

Case Number : D 4/90

D E C I S I O N
of the Disciplinary Board of Appeal
of 7 March 1991

Appellant : N.N.

Decision under appeal : Decision of the Examination Board for the
European Qualifying Examination dated
30 November 1989

Composition of the Board :

Chairman : Paolo Gori
Members : John Stephens-Ofner
Catarina Holtz
Christoph Bertschinger
Chariklia Kaloniarou

Summary of Facts and Submissions

I. The Appellant sat the European Qualifying Examination for professional representatives before the EPO on 19/21 April 1989. She obtained the following marks for the various papers:

- A: 4 "Pass",
- B: 4 "Pass",
- C: 5 "Slightly Inadequate", and
- D: 3 "Good".

The Examination Board therefore decided that the case was a "Borderline fail" (Article 12(3) of the Regulation on the European Qualifying Examination for professional representatives before the European Patent Office - 'REE'), and that, accordingly it needed to be individually substantiated in line with the practice laid down by the Disciplinary Board of Appeal.

II. The substantiated decision, issued on 30 November 1989, and notified to the Appellant on 18 December 1989, stated inter alia, that the results in Paper C were inadequate, and also that the Examination Board had decided that the performance in the other papers was insufficient to lift the overall Examination mark to pass level. The decision went on to give specific explanations for the above conclusion, stating, in particular, that:

in your particular case it must be established whether the grade 5 which you obtained in Paper C can be offset by your performance in Papers A, B and D. In this connection, according to the Instructions to the Examination Committees for marking papers (OJ EPO 1988, 233 et seq.), the inadequacy shown in a paper awarded grade 5 is not serious enough to prevent the

candidate passing the examination if his performances in the other papers are favourable ... In the kind of marking pattern found here, the Examination Board makes distinction between your performance on practical aspects (Papers A, B) and in Paper C the marking criteria 'use of information' and 'argumentation', and your performance on legal aspects, Paper D and the 'legal aspects' in Paper C. It examines whether the inadequacy of the paper awarded grade 5 can be offset by the favourable performance on the corresponding (practical or legal) aspects in the other papers. If this is not the case, it considers the candidate to be unfit to practice as a professional representative before the European Patent Office A material factor in judging whether the grade 5 can be offset or not is whether it lies in the upper, middle or lower range of the relevant scale of points. In order to be considered favourable in the kind of marking pattern found here, the performance on all aspects to be reviewed with a view to offsetting the grade 5 must have been awarded a grade 3 at least (emphasis added).

The Examining Board then went on to say that since the Appellant's performance in Papers A and B ("4" in both) did not reach the above threshold of "3", the mark of "5" in Paper C could not be offset so as to result in an overall pass mark.

III. The appeal, lodged on 19 February 1990 and substantiated with a Statement of Grounds filed on 19 March 1990, requested:

- (a) that the contested decision be set aside and that the Appellant be considered to have passed the European Qualifying Examination, or

(b) that the papers in which a pass mark was awarded be recorded for use in subsequent European Qualifying Examinations.

IV. The Statement of Grounds, in addition to challenging the correctness of certain marking details, and also in seeking to rely on marks awarded in the Qualifying Examination of the previous year, raises, as a matter of law, the interpretation of section 5 of the Instructions to the Examination Committee for marking papers (OJ EPO 1988, 233 et seq). That section provides, inter alia "... '5' means inadequacy not serious enough to prevent the candidate passing the examination if his results in the other papers are favourable. In other words his answer raises sufficient doubts as to his fitness to practice as to warrant a recommendation to the Examination Board to review his results as a whole." The Statement of Grounds emphasises the term "as a whole", and therefore challenges the arbitrary numerical limit of grade 3 which formed the basis of the Examination Board's reasoned decision of 30 November 1989 where it was as stated "... in order to be considered favourable in the kind of marking pattern found here, the performance on all aspects to be reviewed with a view to offsetting the grade 5 must have been awarded a grade 3 at least." The Appellant maintains that no such arbitrary limit can be validly derived from the above Instructions and, therefore, by implication from the joint import of Articles 5(3) and 12(3) REE.

V. The President of the European Patent Office and the President of the Institute of Professional Representatives were consulted under Article 12 of the Regulation on discipline for professional representatives (OJ EPO 2/1978, 91) in conjunction with Article 23(4) REE, but made no comment on the case.

Reasons for the Decision

1. The appeal complies with Article 23(2) REE and is therefore admissible.
2. The appeal rests essentially upon the construction of Section 5 of the "Instructions to the Examination Committees for marking papers" hereinafter referred to as "Instructions" (OJ EPO 7/1983, 296), giving effect to Articles 5(3) and 12(3) REE. Article 5(3) REE provides inter alia that: "after the examination, the Board shall consider the papers marked by the Examination Committees. It shall, in particular, examine borderline cases and decide whether a candidate has passed or failed." Article 12(3) provides as follows: "Nevertheless, if a candidate has passed at least half of the examination papers, the Board shall consider the candidate's papers as a whole and decide whether he has passed the examination." Thus the definition of a borderline case is one where out of 4 papers at least half have obtained the pass mark ("4"). The marks awarded in the case the subject of this appeal clearly fall within this definition.

Article 5(3) REE, in combination with Section 5 of the Instructions, clearly obliges the Examination Board to look upon the candidate's performance as a whole in those borderline cases where one paper has attained only a grade 5, in order to establish whether the candidate is fit to practice. Section 6 of the Instructions deals with those cases where the inadequacy is more serious but is still capable of being offset by exceptional results in other papers, namely, where one of the papers has gained only a 6 grade. In such cases the criterion of offsettability is that the other papers should be "well above a pass level, which can legitimately be taken to mean that their grades should lie at least in the range 1 to 3."

3. A fair and reasonable construction of Section 5 of the Instructions, taken in conjunction with Section 6, is that in the case of a "5" grade having been awarded on one paper, all the papers have to be looked at as a whole, in order to determine whether the 'slightly inadequate' performance may be offset. There is, in this section, no numerical criterion for the range of grades obtained in the other papers, such as is specifically adverted to in Section 6 of the Instructions. Thus, prima facie, this section of the Instructions giving effect the relevant Articles of the REE cited above, does not support the imposition of the arbitrary 'grade 3' relied upon by the Examination Board in its reasoned decision of 30 November 1989.
4. Such a construction of Section 5 of the Instructions finds clear judicial support in the leading case of D 1/86, OJ EPO 11/1987, 489 followed in subsequent cases of D 3/87, OJ EPO 1/1988, 31 and D 4/89 (to be published). The decision in D 1/86 indicates the requirement that each borderline case must be individually substantiated, a requirement expressly mentioned and followed by the Examination Board in the case under appeal. The nature and content of this substantiation is dealt with in paragraph 4.1 of the Reasons of the above case, where it is stated: "In content the substantiation required could be merely a note or brief comment making the exercise of discretion in the particular case sufficiently comprehensible for the purposes of Article 23(1) REE, and thus capable of review". Dealing more specifically with the nature of substantiation in relation to the instructions to the Examination Committees, the decision (paragraphs 3.2 and 3.3 of the Reasons) points out that for a grade 5 mark, the Instructions allow particularly wide discretion under point V, making unconditional provision for the results to be reviewed as a whole. The decisive question is thus whether the

candidate's overall performance indicates fitness to practice; in borderline cases this question cannot be answered in the purely arithmetical terms of marks and equivalent grades (emphasis added).


5. Following the above principle, the disciplinary Board in D 4/89 (to be published) held (cf. paragraph 5 of the Reasons) that in cases where a candidate had obtained marks 5, 4, 3 and 4 in his respective papers, there is no legal basis for the imposition of the arbitrary numerical grade of 3 as the criterion of the offsettability of those papers which had obtained a pass mark against the one which had not.
6. It is quite clear from the above analysis of the case law that the correct practice in borderline cases is by now well established; it is equally clear that the Examination Board failed to follow this practice. Accordingly, the Board finds that the reasons employed and given by the Examination Board in its decision of 30 November 1989 were in breach of Section 5 of the Instructions to the Examination Committee giving effect to Articles 12(3) and 5(3) REE.
7. In these circumstances it is not necessary for a Board to deal with that part of the argument set out in the Statement of Grounds that seeks to consolidate marks earned in an examination held in the previous year with those awarded in the examination held in the current year, although the Board would observe, obiter, that such consolidation appears to find no legal basis either in the present text of the Regulations on the European Qualifying Examination for professional representatives before the European Patent Office or in the instructions to the Examination Committees for marking papers.

Order

For these reasons it is decided that:

1. The decision of the Examination Board dated 30 November 1989 is set aside.
2. The case is referred back to the Examination Board for further examination.
3. The appeal fee is refunded.

The Registrar:


J. Rückerl

The Chairman:


P. Gori