" amendment. Given that a possible unfair marking could not be excluded by the Board, the Board finds, giving the appellant the benefit of the doubt, that the appeal is well founded and allowable so that the contested decision is to be set aside according to Article 24(4), second sentence, REE. **The Board holds that a new evaluation of the appellant's answer paper B is justified.**

Erroneous paper and unequal treatment

11. 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 0008/21, point 10.2 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 instruction of the client was easily overlooked, namely the addition of the feature "by spraying water on said refuse". While it may not be quite clear from the Examiners' Report how the leaving out this feature may have been penalised exactly by the marking scheme, it is clear that the feature was an expected feature (point 3.2 of the Examiners' Report), so it is safe to assume that marks were deducted if the feature was missing.

12. 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. On this basis, the Board accepts that this difference between the French and the English version may have had a significant 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. 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 0008/21, points 10.1 to 10.3 and point 12.1 of the Reasons. **The Board explicitly endorses these reasons of D 0008/21 and agrees with the conclusion stated in point 12.1 that the unequal treatment must be compensated.**

Request for re-marking and award of grade

13. The appellant further requests that his answer paper be awarded a PASS with at least 56 marks. With the award of 56 marks for Paper B the appellant would have satisfied all of the conditions for passing the examination according to Rule 6(4)a), b) and c) IPREE. The Board follows the case law of the DBA (see e.g. decisions D 0024/17, point 15 of the Reasons, D 0013/17 and D 0016/17, point 4 of the Reasons) and considers that the Board itself in principle cannot perform the re-marking requested. An assessment of the appellant's answer paper for determining the marks to be awarded would be equivalent to a review of the marking on the merits and thus would require value judgments which, according to the established jurisprudence (following D 1/92, OJ EPO 1993, 357), falls outside the competence of the Board, as already stated above in points 3. and 4. 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 2021 under its powers pursuant to Article 6(5), last sentence, REE and to award a grade to the appellant on the basis of the re-marking. The re-evaluation should be based on a marking scheme which is fairly proportional and avoids multiple

penalties, according to the principles as set out in decision D 0022/21, point 16 of the Reasons. These principles are also supported by the present Board.

Reimbursement of the appeal fee

14. 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 case is remitted to the Examination Board with the following order:
 - a) the Examination Board is instructed to determine the applicable compensation for the answer paper of the appellant for the Paper B of the European qualifying examination 2021 in respect of
 - (i) the unequal treatment caused by the erroneous examination paper (mark-up error),
 - (ii) the double penalty as set out in the reasons above and

b) to instruct the competent Examination Committee to perform a re-marking of the appellant's answer paper for the Paper B, also taking into account the determined compensation, and

c) to award a grade to the answer paper under Rule 6(3) and (4) IPREE accordingly.

3. The appeal fee is to be reimbursed in full.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated